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S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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S. D. CHAUDHRI, B.A., LL.B.,

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S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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246	Akhil Chandra Biswas v. Hasan Ali Sadagar ...	20	698
248	Rakkal Das Sinna v. King-Emperor ...	15	655
250	Mahomed Musa v. Aghore Kumar	28	930
260	Abdul Gofur Mandal v. Umakanta Pandit ...	24	266
263	Guru Ch. Saha v. Surendra Krista Ray Chowdry ...	22	650
265	Nabin Chandra Saha v. Hem Chandra Ray ...	20	248
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273	H. Meredith v. Sanjibani Dasi ...	28	1000
282	Jambu Parshad v. Muhammad Aftab Ali Khan ...	28	422
287	Christiana Sens Law v. Benarashi Proshad Chodhury ...	22	685
290	Baser Sheikh v. Fazle Karim Biswas ...	28	703
290	Monijan Bibi v. District Judge, Birbhum ...	25	229
295	Sashi Rajbunshi v. King-Emperor ...	26	657
305	Hamabai Framjee Petit v. Secretary of State for India in Council ...	27	26
313	Rameswar Mondal v. Provabati Debi ...	25	84
321	Bata Mondal v. Maharaja Manindra Chandra Nandi Bahadur ...	25	829
325	Esahuq Chowdhry v. Abadennissa Bibee ...	29	692
326	Abdul Aziz v. Tafazuddin Sheikh	23	839
329	Prasanno Kumar Chuckerbutty v. Prokash Ch. Dutt ...	28	560
330	Hare Krishna v. King-Emperor ...	28	795
332	Sarojebashini Debi v. Shripati Charan Chowdhry ...	28	799
334	Purna Chandra Moulik v. Dengar Chandra Pal ...	28	658
335	Emperor v. Sarath ...	28	799
337	Karamali Abdulla Allarakhia v. Vora Karimji ...	26	915
345	Kumar Krishna Mitter v. Amulya Charan Mitter ...	*To be printed.*	
347	Hemanta Kumari Debi v. Midnapur Zemindari Co. ...	28	879
356	Hem Chandra Chowdhury v. Hemanta Kumari Debi ...	23	442
359	Chamed Sheikh v. Naba Gopal Ghosh ...	23	12
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383	Amjadennessa Bibee v. Rahim Bakhsh Shikdar ...	28	713
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18	Syed Ibrahim Sahib v. Arumugathayee ...	16	877	134	Venkataramana Iyer v. Narasinga Rao ...	18	135
25	Sankararama Iyer v. Padmanabha Iyer ...	17	425	138	Varahaswami v. Ramachandra Raju ...	18	520
33	Appalanarasimhulu v. Sanyasi ...	17	120	141	Venkiah v. Krishnamoorthy ...	19	80
36	Govindappa v. Hanumanthappa...	17	420	149	Ramasawmy v. Rasi ...	21	62
41	Valli Ammal v. Corporation of Madras ...	16	971	153	Lingayya v. Kanakamma ...	28	200
45	Kamala Bai v. Bhagirathi Bai ...	16	939	155	Sri Rajagopalaswami Temple v. Jaganadha Pandiajiar ...	18	719
48	Krishnan Nair v. Damodaran Nair ...	17	769	158	Vencataraju v. Ramanamma ...	21	258
67	Mammali v. Kunhipakki Haji ...	17	337	160	Sri Rajah Prakasarayanim Garu v. Venkata Rao ...	21	319
71	Tirupatirayudu Naidu v. Lakshminarasamma ...	17	597	163	Atchaparaju v. Velugoti Govinda Krishnayachendrulavaru ...	19	225
79	Naku Amma v. Raghava Menon...	18	1	166	Krishnamachariar v. Krishnamachariar ..	19	452
86	Kunhi Sou v. Mulloli Chathu ...	17	933	178	Natesa Aiyar v. Appavu Padayachi	19	462
92	Srinivasa Ayyangar v. Secretary of State ...	18	617	199	Balasubramania Chetti v. Swarnammal ...	21	32
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44	Hattikudure Narain Rao v. Andar Sayad Abbas Sahib ...	27	785	72	Kakerla Chukkamma v. Kakerla Punnamma ...	27	775
51	Sri Rajah Jaghapathiraju v. Secretary of State for India ...	26	692	75	Jaganatha Bhupathi Deo v. Appalaswamy ...	23	576
58	Venkayya v. Venkataramiah ...	26	460				

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96	Gopammal v. Srinivasa Iyengar...	**27**	921
98	Maharajah of Venkatagiri v. Secretary of State for India ...	**26**	800
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123	Avasarala Venkata Hanumantha Rao v. Achanna ...	**28**	97
127	Ponammal v. Ramamirtha Aiyar...	**27**	679
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134	Venkatappayya v. Venkatramanayya ...	**27**	220
136	Lodd Govindass v. Chinnappa Naidu ...	**27**	869
138	Vellayam Chetty v. Jothi Mahalinga Aiyar ...	**28**	83
140	Venkatachallan Chetty v. Narayanan Chetty ...	**26**	740
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154	Jagannaikulu v. Manager Nandigam Estate ...	**27**	122
167	Jehangir Dadabhoy v. Kavasha ...	**27**	53
174	Sivagnana Desika Gnanasambhanda Pandarasannadhi v. Advocate-General of Madras ...	**27**	874
179	Harmabai Framjee Petit v. Secretary of State for India ...	**27**	26
184	Thekkamannengath Raman *alias* Kochu Poduval v. Kakkasseri Pazhiyot Manakkal Karnavan...	**27**	989
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199	Ramaswamy Chetti v. Alagappa Chetti ...	**28**	135
204	Venkatarama Aiyar v. Krishna Iyer ...	**27**	192
209	Thiruvengadatha Aiyangar v. Ponnapa Aiyangar ...	**25**	965
217	Ambalavana Pandara Sannadhi v. Sreeminakshy Devastanam ...	**26**	841
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260	Darbha Lingayya v. Darbha Kanakamma ...	**28**	200
262	Karunakara Menon v. Krishna Menon ...	**27**	952
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29	Venkata Simhadri Jagapathi Raju v. Secretary of State ...	**26**	692
35	Karmali Abdulla Allarakhia v. Vora Karimji ...	**26**	915
45	Seth Ramlal v. Narsingdas ...	**26**	924
48	Narayanaswami Aiyar v. Krishnamurti Aiyar ...	**26**	927
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85	Kolakudi Veeranna Reddy v. Vasudeva Reddy ...	26	991	164	Venkatarama Iyer v. Krishna Iyer	27	192
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87	Nachiappa Gounden v. Rangasami Gounden ...	26	757	170	Kallani Amma v. Narayanan Nambiar ...	28	69
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129	Venkata Perumal Raju v. Ramudu ...	27	688	191	Rangayya Naidu v. Chinnaswami Iyer ...	28	898
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67	Ali Mahomed Mukri, *In re* ...	26	645
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103	Annasami Sastrigal v. Ramasami Sastrigal ...	27	824
105	Majeti Nagaratnam v. Pachigella Ramayya ...	27	882
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109	Salicheemala Venkataswami Naidu v. Gunturu Rangappa Naidu ..	26	944
113	Jhandu v. Tarif ..	27	892
117	Mallikarjuna Nayudu Bahadur v. Rayalapati Somayya ..	27	77
127	Amritheswara Pandithar v. Murugappa Chettiar ...	27	886
133	Karamali Abddulla Allarakdio v. Vara Karimji Jivanji ..	26	915
142	Lodd Govind Doss v. Chinnappa Naidu ...	27	869
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152	Cunniah Chetti v. Elamanda Chetti ...	27	877
155	Sankaran Nair v. Ramaswami Patter ...	27	889
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15	Lanka Gopalam v. Lanka Ratnamma ...	26	353
17	Balakrishna Mudaliar v. Raju Mudaliar ...	27	736
19	Kakerla Chukkamma v. Kakerla Punnamma ...	27	775
21	Ponnuranga Mudaliar v. Thandavaraya Mudaliar ...	26	274
22	Subbier v. Chinnappa Rowthen ...	26	366
23	Arunachelam Chetty v. Raman Chetty ...	27	807
25	Sadini Kondayya v. Kosagani Peda Swami ...	27	919
26	Alamelu v. Balu Ammal ...	26	455
29	Sinnasami Gounden v. Subbana Gounden ...	26	904
31	Kuppusamy Iyer v. Muthusami Iyer ...	27	891
33	Dupageentla Subba Rao v. Gallapudi Ethirazulu ...	26	360
34	Parvatanenikamayya v. Emperor	26	318
34	Muniandi v. Emperor ...	26	332
37	Chengalavala Gurraza v. Madapati Venkateswara Row ...	27	920
39	Secretary of State v. Cockerall ...	27	723
45	Munisawmy Mudaly v. Abbu Reddy	27	323
48	Muthukaruppa Pillai v. Sellathammal ...	26	785
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76	Ambalavana Pandara Sannadhi v. Anantanarayana Iyer ...	26	841
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150	Chitturi Suriah v. Boddu Ramayya ...	28	57
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4	Bhioraj v. Narayan ...	**27**	861	18	Murlidhar v. Mulu ...	**27**	935
8	*Musammat* Amba v. Sheoram ...	**27**	864	21	Chandan Singh v. Fakirgir ...	**27**	940
9	Haria v. Manakchand ...	**27**	866	25	Sadashiv v. *Musammat* Rukhmabai	**27**	969
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30	Raj Raghubar Singh v. Bikramajit Singh ...	**28**	171	55	Deputy Commissioner, Fyzabad v. Sant Bakhsh Pathak ...	**27**	72
34	Imam-ud-din v. Mumtaz-un-nissa	**27**	118	58	Niranjan Singh v. Jagan Nath ...	**28**	862
38	Mohammad Nasim v. Mohammad Ahmad ...	**27**	389	61	Sheoambar Singh v. Balbhadra Singh ...	**28**	357

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P. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

G. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

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Act 1858—I. *See* MADRAS COMPULSORY LABOUR ACT.
— 1860—XXVIII. *See* MADRAS BOUNDARY MARKS ACT.
— 1864—II. *See* MADRAS REVENUE RECOVERY ACT.
— 1865—VII. *See* MADRAS IRRIGATION CESS ACT.
— 1882—V. *See* MADRAS FOREST ACT.
— 1884—IV. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
— 1890—XI. *See* MADRAS MOTOR VEHICLES ACT.
— 1904—III. *See* MADRAS CITY MUNICIPAL ACT.
— 1905—III. *See* MADRAS LAND ENCROACHMENT ACT.
— 1908—I. *See* MADRAS ESTATES LAND ACT.

ACTS—(LOCAL)—PUNJAB.

Act 1887—XVI. *See* PUNJAB TENANCY ACT.
— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
— 1905—II. *See* PUNJAB PRE-EMPTION ACT.

ACTS—(LOCAL)—U. P.

Act 1876—XVIII. *See* OUDH LAWS ACT.
— 1886—XXII. *See* OUDH RENT ACT.
— 1899—III. *See* U. P. COURT OF WARDS ACT.
— 1900—I. *See* U. P. MUNICIPALITIES ACT.
— 1901—II. *See* AGRA TENANCY ACT.
— 1901—III. *See* U. P. LAND REVENUE ACT.

ACTS—REGULATIONS.

Act 1793—I. *See* BENGAL REGULATION.
— 1793—VIII. *See* BENGAL REGULATION.
— 1819—VII. *See* BENGAL PATNI TALUKDARS REGULATION.
— 1819—VIII. *See* PUTNI REGULATION.
— 1825—XI. *See* REGULATION.
— 1855—XI. *See* REGULATION.
— 1859—X. *See* REGULATION.

STATUTES.

24 & 25 VIC. C. 104. *See* CHARTER ACT; HIGH COURTS ACT.

Adjournment of case. *See* CIVIL PROCEDURE CODE, O. XVII.

——— **of sale.** *See* CIVIL PROCEDURE CODE, O. XXI, r. 69.

Administration bond—Surety's liability, suit to enforce—Limitation—Limitation Act (IX of 1908), Sch I, Art. 68 **505**

Administrator pendente lite—*Commission—Government security pledged to Bank for loan, how far assets of deceased—Evidence Act (I of 1872), s. 115—Estoppel—Suit to recover excess commission, whether to open settled account—Laches—Acquiescence—Commission once charged on whole, whether allowed on part property sold.*

Government securities, whether endorsed in blank or endorsed to a Bank for a debt, pass a legal and not a mere equitable interest and the Bank is a holder for value to the extent of the sum for which it has a lien.

Therefore, the sale-proceeds of such securities as are applied to the discharge of the debt are not the assets of a deceased that come into the hands of the administrator *pendente lite*, notwithstanding the fact that the sales are effected through the agent nominated by the administrator, and the administrator *pendente lite* is not entitled to commission on such amount.

The mere fact that the accounts of the administrator *pendente lite* were passed and the plaintiff with full knowledge of their contents raised no objection and the Solicitor also expressed a favourable opinion, does not operate as an estoppel.

A suit to recover from the administrator the commission retained in excess, of what he was entitled to is not a case of opening a settled account so much as enforcing a claim against a fiduciary agent.

A defence of laches cannot prevail where a statutory period of limitation is prescribed.

Acquiescence cannot be imputed where there is no evidence to show that the plaintiff actually knew the facts as represented in the accounts to be incorrect or that he did not rely on that representation.

If commission be once taken on the whole property, the administrator *pendente lite* cannot again charge commission on the sale-proceeds of a part of the property. C OSMOND BEEBY *v.* KHITISH CHANDRA, 18 C. W. N. 631; 41 C. 771 **284**

Administrator-General's Act (II of 1874), ss. 17 to 20—*Probate and Administration Act (V of 1881), s. 90—Succession Act (X of 1865), s. 19—Hindu Wills Act (XXI of 1870), s. 2—Hindu dying intestate—Letters of Administration to estate of deceased taken out by Administrator-General—Son of deceased minor on that date—Sale of one item of property by son on attaining majority—Subsequent sale by Administrator-General of same item of property, validity of.*

If an Administrator-General takes out Letters of Administration to the estate, moveable or immoveable, of a Hindu dying intestate, the whole estate of the deceased vests in the Administrator-General and he can dispose of it without the sanction of the Court in such manner as may appear to him proper.

An administration cannot be treated as closed until every act necessary for its completion has been done.

Where, therefore, the Administrator-General in order to realize the commission due to him sold an item of immoveable property forming part of the

Administrator-General's Act—concld.

estate of the deceased while that same item had been previously sold by the son of the deceased on attaining majority:

Held, that the sale by the latter was a nullity, as that property still vested in the Administrator-General, and not in the son. M. ALWAR CHETTY *v.* CHIDAMBARA MUDALI, 16 M. L. T. 23 ; (1914) M. W. N. 642; 27 M. L. J. 400 **792**

Admission of receipt of consideration in mortgage-deed, whether admissible in evidence **68**

Adoption. *See* CUSTOM.

——— ——— *See* HINDU LAW.

———, Illatom *form of Custom—Presence of son of adoptive father, whether invalidates* Illatom *adoption—Hindu Law—Presumption.*

Under Hindu Law an adoption is invalid where the adoptive father has a son, but the *illatom* adoption is opposed to Hindu Law and is based on custom and, therefore, no presumption of Hindu Law can apply to such an adoption.

The existence of a son is no bar to an *illatom* adoption. **M.** NALLURY KRISHNAMMA *v.* KAMAPALLI RAMALINGAM **54**

Advancement, principle of, whether applicable in India **102**

Adverse possession *by one co-owner against another—Presumption—Acts of hostile character—Exclusive possession.*

To establish as amongst co-owners of joint property that there has been adverse possession of one against the others by reason of a particular act to which a hostile character is attributed, it must be conclusively shown that such act is wholly inconsistent with, and is not by any possibility attributable to, his character as joint owner.

A case of adverse possession by a co-owner cannot be established by mere paper assertions not brought home to the knowledge of the other co-owners, when there has been no actual exclusion of the latter from use and enjoyment for the period of limitation.

The entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. C. SURJA BIBI *v.* TARAP MONDAL. **788**

——— ——— ———*Co-owner—Possession by one co-owner — Presumption —Burden of proof —Limitation.*

There is a presumption that the possession of one co-owner is the possession of the other, and the burden lies on the co-owner setting up title by adverse possession to prove that he or his predecessor had set up an adverse title to the other co-owner's share, to the knowledge of the latter, more than twelve years before the institution of the suit. AHMAD RAZA KHAN v. RAM LAL, 13 A. L. J. 204 **922**

——— ——— ———Dharmsala—Mahant *leaving no legal representative Founder's right to oust trespasser—Mahant's possession, when becomes adverse to its founder.*

Adverse possession—contd.

In the absence of a duly appointed *Mahant* of a *dharmsala*, its founder is entitled to oust a trespasser.

The mere long possession by a *Mahant* of a *dharmsala* does never become adverse to its founder, unless the former does some overt act repudiating the latter's title for over 12 years. **P.** PREM SINGH *v.* MOKAND SINGH, 151 P. W. R. 1914; 281 P. L. R. 1914 **345**

——— ——— ——— when encumbrance **436**

——— ——— ——— Ex-proprietary tenancy **21**

——— ——— ——— of interest in land—Possessor not deriving any benefit - Possession, whether adverse **528**

——— ——— ——— against members of joint family, commencement of—Hindu Law—Sale by managing member—Deed unregistered **383**

———*Joint holding—Possession by one co-sharer, when adverse to other co-sharers—Revenue Records—Statutory presumption—Burden of proof*

There is a statutory presumption in favour of the correctness of the Revenue Records and the onus lies on the party who disputes the correctness to prove that they are incorrect.

In a joint holding, the possession of one co-sharer is the possession of all the co-sharers and in the absence of a clear and unequivocal overt act, the possession of a joint owner cannot be regarded as adverse to his co-owner.

Where the Revenue Records of two successive Settlements and the entries in the *jamabandis* were in favour of the defendants and the predecessors-in-interest of the plaintiffs had agreed to the property in dispute being mutated in the defendants' names:

Held, that the title in the property had passed to the defendants and though the plaintiffs were in possession, their possession being permissive and in their capacity as co-sharers, could not ripen into ownership. **P.** THIRAJ *v.* KASIM **481**

——— ——— ———*of limited right—Prescription—Limited right of management, whether can be prescribed for—Document containing assertion of rights, admissibility of—Evidence Act (I of* 1872), *ss.* 13, 35—*Suit to recover possession as* hukdar—*Limitation Act (IX of* 1908), *s.* 10.

A limited right of management of an endowment can be prescribed for as well as any other limited right.

A document containing an assertion of certain rights, though not a public document within the meaning of section 35 of the Evidence Act, is admissible in evidence under section 13.

A suit to recover possession of certain villages as *hukdar* and for an injunction restraining defendants from interfering with the plaintiff in the discharge of his duties is barred by limitation when it appears that the right of management has been in the adverse possession of the defendant for nearly 60 years before suit. Section 10 of the Limitation Act has no application to such a suit. M. AMBALAVANA PANDRASANNADHI AVERGAL *v.* MINAKSHY SUNDARESWARA DEVASTANAM, (1915) M. W. N. 76; 28 M. L. J. 217; 17 M. L. T. 271, **841**

Adverse possession—concld.

——————*Possession of co-heir—How far adverse to his co-heirs—Possession when referrable to lawful title, whether can be treated as of trespasser.*

Where one of several heirs takes possession of an inheritance, his possession is not adverse to his co-heirs.

If the possession of a person can be traced to a lawful title, possession will be referred to such title and would not be treated as the possession of a trespasser

Where a widow alienated by a deed of gift the property she had got by inheritance shortly before her death in 1895 to *M*, one of four presumptive reversioners who were entitled to succeed to the said property after her death, and he alienated the same to the 1st defendant in 1899 and the suit was brought in 1909 by an alienee from the other reversioners, who sold their shares to him, to recover possession of the said shares:

Held, that the possession of *M* from the death of the widow to 1899 was not advers to the other reversioners and that, therefore, the 1st defendant was not entitled to tack on *M*'s possession to his own. **M.** PONNUSWAMY IYER v. PERMAYE, 16 M. L. T. 530 **346**

—— —— Purchaser at Court sale delivered formal possession by proclamation of property under tenants—Burden of proof that purchaser was not in possession **537**

—— —— *Title, proof of—Burden of proof—Revenue Records, entry in—Boundary dispute, proceedings in—Title, test of.*

In a suit for possession it is for the party who comes into Court to oust the other party to establish the alleged superior title.

The proceedings of a Revenue Court demarcating the boundary lines of villages are not the only test of title to any land included in a village. **P.** AWAR SINGH v. BHOLA, 240 P. L. R. 1914 **341**

Agent. *See* LAMBARDAR.

Agoo, position of **625**

Agra Tenancy Act (II of 1901), ss. 20, 31, 167—*Illegal transfer of occupancy holding—Ejectment—Jurisdiction of Civil or Revenue Court—Suit for declaration that mortgage of occupancy is null and void, whether cognizable by Civil Court.*

Where an occupancy tenant mortgages his holding and the mortgagee after obtaining a decree on foot of the mortgage forecloses it, the *zemindar* can sue for ejectment in a Revenue Court under section 31 of the Agra Tenancy Act. But a suit for a declaration that such mortgage and decree were null and void and not binding on the landlord, would lie in the Civil Court. **A.** LACHMIN NARAIN v. KALKA PRASAD, 13 A. L. J. 49 **419**

—— —— **s. 22**—*Succession—Occupancy-holding—Death of absolute owner of holding prior to passing of Tenancy Act, but of his widow after it—Right of collaterals to succeed.*

S died prior to the passing of the Agra Tenancy Act (II of 1901) leaving a widow *K*. *K* succeeded to the occupancy-holding left by *S*. *K* died after the passing of the Act;

Agra Tenancy Act—contd.

Held, that the plaintiffs, who were the nephews of *S* and were not in joint cultivation with him, could not succeed to the holding after the widow's death. **A.** HIMAT SINGH v. HULAS SINGH **23**

——————, **s. 31** **419**

—— —— —— **s. 95**—*Jurisdiction—Suit for declaration that plaintiff is an occupancy tenant—Jurisdiction of Civil or Revenue Court.*

A suit for a declaration that the plaintiffs are occupancy tenants of a certain land and that the defendant is not joint with them in such holding is cognizable by a Revenue and not by a Civil Court. **A.** DIWAN SINGH v. RANDHERA, 12 A. L. J. 1322 **718**

—— —— **s. 95**—*Power to fix rent.*

In proceedings under section 95 of the Agra Tenancy Act the Court has no power to fix the amount of rent, it can only ascertain what in fact the rent payable is. **A.** RAM CHARAN LAL v. KARIM-UN-NISSA BIBI, 12 A. L. J. 1131; 37 A. 12 **121**

—— **ss. 95, 167**—*Suit for ejectment—Revenue Court, whether competent to go into validity or invalidity of lease*—Res-judicata.

The plaintiff sued in the first instance in the Revenue Court to eject the defendant alleging that a certain lease and *kabuliat* upon which the defendant relied were given by his *karinda* without his authority. Upon the suit being dismissed he filed a suit in the Civil Court for a declaration that the lease and *kabuliat* were not binding upon him and averred that the present suit could not have been brought in the Revenue Court and that, therefore, the matter could not be said to be *res judicata*:

Held, that the subsequent suit was not maintainable inasmuch as the Revenue Court was competent to go into the question of validity or invalidity of the lease, and, therefore, its decision operated as *res judicata*. **A.** RAM SINGH v. GIRRAJ SINGH, 12 A. L. J. 1252; 37 A. 41 **731**

—— **s. 97**—*Lease—Endorsement by Kanungo—Date from which it takes effect—Subsequent registered lease—Priority*

A document endorsed by a Kanungo or Revenue Officer under section 97 of the Agra Tenancy Act takes effect from the date on which it was executed.

Therefore, a lease executed prior to, but endorsed after, the execution and registration under the Registration Act of another lease for the same holding, has priority over the latter. **A** BANWARI LAL v. KHUBI RAM, 12 A. L. J. 1265; 37 A. 59 **458**

—————— **s. 164 (2)**—*Suit for profits—Liability of lambardar to account—Burden of proof.*

It is the duty of a *lambardar* to maintain accounts of collection and disbursement. The fact that the village *patwari* maintains accounts does not exonerate the *lambardar* or free him from his duty of maintaining his accounts.

In a suit for profits against a *lambardar*, once the liability to account has been admitted by the defendant or held proved against him, it is the duty of the Court trying the suit to call upon the defendant to file his accounts and to produce his books and prove his accounts.

Agra Tenancy Act—concld.

The initial burden on the plaintiff is to prove that the defendant *lambardar* is liable to account. This shifts the burden on to the *lambardar* to prove the accounts. When this has been done, it is open to the plaintiff to prove that there are uncollected items which would not have remained uncollected but for the negligence or misconduct of the defendant. **A.** RAGHUBAR CHARAN *v.* KRISHEN BALDEO **515**

——— ——— **s. 167** **419, 731**

Agraham. *See* MADRAS ESTATES LAND ACT.

Agreement *Debt to be discharged in particular manner, (whether waiver of) other remedies—Family partnership—Nattukottai Chetties—Usage—Family property as trading assets—Signature—Limitation Act (IX of 1908), s. 19—Acknowledgment.*

An agreement that the debt may be discharged in a certain manner does not show that the creditor has waived any other remedy which he may have.

Nattukottai Chetties are a trading community and they usually treat the family property as assets, making no distinction between their family property and their trade assets.

Therefore, in the absence of any evidence to the contrary their family properties should be treated as trade assets.

Where it is proved that the Nattukottai Chetties in writing their private letters do not usually sign their names, but only write words invoking the help of the family deity, a letter thus signed may be taken as signed by the writer for the purposes of section 19 of the Limitation Act.

A letter signed by the managing member of a family acknowledging a debt is binding on the family. CHIDAMBARAM CHETTI *v.* RAMASWAMI CHETTIAR, 27 M. L. J. 63 **911**

Agreement to re-sell—Rent—Interest **753**

Alienation. *See* CUSTOM.

——— ——— *See* HINDU LAW.

——— ——— by father 276 days before birth of son—Right of son against purchaser for value—Burden of proof **61**

——— ———*Legal necessity*—Onus—*Just debts, payment of, by mortgagee Mortgagee, right of, to recover.*

In a suit by a reversioner for a declaration that the mortgage-deeds executed by the plaintiff's brother in favour of a certain person, being without consideration and legal necessity, shall not affect his reversionary rights, the onus of proving legal necessity for the alienations lies upon the mortgagee and if the mortgagee fails to establish his position he is entitled to credit only in respect of such portion of the mortgage-money as was applied towards the liquidation of the mortgagor's "just debts" due to third parties. **P.** BHIM SINGH *v.* JOT RAM, 42 P. W. R. 915 **530**

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Alienation—concld.

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Alluvial Land—Resumption by Government—Settlement with one of original proprietors—New tenure—Pre-existing contract of lease—Suit for recovery of rent—Necessary parties—Fair rate, determination of—Civil Procedure Code (Act V of 1908), s. 103 **215**

Amendment—Decree in accord with judgment but not with intention of Court, whether can be amended—Inherent power—Jurisdiction—Amendment of decree, if allowed, after appeal against that decree pending **940**

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——— ———Plaint framed on wrong view of law—Subsequent alteration of law—Adjournment of case, application for, grant of **363**

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Anicut irrigation, construction of, by Government—Presumption—Implied engagement—Right of owners of land whose supply is cut off to receive free supply—Cause of action—Government, liability of **590**

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Appeal—*concld.*

——Mortgage — Foreclosure decree—Extension of time for payment of money —Good cause—Civil Procedure Code (Act V of 1908), ss. 05 1), 99, O. XXXIV, r. 3, O. XLIII, r. 1 (o),—Preliminary order incorporated in decree may be questioned in appeal **701**

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——Surety, liability of — Bond to restore property attached before judgment—Dismissal of suit **76**

Appeal (Criminal)—*Appellate Court, duty of.*

In an appeal from a conviction and sentence it is for the Appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellant has been established beyond all reasonable doubt. **C.** KANCHAN MALLIK *v.* EMPEROR, 18 C. W. N. 1215; 15 CR. L. J. 686 **134**

Appeal, second—*Concurrent findings of lower Courts based on no evidence—High Court, power of interference—Plaint, signing and verification of—Practice—Parties not getting summons served on witnesses—Court, power of—Procedure.*

Where the lower Appellate Court gives a decree not based on evidence, it is a substantial defect or error in the procedure of that Court which entitles the High Court to interfere in second appeal.

Judges are bound to see that plaints are signed by persons authorised to sign them and that verifications are not treated as mere formalities.

When parties do not get summonses served on their witnesses in time for them to appear on the day of hearing, the Judge should proceed to deal with the case on the materials at the time before him. **U. P. B. R.** MA THA *v.* P. L. M. M. CHETTY FIRM **240**

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Approver—Forfeiture of pardon—Approver to be committed for trial along with other accused if forfeiture proved—Plea of pardon may be decided by Magistrate—Plea may be re-opened in Sessions Court—Burden of proof—Forfeiture—Question of fact—Judge—Jury **657**

Arbitration *Arbitrator going beyond reference Documents acted upon not disclosed—Award.*

An award is bad if the arbitrators go beyond the scope of reference and decide disputes not submitted to them.

An arbitrator acts illegally if he does not disclose to the parties the documents upon which he acts. **C.** JAGAT HARI-BEPIN BEHARY PODDAR *v.* MORAN & Co., **73**

Arbitrator—Court-appointed arbitrator, whether should pass separate award—Aggrieved party, remedy of—Agreement not to appeal, whether binding **355**

Arms Act (XI of 1878), ss. 4, 20—*"Arms," definition of—Weapon, dangerous and probably to cause death if used—Pole-axe.*

The definition of "arms" in the Arms Act is neither exhaustive nor altogether happy.

The mere fact that a weapon is dangerous and, if used, may probably cause death, does not make it "arms" within the meaning of section 4 of the Arms Act.

A weapon consisting of a plain *lathi*, a blade and two moveable screws and so contrived that by loosing the screws the blade may be detached from the shaft made up of the *lathi*, is not "arms" as defined in section 4 of the Arms Act, although the weapon may be described as a pole-axe. **O.** GAJJA *v.* EMPEROR, 1 O. L. J. 559; 15 CR. L. J. 685 **133**

—— **ss. 4, 14, 19 6), 20**—*Fire-arms, whether includes parts of fire-arms—Possession of part of fire-arms—Manufacture of fire-arms Penal Code (Act XLV of 1860), ss. 109, 116, 120B—Punishment on conviction under section 120B—Abetment—Joinder of charges—Transaction—Criminal Procedure Code (Act V of 1898), s. 239.*

Unless there is something repugnant in the subject or context, wherever the word "arms" occurs in the Indian Arms Act, it has got to be read as including "parts of arms." By section 4 of the Act the word "arms" also includes "fire-arms." Therefore, the word "fire-arms" as used in section 14 includes "parts of fire-arms."

The word "fire-arms" only means "arms that are fired by means of gun-powder or other explosive."

Possession of parts of fire-arms is prohibited by section 14 read with section 4 of the Indian Arms Act.

An offence under section 20 of the Indian Arms Act is different from an offence mentioned in section 19 (6) The only additional element necessary to constitute an offence under section 20 is that the possession should be in such manner as to indicate an intention that such act may not be known to any public servant.

The keeping of arms under section (19) *a* of the Indian Arms Act must be a keeping for sale, not keeping only

The term "transaction" in section 239 of the Criminal Procedure Code is not synonymous with the term "offence." A "transaction" cannot be said to be complete as soon as the offence is committed. It

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is clear that so long as the conspiracy continues, the transaction which began with the forming of the common intention continues.

For an offence under section 120B, Indian Penal Code, punishment is provided by section 109 of the Indian Penal Code if an offence has been committed; but if an offence has not been committed, punishment is limited to the extent provided by section 116. Perhaps, strictly speaking, in the former case there should not be a conviction for conspiracy but for abetment of an offence, for conspiracy followed by an act done to carry out the purpose of the conspiracy amounts to abetment. **C.** HARSHA NATH CHATTERJEE *v.* EMPEROR, 16 CR. L. J. 9; 21 C. L. J. 201 **313**

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——— **s. 20** **133**

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Auction-purchaser, title of—Date of sale, title complete from **353**

Auction-sale—Fraud - Application to set aside sale—Plea of limitation, whether can be raised in second appeal—One administrator representing others—decree passed against such administrator, validity of—Auction-sale in such decree - Sale not set aside within 30 days—Suit to declare auction-sale not binding, whether maintainable—Succession Act (X of 1865), ss. 268 to 273 **359**

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Benami transaction—Source of purchase-money—Principle of "advancement"—Father purchasing property in son's name, whether gift—Presumption **102**

Benamidar, whether can sue—Mortgage **507**

Bengal Alluvial Land Settlement Act (XXXI of 1858), ss. 1, 2—*Alluvial Land—Resumption by Government—Settlement with one of original proprietors—New tenure—Pre-existing contract of lease—Suit for recovery of rent—Necessary parties—Fair rate, determination of—Civil Procedure Code (Act V of 1908), s. 103.*

Alluvial lands formed by the recession of a river were resumed by the Government and settled with one of the original proprietors, who was a co-sharer to the extent of two-thirds and who had along with the other co-sharers executed a lease before resumption in favour of the defendant. He sued for the recovery of arrears of rent for the whole land without making the original co-sharers parties to the suit:

Held, that the plaintiff was bound by the terms of the pre-existing contract to the extent of a two-thirds share, of which he was a proprietor, of the original estate, but that in respect of the remaining one-third he was in the position of a stranger and was entitled to realise rent at the rate assessed by the Settlement Authorities as payable by the under-tenure-holder of the original estate;

that the co-sharers of the plaintiff were not necessary parties to the suit; and

that since the rent payable by the under-tenure-holder was not determined by the Settlement Authorities, the High Court had power to do so under section 103, Civil Procedure Code. **C.** MUKTAKESHI DASI *v.* SRINATH DAS, 19 C. L. J. 614 **215**

Bengal Cess Act (IX of 1880, B. C), s. 95—*Returns, whether admissible in evidence in favour of the person filing them—Words as to address, directory.*

Under section 95 of the Cess Act, 1880, the returns filed by or on behalf of any person in pursuance of the Cess Act are not admissible in evidence in his favour.

The words as to the return bearing the signature and address of the person or his authorized agent in section 95 of the Cess Act are only directory and the fact that a wrong address is given, does not make the return admissible in evidence in favour of the person by or on whose behalf it was filed. **C.** RAJANI BALA DASI *v.* BHAJA HARI KOLEY, 18 C. W. N. 076 **126**

Bengal Municipal Act (III of 1884), ss. 238, 240, 273, sub-s (1)—*Building of new masonry wall, whether erection of house—Erection without sanction, whether offence—"Building," meaning of*

The building of a new and additional masonry wall which materially enlarges a courtyard constitutes the erecting of a house within the meaning of sections 238 and 240 of the Bengal Municipal Act, and its erection without the sanction of the Municipal Commissioners is an offence under section 273, sub-section (1) of the Act.

The word "building," in the absence of any specific definition in the Act, should be construed in its ordinary sense and as including erections, structures, or buildings such as masonry walls. **C.** MOHABIR DAS *v.* GAYA MUNICIPALITY, 16 CR. L. J 59 **651**

——— **ss. 240, 273 (1)** **651**

Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), ss. 21 (4), 22—*Appeals lying to District Judge ordered to be preferred to Subordinate Judge—Subordinate Judge, power of, to hear such appeals.*

Where appeals lying to a District Judge under sub-section 2 of section 21 of the Bengal, N.-W. P. and Assam Civil Courts Act are directed under sub-section (4) to be preferred to the Court of a Subordinate Judge, the intention is that the appeals preferred accordingly should be heard and disposed of by the Subordinate Judge without any order of transfer of such appeals to his Court under section 22 of the Act. A. SHEO HARAKH v. RAM CHANDER, 3 A. L. J. 41; 37 A. 76 **783**

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Bengal Patni Taluqdars Regulation (VII of 1819) **197**

Bengal Regulation (I of 1793), s. 8, cl. 4—*Bengal Regulation (VIII of 1793), s. 41—Chowkidari chakran lands—Inclusion in zemindari—Permanent sanad—Resumption, when permissible—Burden of proof—"Assigned," meaning of, in Village Chowkidari Act (VI of 187).*

Zemindars have a *prima facie* title to the full enjoyment of every parcel of land lying within the ambit of their estates for which they pay revenue to Government, and it rests on the Government to prove that when the *zemindari* was confirmed, land therein was subject to reservation empowering the Government to resume and assess it.

Under section 8, clause 4, of Bengal Regulation I of 1793 and section 41 of Regulation VIII of 1793, the power or option of resumption was reserved only in respect of lands which had been appropriated by the *zemindar* with the permission or under the authority of Government for the purpose of remunerating the *chowkidars* for their services and which, although included in the *mahal* and annexed to the *malguzari* lands, were not taken into consideration for assessment of revenue.

The word 'assigned' in Bengal Act VI of 1870 means assigned by the Government or appropriated under its authority or with its permission.

The mere fact that some of the appointments of *chowkidars* were made with the approval of Government Officers cannot alter the nature of the grants.

The history of the *chakran* grants in Orissa traced P. C. SECRETARY OF STATE v. KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA, 19 C. W. N. 65; 2 L. W. 11; 17 M. L. T. 1; 21 C. L. J. 31; 17 BOM. L. R. 32 **676**

——— **s. 41** **676**

Bengal Rent Act (X of 1859), s. 16 **908**

Bengal Sales of Under-tenures Act (VIII B. C. of 1865), s. 16—*Intermediate landlord, obligations of—Agreement with another person to get rid of under-tenure, whether fraud—Under-tenure, annulment of—Wilful default by tenure-holder in payment of rent—Decree under Rent Law—Sale—Pre-arranged terms.*

An intermediate landlord is bound to protect his own tenant from all paramount claims and may be deemed to have committed an act of fraud against his under-lessee, when he enters into an agreement with another person to get rid of the under-tenure by means of a fraud and fictitious sale for arrears of rent. C. UMA CHARAN MANDAL v. MIDNAPORE ZEMINDARY COMPANY, 20 C. L. J. 11; 19 C. W. N. 270 **182**

Bengal Tenancy Act (VIII of 1885), s. 25—Denial of landlord's title, when operates as forfeiture **619**

——— **ss. 93, 94, 95, 99**—*Common manager, appointment of, for part of estate, whether legal—Common manager, whether can be appointed without complying with formalities of the Act—Illegal appointment, effect of—Permanent lease granted by common manager without sanction of Judge, whether valid.*

The Bengal Tenancy Act does not authorize the appointment of a common manager of a part of an estate.

An order of the District Judge making the appointment of a common manager is illegal if the formalities provided by section 95 of the Bengal Tenancy Act are not complied with and, therefore, a common manager so appointed does not acquire the statutory powers conferred on a common manager duly appointed under the Act.

A permanent lease granted by a common manager without the sanction of the District Judge is invalid C. KANAI LAL GHOSE v. BESIR PRAMANIK **493**

——— **ss. 94, 95, 99** **498**

——— **ss. 144 (1), 193**—*Money payable in respect of forest rights, suit for recovery of—Jurisdiction of Civil Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8.*

The provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent apply, as far as may be, to a suit for the recovery of money payable in respect of forest rights.

What is payable in respect of forest right is in the nature of rent for the purposes of determining the jurisdiction of the Court, and, therefore, a suit for recovery thereof is entertainable by an ordinary Civil Court and not by a Small Cause Court C. BANDI ALI FAKIR v. AMJD SARKAR, 20 C. L. J. 227; 19 C. W. N. 415 **380**

——— **s. 159, 161** **436**

——— **s. 167** **436**

——— **s. 193** **380**

——— **s. 195 (c)** **436**

Bengal Village Chowkidari Act (VI of 1870) **676**

Bombay Civil Courts Act (XIV of 1869), s. 16—*Suits under Divorce Act for dissolution of marriage, whether District Judge competent to refer to Assistant Judge for decision—Nature of such suits—Divorce Act IV of 1869, s. 10*

Section 16 of the Bombay Civil Courts Act does not authorize a District Judge to refer for trial to an Assistant Judge suits under the Divorce Act for dissolution of marriage. Such suits cannot appropriately be described as applications under a special Act. They are suits, but not suits the subject-matter of which is capable of valuation. B. THOMAS G. G. FRENCH v. JULIA FRENCH, 16 BOM. L. R. 754 **599**

Bombay Land Revenue Code (V of 1870), ss. 79A, 202 **749**

Boundary Marks Act (XXVIII of 1860). See MADRAS BOUNDARY MARKS ACT.

Breach of public peace. See CRIMINAL PROCEDURE CODE, s. 106.

Burden of proof—Adverse possession—Title, proof of **341**

——— ——— ——— ——Alienation by father 276 days before birth of son—Right of son against purchaser for value **61**

——— ——— — — Alienation by widow, suit by reversioner to set aside—Legal necessity—Old alienation **376**

——— - ——— ——Alienation—Legal necessity —Just debts, payment of, by mortgagee—Mortgagee, right of, to recover **530**

——— ——— — , *allocation of, after evidence produced by both parties upon clear and specific issues—Evidence as a whole to be considered—Parties brought on record on their application, names of, striking off—Additional defendants, pleadings and evidence of, not to be expunged from record—Defendants, two sets of—Admission of plaintiff's claim by one set of defendants—Denial of plaintiff's claim by other set of defendants—Relief, separate, not claimable against each set of defendants—Claim of plaintiff not to be decreed against defendants admitting it—Pleadings, object of—Court, duty of, where pleadings vague and unsatisfactory—Attestation of Will—Succession Act (X of* 1865*), s.* 50*—Execution of Will —Executant's signature on document, place for, no law as to—Signature for purpose of execution—Re-execution of Will—Will, execution of, includes signature of executant and attestation of witnesses—Adoption itself does not revoke previous Will—Document, construction of—*"Janashin wa qaimmuqam," *interpretation of—Testamentary character of document Bequest of* talukdari *estate—Revocation of previous Will—Estate received under Will, divesting of—Burden of proof, nature of, in case where document set up as having effect of setting aside previous Will—Suspicion in mind of Court to be removed—Execution, both mechanical and intelligent or conscious to be proved—Pleadings, point not stated in, tried to be established—Rebutting evidence, objection as to, not entertainable—Cross-examination, question put in—Admission—Statements of deceased testator or executant, when admissible in evidence—Deceased executant, conduct of, relevancy of—Evidence Act (I of* 1872*), ss.* 11, 18, 19 *and* 21*—Oral evidence as to statements of deceased executant—Cancelled registered document, admissibility in evidence of—Admissions against one's own interest, when lose their force as such—Unregistered document can be referred to for ascertainiing executant's state of mind at or about time of its execution.*

Where a suit has gone to trial upon clear and specific issues, in respect of which evidence has been produced by both parties, a Court ought not to pay much heed to the arguments as to the allocation of the burden of proof, or the precise point at which such burden of proof may be said to have shifted to one side or the other in consequence of particular pleadings or admissions or particular items of evidence, but should prefer as a rule simply to consider the evidence as a whole, treating the pleadings of the parties as pieces of evidence relevant under the head of admissions, and endeavouring if possible to arrive at a clear finding upon the questions of fact involved.

On certain persons applying to be added as defendants in a case the Court of first instance, in spite of the plaintiffs' protest, ordered them to be so added. The plaintiffs did not reserve it as a matter

Burden of proof—contd.

which might be called in question, if necessary, later on in appeal from any decree which might be passed in the case, but at once appealed from that order, which even the Appellate Court upheld. These additional defendants were thus brought on the record, entered their pleadings, putting the plaintiffs to proof of their entire case, cross-examined the plaintiffs' witnesses, and tendered evidence of their own The Court of first instance passed a decree in the case against the plaintiffs, and they again contended on appeal from that decree, on certain new allegations not brought home to the Appellate Court in the previous appeal from the said order, that the present additional defendants ought never to have been brought upon the record, and that not only their pleadings but also the evidence led by them ought to be ignored and excluded from consideration:

Held, that the additional defendants could not be struck off the record at that stage and that their pleadings and the evidence led by them could not be expunged from the record or ignored in arriving at a decision on the facts.

Where there are two sets of defendants and one of those sets admits and the other denies the plaintiffs' claim, and the case is such that no separate reliefs can be granted against each set, the plaintiffs cannot get a decree as against the defendants admitting their claim if they fail to establish their case, which they are bound to prove owing to the pleadings of the other defendants denying their claim.

The sole object of every system of pleadings is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues.

Where the pleadings of a party are vague and unsatisfactory, a Court ought to endeavour to have them clearly specified as far as possible.

A Will, after having been executed but without having been signed by any attesting witness was deposited in a sealed cover at the office of the Sub-Registrar. About ten years later the executant went to the Sub-Registrar's office, took out the Will from the sealed cover and formally presented it for registration as a Will and admitted its execution in the presence of attesting witnesses, and these witnesses as well as the executant himself signed the document in the proper places:

Held (per *Piggott, J. C.*), that the above proceedings amounted to an attestation of the Will sufficient to satisfy the requirements of section 50 of the Indian Succession Act.

Held, further (per *Piggott, J.C.*), that the execution of the Will was not legally complete before the time when it became valid in law in consequence of its attestation by the Sub-Registrar and by the identifying witnesses.

Held, also (per *Piggott, J. C.*,) that as there is no law as to the precise place on a document where the executant must affix his signature in order that his act in so doing may amount to an execution, the Will in question could be said to have been executed and registered on one and the same day.

Held, lastly (*per Lindsay, A. J.C.*), that as the execution of a Will included both the signature of an

Burden of proof—*concld.*

knowledgment by the testator and the attestation of the subscribing witnesses, the Will in question could not be said to have been executed until it was attested by the marginal witnesses.

The adoption of a son does not in itself operate to revoke or nullify a valid Will executed by the adoptive father in favour of his wife, any more than the birth of a natural son does.

A document purported to constitute a person the *Janashin wa qaim-muqam*" (representative or *locum tenens*) of the executant and provided that "*hamesha bad mere tamam umur talukdari ka anjam deta rahega*" (after the executant's death the person will always attend to or perform all the duties appertaining to *talukdar*), and that he should represent the executant in the presence of officials, members of the brotherhood, tenants of the estate and others, and on official occasions such as *Darbars* held by the Lieutenant-Governor and the like. It was contended that these words and expressions considered together might reasonably be interpreted as being of a testamentary character and as implying a bequest of the *talukdari* estate in that person's favour and thus revoking a Will previously in existence:

Held, that, inasmuch as a revocation in order to be valid and operative as a fresh bequest must be in clear and unambiguous terms, and as words to the effect that the person named in the document in question was merely to be the *janashin* or *locum tenens*, the document could not, in the absence of a clear and positive bequest of the estate in his favour, be interpreted as a Will conferring the *taluka* upon him and to divest the legatee of such estate in whose favour the Will had previously been made.

Where the plaintiffs put forward a document which they contended had the effect of setting aside the Will in favour of the defendant:

Held, that the burden of proof to be laid upon the plaintiffs should be just the same as legally lies upon the propounders of a Will, and more particularly upon the propounders of a Will which has the effect of revoking a Will previously in existence, and that once any circumstances are shown to exist which may reasonably excite proper and well-grounded suspicion in the mind of the Court, a person claiming under such a document is bound to satisfy the Court, not only as to its mechancial execution, but also as to the fact that the executant fully understood the nature and the terms of the deed.

A party endeavouring to establish a point not specifically stated in his pleadings cannot object to the opposite party's tendering rebutting evidence as regards that point.

If a party's Counsel simply asks a witness in cross-examination as to whether a certain event happened, it cannot be said that that party commits himself to the assertion that such an event actually took place.

In cases of disputed Wills or other dispositions of property, evidence as to statements alleged to have been made by the deceased testator or executant, from which inferences can be drawn as to the execution or otherwise of the documents in dispute or as to the circumstances under which such execution was obtained, is admissible.

Burden of proof—contd.

Where in a case of disputed deed of adoption the defendant alleged that the deceased executant had become, shortly after the execution of the deed, aware of its existence, purport and effect, and after having become so aware had taken steps to cancel it or nullify its effect, the conduct of the executant from the moment that he became admittedly aware of the existence, purport and effect of the deed is not merely a relevant fact, but a very important fact in the case; and the evidence offered by the defendant as to statements made by the executant in the interval of the execution of the deed and his death expressing the view taken by him of the deed after he had known of its existence, or the action which he had conceived himself to have taken regardjng it, cannot be excluded as irrelevant, but is admissible under the head of admissions under sections 18, 19 and 21 or section 11 of the Evidence Act.

It is a dangerous thing to admit oral evidence as to statements alleged to have been made by a deceased executant as having the effect of practically cancelling a registered document, unless there are anomalous and suspicious circumstances already in existence.

In ordinary cases the admissions made by a party against his own interest might well be regarded as decisive against him. But in special cases where there exist a variety of circumstances calculated to discount the value of such admissions, those admissions may well be ignored from consideration as being of no effect.

An unregistered document, although inoperative as a deed of transfer of property or the like, can be looked at for a collateral purpose, for instance, to ascertain the executant's state of mind on or about the time that the document was executed. **O.** MIR SYED HASAN *v.* TAIYABA BEGUM, 1 O. L. J. 591 **547**

——————*Chowkidari chakran* lands —Inclusion in *zemindari*—Permanent *sanad*—Resumption, when permissible **676**

——————Custom **450**

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——— ——— ——— Suit for profits—Liability of *lambardar* to account **515**

——— ——— ——— Temple, right of worship in—*Sudra*, right of, to enter **7**

——— ———Two Chetties signing joint promissory notes **253**

Burmese Buddhists—*One of the parents changing religion, effect of, on legitimacy of subsequently born child—Minors' Act (XL of* 1858), *person holding property, by virtue of certificate under—Trustee—Limitation.*

If after marrying according to the Burmese Buddhist custom of marriage, the father becomes a Christian and the mother remains a Buddhist, the marriage does not become thereby dissolved and the legitimacy of the child born after the father's change of religion is not thereby affected.

A person who holds property by virtue of a certificate granted under Act XL of 1858 holds it as an express trustee for the children of the deceased, who are as such entitled to the property, and limitation does not run against them. **U. P. B. R.**
MAUNG YIN *v.* MA SAW MYAING **700**

Calcutta Police Act (IV B. C. of 1866), s. 13B, cl. (c)—*Police constable in possession of money contrary to order, conviction of—Defence, consideration of—Plea of guilty—Admission—Government order, proof of—Practice.*

A copy of the Government order or an extract therefrom or a reference thereto should be placed on the record if a person is convicted of having contravened that order.

A Police constable when being tried under section 13B, clause *(c)*, of Act IV of 1866 for being in possession of a sum of four annas while on duty contrary to an order of the Commissioner of Police, pleaded guilty to having the money in possession but stated he was not on duty:

Held, that the plea of guilty was to be looked upon merely as an admission of the fact that he had at the time in question the sum of annas four upon his person and that he could not be convicted unless his defence was considered and adjudicated upon. **C.**
GAYA ROY *v.* EMPEROR, 18 C. W. N. 1272; 15 CR. L J. 703 **151**

Cause of Action. *See* CIVIL PROCEDURE CODE, O. II, r. 2.

——— ———Alienation by widow—Contest by remote reversioner **737**

——— ———*Anicut* irrigation, construction of, by Government—Right of owners of land whose supply is cut off to receive free supply—Government, liability of **590**

Cause of action—concld.

——— ——— — Arbitration, dispute between two partners of money-lending firm settled by—Award—"Receipt"—Accord and satisfaction by substituted agreement—Pro-notes in lieu of "receipt"—Pro-notes altered—Suit on pro-note dismissed—Fresh suit for amount in receipt, whether maintainable—Causes of action, inclusion of **228**

——— ——— ——, whether claims upon several contracts included in one—Contract for supply of goods by monthly instalments, breach of—Intention of parties—Damages, whether separate suits maintainable **209**

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Central Provinces Tenancy Act (IX of 1883), ss. 21, 32——*Unregistered lease by* thekadar, *whether can confer permanent title—Sanction of* zemindar, *effect of—Improvement made by tenant under* bona fide *belief of permanent title, compensation for, whether allowed—Equitable estoppel—Landlord, whether bound by equities binding on his* thekadar—*Compensation, assessment of—Assessors, failure to appoint, effect of—Irregularity.*

An unregistered lease by a *thekadar* of a village cannot confer any permanent title, although the lessee may have been in possession for a long time, nor can the assent or sanction of the *zemindar* in very guarded terms be construed as sanctioning the tenancy "for ever."

If a tenant under a *bona fide* belief that he has a perpetual lease makes a permanent improvement within the knowledge of his landlord, which is advantageous not only to his own holding but can also enure to the benefit of the other holdings of the *zemindar*, he is entitled to compensation on ejectment.

A landlord who gets possession of a holding by the surrender of the person who held it and who gave a permanent lease for valuable consideration, may be considered to be bound by the equities binding upon the person surrendering.

A Munsif who is authorized under the Central Provinces Tenancy Act to assess compensation for an improvement in a holding but is directed to associate with him assessors, commits an irregularity if he does not associate them, but the irregularity is such as can be waived. **C.** SARDAKAR PODH *v.* BISSESWAR GOANTIA **476**

——— ——— ——— **s. 32** **476**

——— ——— ——— **ss. 47, 48, 60, 71, 72**—*Sub-lease for more than a year—Sub-tenant ca not resist eviction after one year.*

A sub-tenant, under an occupancy-tenant, cannot after the expiry of a year from its commencemens, plead as a ground for resisting a suit for eviction, a

Central Provinces Tenancy Act—concld.

sub-lease for a period exceeding one year. The remedies provided by sections 47 and 48 and 71 and 72 of the Central Provinces Tenancy Act are for the protection of the tenant's heirs and of his landlords. **N.** VISHWANATH *v.* SITARAM, 10 N. L. R. 159 **708**

——— ——— ——— ——— **ss. 48, 60, 71, 72** **708**

——— ——— ——— ——— **ss. 85, 115**—*Tenant can save one holding if unable to save another—Surrender by tenant, effect of, on his mortgagee—Partition—Order of Settlement Officer, whether necessary—One holding could be split up into several by consent of landlord and his tenants.*

A holding can be split up by a landlord and his tenants with mutual consent and without the order of a Settlement Officer. If a partition made by two persons interested in two portions of a holding is accepted by the landlord, each becomes separate holding.

Section 85 of the Central Provinces Tenancy Act contemplates ejectment only from the holding in respect of which an arrear is due. In other words, it is open to a tenant to pay up the arrear on one holding and save it from forfeiture, though he be unable to pay what is due on another holding.

A surrender by a tenant will not prejudice the rights of his mortgagee when the mortgage is not voidable at the instance of the landlord. **N.** TIKARAM *v.* GHASIRAM, 10 N. L. R. 129 **810**

——— ——— ——— **s. 115** **810**

Ceylon Civil Procedure Code, s. 34—*Civil Procedure Code (Act V of 1908), O. II, r. 2—Causes of action—Arbitration, dispute between two partners of money lending firm settled by—Award—"Receipt"—Accord and satisfaction by substituted agreement—Pro-notes in lieu of "receipt"—Pro-notes altered—Suit on pronote dismissed—Fresh suit for amount in receipt, whether maintainable—Causes of action, inclusion of.*

A dispute between the two partners of a money-lending firm was referred to arbitrators, who after the completion of the investigation drew up a "receipt" which the appellant signed, the arbitrators witnessed and the respondent accepted and acted upon. In accordance with the "receipt" the appellant paid to the respondent Rs. 224-5/32 and handed to him two promissory notes for Rs. 14,000 each in which no rate of interest was inserted by an oversight, although the parties intended that they should bear Chetty interest. The respondent thereupon went to one of the arbitrators and persuaded him to alter the pro-notes by inserting therein 9 per cent. as the rate of interest. He then sued on the two notes, but his suit was dismissed on the ground that a material alteration had been made in them. He then brought another suit for two items referred to in the "receipt" which with other items were the basis of the two pro-notes:

Held, (1) that the proceedings of the arbitrators, though informally conducted, were in the nature of an arbitration, that the so-called "receipt" expressed the finding of the arbitrators and the mode in which it was to be performed and that the case was a clear example of "accord and satisfaction by a substituted agreement" by which the prior rights of the parties were extinguished; and

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(2) that the form of the claim was faulty, inasmuch as the sole existing liability was under the agreement set out in the receipts, while the arrangement for the discharge of the amount found due by means of the promissory notes only expressed the mode of payment contemplated and arranged for at the time, and that the respondent could bring an action for the unpaid balance of the sum found due.

Section 24 of the Ceylon Civil Procedure Code, which corresponds to Order II, rule 2, of the Indian Civil Procedure Code, 1908, is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph is not intended to be an illustration of the foregoing provisions, but a substantive enactment making an obligation and a collateral security for its performance one cause of action for the purposes of the section.

Therefore, a claim on the bills and a claim for the amount found due under the award and for which payment was provided by the agreement are not the same cause of action, but are inconsistent and mutually exclusive causes of action, and thus the sum sued for is recoverable by the respondent but he cannot bring a fresh action for the remainder. **P. C.** SAMINATHAN CHETTY *v.* PALANIPPA CHETTY, 18 C. W. N. 617; 83 L. J. (P. C). 131; 17 New Law Reports 56; (1914) A. C. 618; 41 I. A. 142 **228**

Charge, amendment of **306**

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——— of bribery—False charge—Compensation—Frivolous or vexatious **1004**

——— — Joint trial of two persons for two distinct offences—Misjoinder—Re-trial of appellant **636**

——— mortgage—Construction of deed **752**

——— of rioting—Common object wrongly stated, effect of—Acquittal—Conviction under another section, whether sustained—Proper course—Procedure **654**

——— Suit for maintenance filed between date of sale and confirmation of sale—Property, whether charged—*Lis pendens*—Transfer of Property Act (IV of 1882), s. 52 **353**

———, validity of—*Wakf* property—Sanction of *Cazee*—*Ex post facto* approval, whether valid—Deed named as *tamleek* and *tawliatnama*, whether contemplates absolute endowment of entire property **358**

Charter Act (24 and 25 Vic. C. 104), s. 15 **203**

Cheating. *See* CRIMINAL PROCEDURE CODE, s. 179.

Chenab Canal *Colony—Confiscation of squares for absence from* chak—*Habitable house.*

Throughout the whole of the Lower Chenab Colony the fact that a grantee has a habitable house in his *chak*, must be accepted as conclusive evidence that he is fulfilling the condition of residence. BAHADRI *v.* EMPEROR. 3 P. R. 1914 Rev, **756**

Circumstantial evidence—Confession to Police Officer Statements made by accused in order to exculpate himself—Test of admissibility—Admission of deposition when witness not found, when allowed **161**

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——— ——— ——— ——— , whether alone sufficient to pass death sentence **324**

——— ——— ———Unsatisfactory evidence of identification of body—Conviction, whether sustainable **1001**

Civil Procedure Code (Act XIV of 1882), s. 211 and Civil Procedure Code (Act V of 1908), O XX, r. 12—*difference between—Future mesne profits*—Res judicata - *First suit for possession and future profits under old Code—Possession alone decreed after new Code—Second suit for mesne profits for same period, maintainability of* - Res judicata *pleaded in first Court as regards part of claim—Plea taken as to whole claim in appeal—Decree dismissing whole suit in appeal, if legal.*

Under section 211 of the Code of Civil Procedure (Act XIV of 1882), the grant of future mesne profits was purely discretionary with the Courts and could not be claimed as of right and no cause of action would accrue in respect of them. But under Order XX, rule 12, of the new Code (Act V of 1908) the Court's power to direct an inquiry into future mesne profits is put on a par with its power to pass a decree for possession or past mesne profits, and there is nothing in the latter to indicate that the one relief is more a matter of discretion and less of right than the other.

Where, therefore, a plaintiff in 1907 sued for possession of certain lands and for future mesne profits from date of plaint till delivery of possession and possession only was decreed and no mesne profits were awarded:

Held, that a subsequent suit for mesne profits for the same period was barred by *res judicata.*

Where in the above suit the defendant in his written statement pleaded that the matter was *res judicata* as regards the claim for mesne profits up to the date of the decree in the first suit, but in the memorandum of appeal to the lower Appellate Court pleaded that the whole claim was barred and the District Judge, accepting the plea, dismissed the whole suit:

Held, that, subject to the limitations set forth in Order XX, rule 12 (c), the mesne porfits for the period subsequent to the date of decree in the first suit stood on the same footing as those accruing during the pendency of the said suit and that the District Judge was quite justified in dismissing the whole suit. **M.** RAMASAMI IYER *v.* SRIRANGARAJA IYENGAR, 2 L. W. 8 **622**

——— ——— ——— ——— **s. 244** **430**

——— ——— ——— ——— **s. 278** **943**

——— ——— ——— ——— **ss. 278, 283**—*Attachment of property, objection to, by three claimants—Joint order setting aside attachment—Opinion adverse to one claimant, effect of—Claims to attachment, decision on, principle of.*

The attachment of a property was objected to by three different objectors on different grounds. The first objector claimed to be a *bona fide* purchaser before attachment, the second claimed to be a mortgagee, while the third claimed that the property had devolved upon him by survivorship under Hindu Law. The Court accepted the contention of the third objector and held that the grounds relied upon by the first objector were not well-founded. But all the same it raised the attachment of the property by one joint order dealing with all objection petitions:

Held, that as the order raised the attachment, it was not against the first objector and that it could not be interpreted as against him simply because the Court had expressed an opinion that his grounds were not well founded.

Object of proceedings under section 283 etc., explained. **M.** PONAKA BALARAMI REDDI *v.* HAZI MAHOMED ABDUL AZIZ, 26 M. L. J. 499 **532**

——— ——— ——— ——— **s. 281** **943**

——— ——— ——— ——— **s. 283** **532**

——— ——— ——— ——— **s. 316**—*Auction-purchaser, title of Date of sale, title complete from—Suit for maintenance filed between date of sale and confirmation of sale—Property, whether charged—*Lis pendens—*Transfer of Property Act (IV of 1882), s. 52.*

An auction-purchaser's title even as regards strangers arises on, and in case the sale is confirmed becomes complete with effect from, the date of sale.

Where, therefore, a female institutes a suit for maintenance subsequent to the sale but prior to the date of the grant of the certificate of sale, the sale is not vitiated by the doctrine of *lis pendens*, and the purchaser takes the property free from any charge of maintenance. **M.** LANKA GOPALAM *v.* LANKA RATNAMMA, (1915) M. W. N. 15 **353**

——— ——— **s. 521**—*Court appointed arbitrator, whether should pass separate award—Aggrieved party, remedy of—Agreement not to appeal, whether binding.*

An agreement not to appeal is binding as between the parties, the consideration being their mutual consent to refer the matter in dispute to the Court as an arbitrator.

Where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting parties to put in objections before passing a decree. Such an award is itself a decree and objections to the award can be raised only by way of appeal against the decree to the Appellate Court, and not by means of applications to the Court itself.

The application to the Court to act as an arbitrator is not an application to make a reference. **M.** NIMMAGADDA PEDA NAGANNA, *In re* **355**

Civil Procedure Code (Act V of 1908), ss. 7 (b), 104—*"Injunction and interlocutory orders" in s. 7, meaning of—Provincial Small Cause Court—Compensation for attachment before judgment, order of Appeal.*

The words "injunction and interlocutory orders" in section 7 of the Civil Procedure Code can only refer to the orders contemplated in Order XXXIX, and those words read together can only mean applications for an injunction and interlocutory orders on such applications.

Civil Procedure Code—(1908)—contd.

A Small Cause Court has power to award compensation when it issues an *interim* attachment and dismisses it after the other side is heard and such an order cannot be questioned in appeal. **M.** KARUMURU VENKATESWAMI *v.* LANKA TRIPURIAH **359**

——— ——— **ss. 9, 20**—*Jurisdiction of British Indian Courts—Right to trusteeship—Temple in French territory—Parties French subjects.*

The nationality of the parties has nothing to do with the jurisdiction of Civil Courts.

British Indian Courts have jurisdiction to determine the question whether a plaintiff is the sole trustee of a temple situate in French territory, even though the parties to the suit may happen to be French subjects, when the land in respect of which the suit is brought is within British India. **M.** AGNIHOTRAM VENKATA APPALA CHARLU *v.* KUMBUM PAKIRU, 1 L. W. 724 **367**

——— ——— **s. 10,** *inapplicability of.*

Section 10 of the Code of Civil Procedure, 1908, does not apply where the previously instituted suit is pending in a Court not competent to try it. **O.** JAHANGIR SINGH *v.* HIRA, 157 P. W. R. 1914; 283 P. L. R. 1914 **222**

——— ——— **s. 11** **817**

——— ——— **s. 11**—*Matter substantially in issue in both suits same—Plaintiff not adequately represented in former suit, whether barred—Pro forma defendant in former suit, whether can sue for same matter.*

Section 11 of the Civil Procedure Code does not bar a suit only on the ground of the matter in suit having been substantially in issue in a previous suit, if the plaintiffs in the second suit were minors at the time of the first and were not adequately represented or if the plaintiff was a *pro forma* defendant in the first suit and took no active part in that suit. **B.** SUNDARA BAHU SHETYE *v.* SAKHARAM GOPALSHET GANDHI, 16 BOM. L. R. 616; 39 B. 29 **444**

——— ——— **s. 11**—Res judicata—*Test—Suit by son to set aside sale-deed executed by father, dismissal of—Death of father—Subsequent suit to set aside father's alienation of family property barred—Cause of action—Limitation Act (IX of 1908), Sch. I, Art. 126.*

In order to determine whether a suit is barred by *res judicata*, the test to be applied is whether the issue was one on which the judgment of the previous suit was based, quite apart from the question whether the decision itself in the former suit would be affected by the matter being re-opened in the later suit or whether the decision in the former suit could not logically have been based on even a different finding.

Where the plaintiff's suit to set aside a sale-deed executed by his father in the defendants' favour in 1896 was dismissed, and on his father's death in 1910 the plaintiff again brought a suit in October 1911 to have the deed set aside and to recover possession of the plaint lands, alleging that a new cause of action arose on his father's death:

Held, (1) that a finding on the question of possession in the former suit was *res judicata* in this suit, the cause of action in both being the same;

Civil Procedure Code—(1908)—contd.

(2) that the suit, being one by a Hindu governed by the law of *Mitakshara* to set aside his father's alienation of famiiy property, was barred by Article 126 of the Limitation Act, as having been brought more than 12 years from the date when the alienee took possession. **M.** RAMASAWMY AIYAR *v.* VANAMAMALAI AIYAR **873**

——— ——— **s. 11**—Res judicata—*Ejectment suit—Denial of landlord's sole title—Fresh suit for declaration against alleged landlord and tenant, if barred—Specific Relief Act (I of 1877), s. 42—Bengal Tenancy Act VIII of 1885, s. 25—Denial of Landlord's title, when operates as forfeiture.*

Where in a suit brought by an occupancy *raiyat* to eject an under-*raiyat*, it was held that the former was not the sole landlord, and then another suit was brought by the occupancy *raiyat* against the under-*raiyat* and the alleged co-sharer landlord for a declaration of right to the full share of the holding:

Held, that as between the occupancy *raiyat* and the under-*raiyat*, the question whether the former was the sole landlord of the holding was directly and substantially in issue in the previous ejectment suit, and under section 11 of the Civil Procedure Code, a decision on that issue must be held to be *res judicata* as between them, but that the section did not stand in the way of a declaratory decree against the alleged co-sharer landlord.

Where a tenant does not deny the whole title of his landlord but sets up the right of a third party as co-sharer, there can be no forfeiture. **C.** NEAMATULLAH *v.* BAJULLA **619**

——— ——— **ss. 11, 24, cl. (4)**—Res judicata—*Suit transferred from Court of Small Causes to that of Munsif for trial—Appeal, whether competent—Decision, whether can operate as* res judicata *in suits not cognizable by Small Cause Courts.*

A small cause suit which is transferred to a Munsif retains its character as such and no appeal lies against the decision of the Munsif in such a suit, nor can his decision operate as *res judicata* for purposes of other suits not cognizable by Small Cause Courts. **A.** DULARE LAL *v.* HAZARI LAL, 12 A. L. J. 853 **56**

——— ——— **s. 11 (Expl. IV)** **860**

——— ——— **s. 11 (Expl. VI)**—Res judicata.

S sued his brothers, *F* and *J*, in 1856, for his ⅓rd share in the ancestral estate. The suit was referred to arbitration, and *S* accepted a certain area of the *shamilat* in full satisfaction of his claim After his death, his son again sued *F* and *J* for the alleged share of *S*, but the suit was dismissed in January 1860 on the ground that in the previous proceedings *S* had given up all right to his share. Owing to some mistake which was repeated from time to time till 1908, *S* and his descendants were entered in the Revenue Records as full proprietors of the land in their possession and as having a right to claim a share, according to their holding, in the village *shamilat* On a suit by the descendants of *F* to have the entry rectified:

Civil Procedure Code—(1908)—contd.

Held, that the decision of 1860 operated as *res judicata* and that consequently the plaintiffs' suit ought to be decreed. **P.** MUHAMMAD *v.* MUZAFFAR, 28 P. W. R. 1915 **388**

——— ——— ——— — **ss. 13, 44**—*Foreign judgment—Decree of Court of Cochin State—Execution in British India—Executing Court, power of, to impeach validity of decree—Jurisdiction—Suit in Cochin State—Temporary injunction* pendente lite *—Appearance of defendant—Jurisdiction objected to —Written statement also filed—Submission, whether voluntary or under duress—Foreign Courts and Courts of Native States, judgments of—Suit in British India on such judgments, maintainability of.*

A British Indian Court, executing a decree passed by a Court in a Native State, in respect of which a notification pursuant to section 44 of the Civil Procedure Code has been issued, is competent to go behind the decree and inquire into the question whether the Court which passed the decree had jurisdiction to do so, as a British Court ought not to execute the decree if passed without jurisdiction.

The question whether submission to jurisdiction is voluntary or under duress is one of fact in each case. If the submission is for saving property, it is not voluntary, even though a written statement is filed objecting to the jurisdiction and raising a defence on the merits.

The scope and effect of sections 13 and 44 of the Civil Procedure Code (Act V of 1908) and their bearing upon each other considered.

Per *Seshagiri Aiyar, J.—Quære:*—Whether suits upon judgments of Native States, in respect of which a notification pursuant to section 44 of the Civil Procedure Code has been issued, can be instituted in British India? **M.** VEERARAGHAVA IYER *v.* MUGA SAIT, 1 L. W. 887; 27 M. L. J. 535 **287**

——— ——— ——— — **s. 20** **225, 367**

——— ——— ——— — **s. 20 (c)**—*Cause of action arising in part—Jurisdiction.*

The plaintiff contracted with the defendant Company for carriage of grain and seed from Cawnpore to Jagganath Ghat *via* Howrah. He paid for the conveyance of several consignments certain sums of money which, he subsequently discovered, were in excess of what he should have paid. He sued for the recovery of the excess sum at Cawnpore:

Held, that the cause of action having arisen in part at Cawnpore, the Cawnpore Court had jurisdiction to entertain the suit. **A.** EAST INDIAN RAILWAY Co. *v.* BINDA, 13 A. L. J. 66 **620**

——— ——— ——— **s. 21**—*Jurisdiction—Suit instituted in wrong Court—Consequent failure of justice—Alterations in procedure—Retrospective effect.*

Where a suit was instituted in the Court of the District Judge, Lyallpur, for recovery of the balance due to plaintiffs on account of certain transactions carried out by defendants as plaintiffs' commission agents at Karachi, it being alleged that the agreement by the defendants to act as plaintiffs' agents was entered into at Lyallpur:

Held, that as the plaintiffs had failed to prove the alleged contract, the Lyallpur Court had no jurisdiction to adjudicate upon the claim of the plaintiffs;

Civil Procedure Code—(1891)—contd.

(2) that alterations in procedure being always retrospective, section 21, Civil Procedure Code, 1908, applied even though the suit was instituted in 1906; and the objection as to the place of suing could not be allowed, because there had been no consequent failure of justice. **P.** RATTI RAM *v.* KUNDAN LAL, 87 P. R. 1914 **543**

——— ——— ——— — **s. 24 (4)** **56**

——— ——— ——— ——— **s. 34** **177**

——— ——— ——— — **s. 44** **287**

——— **s. 47, O. XXX, rr. 5, 7, O. XXI, r. 50 (1), (2)**—*Execution—Order directing execution—Decree—Appeal—Partner in a firm individually served—Service without notice, effect of—Failure to appear—Right of decree-holder to proceed with execution.*

An order directing execution to issue against a judgment-debtor is a final order under section 47, and is essentially a decree as it determines a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree and as such it is appealable.

The concluding words of Order XXX, rule 5, of the Civil Procedure Code do not merely raise a rebuttable presumption, but lay down a definite rule of law that service on a person without the written notice contemplated by the rule is equivelent to a service as a partner.

Sub-section 2 of rule 50 of Order XXI is only applicable in the absence of the conditions in sub-section 1.

Rule 7 of Order XXX must be read as subject to rule 5 and contemplates only a case where service is on a Manager, and not a case where the person served is deemed to be served as a partner.

Where one of the partners of a firm refused to accept a summons, and the peon hung up a copy of the summons on the outer door of the place of business of the firm, and the partner failed to appear in execution proceedings.

Held, that he was individually served as a partner and that since notwithstanding such service he failed to appear, it was open to the decree-holder to proceed with execution against him under Order XXI, rule 50 (*i*) (*c*) of the Civil Procedure Code. **C.** BAISHNAB CHARAN SHAHA *v.* BANK OF BENGAL, 19 C. L. J. 581 **866**

——— ——— ——— **s. 48** **244**

——— ——— ——— ——— **s. 48**—*Court passing decree, whether has jurisdiction to execute it after transfer of jurisdiction—Step-in-aid of execution—Application returned for correction not re-presented —Correction not essential to validity of application.*

A Court, which passes a decree for the sale of certain properties, cannot, after transfer of jurisdiction, entertain an application for sale of those properties.

The validity of the original presentation of an application for execution of a decree is not affected by a subsequent order of return for correction of defects unless the defects to be corrected are such as to prejudice the judgment-debtor substantially.

Therefore, an application for execution returned for correction of defects, not essential to the validity

Civil Procedure Code—(1908)—contd.

of the application, although not re-presented after correction, is a step-in-aid of execution and is valid for the purpose of section 48, Civil Procedure Code. **M.** VADIVELU PILLAI *v.* MARUDA PILLAI **413**

——— ——— ——— **s. 60** **684**

——— ——— ——— **ss. 63, 73, O. XXI, r. 52**—*Attachment of money in another district—Procedure.*

It is illegal for a Court to attach money lying in the hands of a Court in another district. The proper procedure for a decree-holder in such a case is to have his decree transferred to the Court in that district for execution

Money attached before judgment in a case is liable to rateable distribution in execution of decrees against the same defendant. **BUR.** RAMCHANDRA *v.* LATCHMAN PILLAY, 7 BUR. L. T. 277 **941**

——— ——— ——— **s. 64**—*Attachment of mortgagee's rights—Subsequent alienation by mortgagee of his mortgage rights Money reserved with alienee to pay off attaching creditors Attachment by another creditor of moneys in assignee's hands—Payment by alienee to prior attaching creditors—Subsequent attachment, effect of, on such payment—Assignor and assignee—Direction in assignment deed to pay debt, if can be revoked before payment—Revocation, power of, how affected by character of debt, secured or unsecured.*

A direction in an assignment-deed that the assignee should discharge certain debts due by the assignor to third parties, out of the moneys forming the consideration for the assignment, may be revoked by the assignor at any time before the debts are actually paid by the assignee if the debts are unsecured, but it cannot be so revoked if the debts are secured.

Where, pending attachment by two creditors of his rights under certain mortgages, the mortgagee assigned his rights therein to the 1st defendant and directed him to pay the consideration for the assignment to the attaching creditors and the assignee afterwards paid them off, but not before the money in his hands had been attached at the instance of the plaintiff, another creditor of the assignor:

Held, that the assignee was entitled to protect himself by paying off the prior attaching creditors, and that such payment did not offend against the provisions of section 64 of the Civil Procedure Code and could not be impeached by the plaintiff. **M.** GOPALA AIYAR *v.* RAMA VENKATASUBBA IYER, 1 L. W. 977 **223**

——— ——— ——— **s. 64, O. XXI, r. 57, and O. XXXVIII, r. 1**—*Attachment before judgment—Records, destruction of—Re-attachment* ex majori cautela, *if amounts to abandonment of prior attachment Dismissal of execution petition, whether affects prior attachment before judgment.*

A re-attachment, in execution, *ex majori cautela*, of certain immoveable properties which had already been attached before judgment (the records relating thereto having been destroyed), does not raise any presumption that the original attachment was abandoned.

In cases where attachment before judgment has been obtained, no fresh attachment by means of an

Civil Procedure Code—(1908)—contd.

execution petition is necessary and all that is contemplated by section 64 of the Civil Procedure Code is the existence of a pending attachment. Mere dismissal of an execution petition has not the effect of causing an attachment before judgment to cease to exist. **M.** KOSURI SURAPARAJU *v.* MANDAPAKA NARASIMHAM, 1 L. W. 932 **81**

——— ——— ——— **ss. 64, 73**—*Execution proceedings—Attachment of property by two decree-holders—Sale ordered under first attachment Private alienation of property after attachment—Deposit of decretal amount of first decree-holder—Assets, rateable distribution of—Second decree-holder, right of.*

Where a judgment-debtor's property was attached in execution of a certain decree and another decree-holder applied for attachment of the same property in execution of his decree against the same judgment-debtor, and the judgment-debtor paid into the Court the decretal amount with costs of the first decree-holder a day before the sale and meanwhile sold it privately to another person:

Held, that, whether the second decree-holder's attachment was actually effected or not, he was entitled under section 73, Civil Procedure Code, to a rateable distribution of the assets received by the Court and the private transfer of the property was, under section 64, Civil Procedure Code, void as against his claim to the extent of his share. **L. B.** MG. HYIN BA *v.* MG. PE U KIN **264**

——— ——— ——— **s. 73 81, 264, 941**

——— ——— ——— **s. 73**—*Limitation Act (IX of 1908), s. 14, Sch. I, Arts. 62, 120—Suit to recover money paid to defendant under s. 73, Code of Civil Procedure—Limitation—Revision when other remedy open, time taken in, whether excluded to save limitation.*

A suit by a plaintiff to recover from a defendant money paid to him under section 73 of the Code of Civil Procedure is a suit to recover from the defendant money paid to him for plaintiff's use and should, therefore, be brought within three years from the date when the defendant received the money, and not within six years under Article 120 of the Limitation Act.

Where a person files a revision petition to the High Court against an order of a Subordinate Court when he had another remedy open to him, he is not entitled to a deduction of the time occupied in prosecuting the revision petition under section 14 of the Limitation Act. **M.** BAIZNATH LALA *v.* RAMADOSS, 1 L. W. 952; 27 M. L. J. 640; 16 M. L. T. 509 **219**

——— ——— ——— **s. 73 (b)**—*Execution proceedings—Sale-proceeds, distribution of—Mortgagee, whether entitled to share without obtaining decree.*

A mortgagee who does not obtain a decree on his mortgage or charge has no right to obtain, by an order in execution or by miscellaneous application, payment of any part of the sale-proceeds of the property over which he claims his mortgage or charge, and a suit lies against him to refund the amount if paid to him. **L. B.** MAUNG TA TE *v.* MAUNG NYIN **273**

Civil Procedure Code—(1908)—contd.

——— ——— — **s. 80**—*Bombay Land Revenue Code (Act V of 1879), ss. 79A, 202—Gujarat Talukdars Act (Bom. Act VI of 1888), ss. 29 B, 33 (2) (cc)—Notice of eviction served by Talukdari Settlement Officer under Bombay Land Revenue Code—Suit for injunction to restrain Settlement Officer from carrying out eviction—Notice of suit under section 80, Civil Procedure Code, whether necessary.*

If, under the provisions of the Bombay Land Revenue Code, a Talukdari Settlement Officer serves a notice of eviction on a person whom he considers to be wrongfully in possession of any land, that person cannot, without giving a notice under section 80 of the Civil Procedure Code, sue for a permament injunction to restrain the Settlement Officer from evicting him from the land. **B.** BHAVANISHANKAR *v.* TALUKDARI SETTLEMENT OFFICER, 16 BOM. L. R. 766 **749**

——— ——— ——— — **s. 92,** *applicability of—Dispute between parties as to who is entitled to be* mutwalli, *suit relating to.*

Suits relating to disputes between parties as to who is entitled to be *mutwalli* on the ground of family relationship are not brought under section 92 of the Civil Procedure Code. **A.** NIAMAT ALI *v.* ALI RAZA, 13 A. L. J. 26; 37 A. 86 **778**

——— ——— ——— — **s. 92** *Public charities, suit in respect of—Relief against strangers not contemplated—Trespasser, whether to be made defendant—Possession, recovery of, suit for.*

A relief against strangers for recovery of possession of property in their hands cannot be granted under the provisions of section 92, Civil Procedure Code; and the names of such strangers-defendants ought to be struck off the record. **O.** ANGAD DAS *v.* GHASITI, 1 O. L. J. 548 **108**

——— ——— ——— — **s. 92,** *suit under, whether can be compromised—Compromise before deciding whether endowment is public or not, if lawful.*

A suit under section 92 of the Civil Procedure Code, 1908, cannot be compromised if it is proved that the endowment is a public one. The question whether an agreement entered into between the parties in such a suit is or is not a lawful agreement, depends on the question whether the endowment is or is not a public one and so long as it remains subject to controversy whether it is a public endowment or not, it cannot be said to be proved to the satisfaction of the Court that the suit has been adjusted by a lawful agreement. **C.** ABDUL KARIM *v.* ABDUS SOBHAN, 18 C. W. N. 1264 **360**

——— ——— ——— — **s. 93** **59**

——— ——— ——— — **s. 95**—*Malicious prosecution, suit for damages for, when maintainable—Interlocutory injunction, whether dissolved when perpetual injunction granted—Limitation Act (IX of 1908), Sch. I, Art. 42—"Want of reasonable and probable cause", allegation of—Malice—Erroneous decision, procuring of—Damages, liability for.*

The bringing of an ordinary action, however, maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution, except where the proceedings involve "either scandal to reputation or the possible loss of liberty to the person" or are specially provided by Statute.

Therefore, a suit for damages cannot be maintained against a defendant for obtaining maliciously and without reasonable or probable cause a perpetual injunction, which was dissolved on appeal.

An interlocutory injunction granted in such a suit is *ipso facto* dissolved by a decree of the Court granting a perpetual injunction.

Therefore, if a suit for damages for "wrongfully" obtaining such an injunction is maintainable, limitation under Article 42 of the Limitation Act would begin to run from the date when the interlocutory injunction ceases.

Per *Fletcher, J.*—An allegation that the defendants were actuated by malice and that the suit for an injunction ultimately proved unsuccessful, when the decree of the High Court was set aside by His Majesty in Council, is not sufficient to show want of reasonable or probable cause.

The want of probable cause is not to be inferred because of mere evidence of malice.

Per *Richardson, J.*—It is doubtful whether a suit as contemplated in section 95 of the Civil Procedure Code to recover compensation in respect of a temporary injunction applied for on insufficient grounds or without reasonable and probable cause, is maintainable in the absence of an undertaking to pay compensation.

A party is not liable in damages for procuring an erroneous decision. **C.** MOHINI MOHAN MISSER *v.* SURENDRA NARAIN SINGH, 18 C. W. N. 1 89; 21 C. L. J. 68 **296**

——— ——— ——— — **s. 96**—*Suit based on contract decreed by Civil Court having jurisdiction over place of formation of contract—Place of contract transferred after decree to another Civil Court—What Court authorised to hear appeal from decree—Jurisdiction.*

In a suit based on a contract, one day after a decree was passed by the Civil Court within whose jurisdiction the place of formation of the contract was situated, that place was added to the jurisdiction of another Civil Court:

Held, that an appeal against the decree would lie to the Appellate Court authorised to hear appeals from the latter Civil Court, and not to the Appellate Court authorised to hear appeals from the former Civil Court which had passed the decree. **M.** SUBBAYYA *v.* RACHAYYA, 37 M. 477 **519**

——— ——— ——— **s. 97**—*Decision on question of limitation, misjoinder or jurisdiction, whether preliminary decree—Appeal.*

A decision as to misjoinder, limitation or jurisdiction does not amount to a preliminary decree within the meaning of section 97 of the Civil Procedure Code, 1908.

Therefore, a decision in favour of a plaintiff upon a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of Civil Courts, does not amount to a preliminary decree from which the unsuccessful party must at once appeal by reason of section 97 of the Code.

B. CHANMALSWAMI RUDRASWAMI *v.* GANGADHARAPPA BASLINGAPPA, 16 BOM. L. R. 954 **885**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 99** **701**

——— ——— ——— **s. 99** *—Irregularity not affecting merits of case—Improper admission of additional evidence—Evidence Act (I of 1872), s. 167.*

The improper admission of additional evidence by an Appellate Court is no ground for setting aside the decree of that Court, unless the second Appellate Court is satisfied that the decision on the merits is wrong and that the improper admission might have resulted in such a wrong decision. **M.** PEDDIBHOTLA KAMESWARAMMA *v.* BEZWADA CHELAPATHI, (1914) M. W. N. 864 **50**

——— ——— ——— **s. 99, O. II, r. 2**—*Misjoinder of causes of action—Appellate Court, right of, to reverse decree—Cause of action not established against some defendants, whether bars fresh suit on true cause of action.*

An Appellate Court has no power to reverse the decision of the first Court on the ground of misjoinder.

If a suit is dismissed against some of the defendants as the cause of action on which the suit was brought is not established so far as those defendants are concerned, the plaintiff is not precluded from bringing a new suit on the true cause of action which he has against them. **M.** VASUDEVA RAVI VARMA *v.* ATHI KOTTIL EAZHUVAN KANNANUR **51**

——— ——— ——— **s. 103** **215**

——— ——— ——— **s. 104** **359**

——— ——— ——— **s. 105 (1)** **701**

——— ——— ——— **s. 110, O. XLV, r. 2**—*Leave to appeal to King in Council—Decree of affirmance—Substantial question of law.*

Where the Chief Court affirms in part the decree of a District Judge, a petition for leave to appeal to the King in Council cannot be granted, as in substance the decree of the Chief Court is a decree of affirmance within the meaning and for the purposes of section 110, Civil Procedure Code.

A Court has a discretionary power under section 34 of the Civil Procedure Code to allow interest *post litem motam* at such rate as it deems reasonable and if it allows 9 per cent. per annum it is not such an arbitrary and unwarrantable exercise of discretion as to involve such a substantial question of law as is contemplated by section 110 of the Code. **P.** BHAGAT SINGH *v.* JAI RAM, 19 P. W. R. 1915; 66 P. L. R. 1915 **402**

——— ——— ——— **s. 110** *—Privy Council—Appeal from decision of High Court in second appeal, application for—Decision directly involving claim to property of value of Rs. 10,000.*

A suit relating to 2 *bighas* 12 *biswas* of land valued at only Rs. 1,000 came up in second appeal to the High Court and was disposed of. The history of the land in dispute was the same as that of another 300 *bighas* of land in the same *mahal*;

Held, that the mere fact that the history of the property in dispute was the same as that of the other land in the *mahal* valued at more than Rs. 10,000 did not involve a claim in question within the meaning of section 110, so as give the applicant a right of appeal to His Majesty in Council. **A.** KULSUM-UN-NISA BIBI *v. Chaube* BASDEO **6**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 115, O. XIV, r. 2, O. XV, r. 3(1)** *—Issues involving mixed questions of law and fact decided without evidence—Decision, whether legal—Trial piecemeal—Practice—Custom, validity of, to be determined when custom established—Revision—Interlocutory orders, when can be reversed.*

As the trial of a case piecemeal might lead to protracted litigation and serious inconvenience and involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal, it is much to be desired that in appealable cases the Courts below should, as far as may be practicable; pronounce their opinion on all the important points and decide on all the issues joined.

A Court acts quite illegally if it treats issues which really raise mixed questions of law and fact as involving only pure questions of law, and decides them as such without taking any evidence.

A Court should not consider the question of validity of a custom till the custom itself has been established with precision.

In exceptional cases, the special facts and circumstances of which so require, the High Court will reverse in revision the interlocutory orders of Subordinate Courts. **C.** YATINDRA NATH *v.* HARI CHARN, 20 C. L. J. 426 **954**

——— ——— ——— **ss. 115, 151** *—Jurisdiction—Order obtained by suppression or misrepresentation of facts—Appointment of guardian after minor had attained majority—Power of Court to re-call order—Appeal—Guardians and Wards Act (VIII of 1890), ss. 39, 47, 48—Revision—Power to investigate facts in revision—Distinction between appellate and revisional jurisdiction—Inherent power of Court.*

A District Judge, acting under the provisions of the Guardians and Wards Act, appointed a guardian of the person and property of a girl said to be a minor. Subsequently, it was brought to his notice that the girl had attained majority long before he had made the order for the appointment of her guardian. Upon this he revoked his order and removed the guardian. The order of revocation was assailed in the High Court.

Held, (1) that as the order was not made under any of the clauses of section 39 of the Guardians and Wards Act, it could not be questioned by way of appeal under any of the clauses of section 47;

(2) that section 48 of the Act did not preclude the District Judge from re-considering his order and that he had jurisdiction to entertain the application for revocation of his order in the exercise of his inherent powers.

The principle of section 151, Civil Procedure Code, is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary Civil Courts. Therefore a Court which exercises powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it, of which cognizance may be required in the interest of justice.

A Court is competent to recall an order obtained from it by suppression or misrepresentation of facts.

A Court has jurisdiction to determine that it has no jurisdiction to deal with the matter brought before it.

Civil Procedure Code—(1908)—contd.

If even after an order has been made the Court is apprised that it has been made to assume jurisdiction in a matter over which it has in reality no jurisdiction, the Court has inherent power to investigate the matter and to recall the previous order if it transpires that it has been made without jurisdiction.

It is competent to the High Court to investigate facts in revision, if the Court is satisfied that such a step is needed in the ends of justice.

A Court, in the exercise of its appellate jurisdiction investigates the facts and, if necessary, substitutes its own appreciation of the evidence for that of the primary Court. But when the Court, as a Court of revision, looks into the evidence, it does so with a view to determine whether the Subordinate Court has assumed a jurisdiction which it did not possess, or declined a jurisdiction which it did possess, or has in the exercise of its jurisdiction acted illegally or with material irregularity.

In other words, a Court of revision cannot, in the name of revisional jurisdiction, exercise appellate powers. That is to say, it may look at the evidence to determine whether the Subordinate Court has acted illegally or irregularly in the exercise of its jurisdiction but it cannot examine the evidence with a view to determine whether the Subordinate Court has correctly appreciated its effect. **C.** RASHMONI DASI *v.* GANADA SUNDARI DASI, 20 C. L. J. 2 3; 19 C. W. N. 84 **275**

——— ——— ——— **s. 115**—*Other remedies open—Revision, if competent.*

There will be no revision where there is a remedy by suit. **M.** SUBBIAH PILLAI *v.* KAILASAM PILLAI, 1 L. W. 905 **19**

——— ——— ——— **s. 115, Sch. II, cl. 15**—*Perverse decision on facts - Erroneous admission of evidence - Perversity—High Courts Act* (24 & 25 *Vic c.* 104), *s.* 15—*High Court in revision, interference by.*

A decision which is perverse in law or facts can be set aside in revision.

A decision is perverse where it is a conscious deviation from some rule of law or procedure.

The test of perversity will be applicable also, when the error is of fact and the decision has been reached in defiance of facts which have been recognised by the lower Court as established or must be presumed to have been so, or when the decision is based on or involves material assumptions or inferences which there is nothing in fact or probability to support.

The decision of an arbitrator, who in the admission of evidence commits errors which do not materially affect his decision, cannot be said to be "perverse" and should not be set aside under section 115 of the Code. **M.** VENKATACHALLAM PATTAR *v.* PARASU PATTAR, 16 M. L. T. 156; (1914) M. W. N. 614 **106**

——— ——— ——— ——— **s. 115**—*Revision—Rejection of amendment application—No irregularity - High Court, power of, to interfere—Jurisdiction.*

When a Subordinate Judge, holding that the expression "future interest" used in a decree means interest from the date of decision and not from the date of the institution of the suit, disallows an application for the amendment of the decree, he ommits no irregularity; and whether his decision is right or wrong, the High Court has no jurisdiction to interfere in revision. **A.** KANHAI LAL *v.* MUL CHAND **808**

——— ——— ——— **s. 115**—*Revision—Remedy by regular suit available—Practice.*

Ordinarily it is contrary to the practice of the High Court to entertain an application in revision when a remedy by way of regular suit is open to the applicant, but each case must be judged upon its own peculiar circumstances. **A.** RAM NARAIN *v.* MUHAMMAD SHAH, 12 A. L. J. 899 **62**

——— ——— ——— **s. 115**—*Revision—Withdrawal of suit with liberty to bring fresh suit, order of—High Court, whether can interfere - Charter Act* (24 & 25 *Vic. c.* 104), *s.* 15—*Material irregularity.*

To allow a suit to be withdrawn with liberty to bring a fresh suit is not deciding a case and therefore a High Court is not empowered either under section 115, Civil Procedure Code, or under the Charter Act to interfere with such an order of the lower Court. **C.** BANSI SINGH *v.* KISHUN LALL THAKUR, 41 C. 632 **203**

——— ——— ——— **ss. 141, 144**—*Execution proceedings—Decree-holder-auction-purchaser in possession—Auction sale set aside—Subsequent private sale by judgment-debtor—Application for mesne profits—Appeal—Limitation Act* (*IX of* 1908), *Sch. I, Art* 109.

Section 141 of the Civil Procedure Code does not make section 144 applicable to execution proceedings.

Where a decree-holder purchased the property put up for sale in execution and remained in possession thereof for several years, and after the sale had been set aside the applicant purchased the property from the judgment-debtor together with the right to sue the decree-holder for mesne profits and applied for recovery of mesne profits:

Held, (1) that the application was not one authorized by the terms of section 144 of the Civil Procedure Code, as no restitution was sought in respect of any decree which had been varied or reversed:

(2) that inasmuch as the determination of a question under section 144 is a decree, an appeal lies from an order purporting to be made under that section.

A Court has no jurisdiction to award mesne profits for a longer period than three years as provided in Article 109 of the Limitation Act. **C.** DINO NATH DAS *v.* JOGENDRA NATH **890**

——— ——— ——— **s. 145**—*Surety, liability of—Bond to restore property attached before judgment—Dismissal of suit—Appeal.*

Section 145, Civil Procedure Code, deals with procedure, not with the extent of the surety's liability.

A bond given for release of property attached before judgment becomes defunct on the suit being dismissed, and the liability under the bond comes to an end. An order terminating the attachment is not necessary.

There is nothing in section 145, Civil Procedure Code, to restrict the right of appeal only to sureties. Where there is a refusal to enforce liability, other parties interested may appeal. **M.** GOLLAMUDI VENKATASUBBA RAO *v.* CHAPARALA ROSAYYA, (1914) M. W. N. 822 **76**

Civil Procedure Code (1908)—contd.

——— ——— ——— ——— ss. 148, 151 —*Decree of High Court—Time fixed for performance of act—Extension of time, if can be granted—Jurisdiction.*

Where a decree passed by the High Court in second appeal directed that on payment by the plaintiffs to a certain defendant of a sum of Rs. 50 within three months from its date a moiety of the suit property should be delivered to the plaintiffs and where the plaintiffs, without applying for a review of the judgment, prayed for an extension of the time originally granted, on the ground that they were minors and that their next friend, in collusion with the said defendant, had misconducted himself wilfully by not making the payment within the time fixed:

Held, that there was no provision of law under which the extension prayed for could be granted and that neither section 148 nor section 151 of the Civil Procedure Code (Act V of 1908) was applicable to the case.

Per Tyabji, J.—Ordinarily inherent power is something which inheres in a Court by the very fact of its being empowered to exercise any jurisdiction at all, so that it comes either within the express sense of the law or within the consequences that may be gathered from it. **M.** MOIDEEN KUPPAI *v.* PONNUSWAMY PILLAI, 1 L. W. 882; 16 M. L. T. 430 **63**

——— ——— ——— s. 149 **33**

——— ——— ——— ——— s. 151 **63, 275**

——— ——— ——— ss. 151, 152—*Amendment—Decree in accord with judgment but not with intention of Court, whether can be amended—Inherent power—Jurisdiction—Amendment of decree, if allowed, after appeal against that decree pending.*

Where a decree is not really in accord with the intention of a Court as gathered from its judgment as a whole, the Court has an inherent power, under sections 151 and 152 of the Civil Procedure Code of 1908, to amend or vary a perfected order and to make such other orders as may be necessary for the ends of justice.

Section 152 of tha Civil Procedure Code expressly contemplates amendment "at any time" and, therefore, a decree can be amended even after an appeal has been preferred against it. **C.** BARHAMDEO SINGH *v.* HARMANOGE SINGH 18 C. W. N. 772. **946**

——— ——— ——— ——— s. 151—*Amendment of plaint—Plaint framed on wrong view of law—Subsequent alteration of law—Adjournment of case, application for, grant of.*

An application to amend a plaint on the ground that the plaint was based on the wrong view of the law and that the correct view has subsequently been laid down by the High Court, should be allowed inspite of the fact that the suit is barred by limitation on the date of the application. **M.** VISWANATHIER *v.* AIYAVIER **383**

——— ——— ——— ——— s. 151, O. XXI, r. 90, *application under, made out of time—Inherent powers of Court, exercise of—Limitation Act (IX of 1908), Sch. I, Art. 181.*

The inherent powers of a Court are not to be used for the benefit of a litigant who has his remedy under the Code of Civil Procedure, much less for one who, having his remedy, has lost it by his own delay.

Therefore, a Court cannot in the exercise of its inherent powers set aside an irregular sale held in execution of a decree when the application of the judgment-debtor under Order XXI, rule 90, is found to be barred by time.

Per Tyabji, J.—The expression "inherent power" implies that the power is not conferred by or affected by an act of the Legislature. **M.** MUTHIAH CHETTIAR *v.* BAWA SAHIB, 27 M. L. J. 605; 1 L. W. 969 **46**

——— ——— ——— ——— s. 152 **946**

——— ——— ——— ——— s. 153, O. VI, r. 17—*Suit to declare mortgage-deed invalid—Mortgage found to be partly valid—Plaintiff, whether entitled to amend relief for redemption.*

Where, in a suit by the junior member of a *tarwad* to declare a mortgage created by the *karnavathi* invalid and not binding upon the junior members of the *tarwad*, a portion of the consideration for the mortgage is found to be binding upon the family, the plaintiff should be allowed to amend his plaint by adding a relief for redemption on payment of the valid portion of the mortgage-debt. **M.** MANI *v.* KOMALAN KANNAN **443**

——— ——— ——— ——— O. 1, r. 10, O. 41, r. 20—*Power of High Court to add party in second appeal.*

The High Court cannot make a person who was not a party in the lower Appellate Court a party in second appeal. **A.** PACHKAURI RAUT *v.* RAM KHELAWAN CHAUBEY, 12 A. L. J. 1277; 37 A. 57 **25**

——— ——— ——— ——— O. 2, r. 2 **51, 228, 232**

——— ——— ——— ——— O. 2, r. 2, *object of—Cause of action, whether claims upon several contracts included in one—Contract for supply of goods by monthly instalment, breach of—Intention of parties—Damages, whether separate suits maintainable.*

Order II, rule 2, is framed to avoid the splitting of claims and remedies and does not apply where there are several causes of action. The object of the rule is to protect the defendant from being twice vexed for one and the same cause.

A cause of action is not limited to claims arising upon one contract, but might include claims upon several contracts provided they form part of a continuous cause of dealing. This, however, can only be done where there is nothing to show that the transactions were intended to be kept distinct.

Where a contract for the supply of goods by monthly instalments expressly provides that each monthly instalment and item is to be treated as a separate contract, the plaintiff is entitled to bring separate suits for damages. **C.** MANDAL & Co *v.* FAZUL ELLAHIE, 41 C. 825 **209**

——— ——— ——— ——— O. 2, r. 2—*Suit brought on* hundi *executed in consideration of sum due on account—Subsequent suit on account—Cause of action.*

A certain sum was due from the defendant to the plaintiff on an account between them. In consideration of the sum so due the plaintiff drew a *hundi* on

Civil Procedure Code—(1908)—contd.

the defendant and the latter accepted it. The defendant, however, did not pay the *hundi* and the plaintiff had to pay it. The plaintiff then brought a suit to recover the sum due on the *hundi* and the suit was dismissed. The plaintiff then brought a second suit to recover the sum due on account:

Held, that the second suit was not barred by Order II, rule 2, of the Civil Procedure Code, inasmuch as the cause of action of the latter suit was different from that of the former. **A.** BENI RAM *v.* RAM CHANDRA, 12 A. L. J. 959; 36 A. 560 **302**

——————— **O. 6, rr. 5, 7, 17 and O. 8, r. 9**—*Amendment of pleadings—Practice of Subordinate Court's trying preliminary issues and not giving opportunity to amend condemned.*

In a suit for partition against defendants Nos. 1 to 4, co-parceners, and seventy-four other persons alleged to have come into possession of various items of the suit property during plaintiff's minority, the plaint contained no specification of the titles under which the seventy-four defendants above referred to were in possession or the defects in them and no prayer for the avoidance of the partition, the decrees and other transactions by which their titles were constituted. The attention of the parties and the Court was drawn to the defects only during the trial of the suit in the course of the examination of witnesses. The plaintiff then applied for leave to amend, arguments were heard on his application and on certain preliminary issues which had been framed, and leave to amend was refused and the preliminary issues were decided against the plaintiff. The plaint was subsequently rejected two days later for want of a cause of action:

Held, that the dismissal of the petition for leave to amend could not be sustained and that the plaint ought not to have been rejected until opportunity had been given to amend.

Per *Tyabji, J.*—Different procedure and sanctions apply to (1) amending pleadings, (2) furnishing particulars and (3) presenting a pleading subsequent to the written statement; though it may be that on an order to do any of them being disobeyed, the same result—an adverse decision in the suit—may directly or indirectly follow. **M.** NARAYANASWAMI AIYAR *v.* KRISHNAMURTI AIYAR, 17 M. L. T. 48; (19 5 M. W. N. 122 **927**

——————— **O. 6, r. 7** **928**

——————— **O. 6, r. 17** **443, 928**

——————— **O. 6, r. 17**—*Amendment of plaint—Introducing cause of action barred by limitation, whether permissible.*

A plaintiff cannot be allowed to amend his plaint by introducing a cause of action which since the institution of the suit has become barred by limitation. **A.** BISHESHAR PRASAD *v.* GOBINDRAM, 12 A. L. J. 833 **42**

——————— **O. 7. r. 6**—*Suit instituted beyond period of limitation—Plaint silent on ground of exemption from law of limitation—Plaintiff, whether can rely on such ground—Limitation Act (IX of 1908), s. 14.*

Civil Procedure Code—(1908)—contd.

Under Order VII, rule 6, Civil Procedure Code the plaintiffs are bound to show in the plaint the ground on which exemption from the law of limitation is claimed and they cannot be allowed to rely upon a ground upon which the plaint is wholly silent.

The proceedings in a Revenue Court do not fall within the purview of section 14 of the Limitation Act so as to extend the period of limitation for a suit. **P.** GOBINDA MAL *v.* SANTA, 83 P. R. 1914 **441**

——————— **O. 7, r. 11**—Option to abandon part of claim for which Court-fee not paid in time **746**

——————— **O. 7, r. 14**—*Documents filed with plaint or written statement, party filing not permitted to resile therefrom*—Bona fide *mistake.*

If a party to a suit files a document making it a part of the plaint or written statement with the object of relying on it, he cannot be permitted to resile therefrom afterwards, without at least proving that it was filed owing to a *bona fide* mistake and that he had not intended to use it. **O.** SHEO DAT SINNH *v.* SIDHAU KUNWAR, 17 O. C. 327 **503**

——————— **O. 8, r. 2, O. 41, r. 2**—*All pleas of estoppel, whether barred, if not raised in written statement*—Res judicata, *plea of, not raised, whether can be raised in appeal - Mortgage suit—Subsequent mortgagee made party must set up even his prior mortgage—Prior mortgagee not necessary party and not bound to appear and plead—Parties Pleadings.*

By reason of Order VIII, rule 2, of the Civil Procedure Code, all pleas of estoppel of whatever nature are not barred if they are not taken in the written statement.

Therefore, an objection which could have been taken by one of numerous defendants in a mortgage suit to show that his purchase right in the property could not be affected by the plaintiffs' suit by reason of the principle of *res judicata*, is not such a matter as could show that the plaintiffs' suit was not maintainable by reason of Order VIII, rule 2, of the Civil Procedure Code and can be raised in appeal with the leave of the Court under Order XLI, rule 2 of the Code.

A puisne mortgagee, who has also a prior mortgage, if made defendant as a puisne mortgagee, is bound to appear and set up both his prior and subsequent mortgages. But if he is only a prior mortgagee and not a subsequent mortgagee and is sought to be kept on the record as defendant simply because the authenticity of his mortgage is not admitted, it is not at all necessary for him to appear and defend his rights under his prior mortgage. **C.** KISHEN DYAL GIR *v.* MAHOMED AMIRUL HUSSEIN **673**

——————— **O. 8, rr. 2, 5**—*Pleadings—Construction—Evidence Act (I of 1872), s. 58 Malabar Law — Chetties, whether governed by Malabar Law.*

Per *Tyabji, J.*— Whether or not a matter is open upon the proceedings sufficiently to give the Court the right to form a judgment upon it, must be dependent upon the particular facts and upon the allegations in and form of, the pleadings.

Civil Procedure Code (1908)—contd.

Pleadings should be regarded with the following considerations:

(1) Allowance must be made for a very inaccurate mode of setting forth the claims of persons and the answers or defences to them.

(2) The responsibility of clearly perceiving and raising points, which arise upon the pleadings and the evidence and the proper adjudication of which is essential for the ends of justice, rests on the Court asmuch as on the parties or their Pleaders.

(3) The Court must look, not to the mere wording of the plaint, but to the issue which was settled for trial and to the manner in which the case was treated in the lower Courts.

(4) Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

Per *Oldfield, J.*—Where the parties are Chetties residing in Malabar, the Malabar Law is not applicable to them in the absence of a special allegation that it is so. **M.** AZHIMANILA VEETTIL KANNU PILLAI *v.* KAYINARI GOPALAN NAIR. (1914) M. W. N. 883 **337**

——— ——— ——— — **O. 8, r. 9** **923**

——— ——— ——— — **O. 9, r. 9.**—*Application to set aside order dismissing suit in default—Proper form of order to pass when Court of opinion to restore suit—Order restore on payment of damages—Appeal—Damages, adequacy or excessiveness of, if to be gone into by Appellate Court.*

If a Court decides to restore a suit dismissed for default on payment of damages by the plaintiff, the proper order to pass is to direct the plaintiff to depost the amount of damages within a prescribed period and to reserve the passing of any final order until the prescribed period expired.

But if a Court orders restoration of a suit on condition of payment of damages within a prescribed preiod and at the same time directs that otherwise the application for restoration shall stand dismissed, the Court completely disposes of the application and after its order has produced its effect of dismissing the application, an appeal lies against the order, and the Appellate Court is entitled and, therefore, bound to consider whether the damages allowed by the Court below were adequate or grossly excessive. **A.** NAND LAL *v.* KISHORI. 12 A. L. J. 1270. **895**

——— ——— ——— — **O. 9, r. 13**—Ex parte *decree, application to set aside—Appeal subsequently preferred—Jurisdiction to deal with application.*

A Court, which passed an *ex parte* decree, is not deprived of its jurisdiction to deal with an application to set aside the *ex parte* decree on the merits, merely because an appeal against the *ex parte* decree has been subsequently preferred. **C.** SHAJAN BIBI *v.* SAFFIRUDDIN **412**

——— ——— ——— — **O. 14, r. 2, O. 15, r. 3 (1)** **954**

——— ——— ——— — **O. 17, r. 1**—*Case once begun—Court bound to go on from day to day—Case part-heard before Subordinate Judge—Subordinate Judge proper officer to adjourn it and not District Judge.*

When the hearing of a suit has once begun, the Court is bound to go on, under Order XVII, rule 1, of the Civil Procedure Code, from day to day, unless for special reasons it is necessary to adjourn it to some future day.

Where a Subordinate Judge, before whom a suit was part-heard, adjourned it from 7th October 1914 to 18th January 1915 in obedience to the order of the District Judge to whom he applied for directions:

Held, that the order of the District Judge must be set aside and that the Subordinate Judge was the proper officer to decide when a part-heard case before him was to be adjourned and the District Judge had no voice in the matter. **M.** SIVAGAMI AMMAL *v.* LOUIS GNANA PRAKASA MUDALIAR. 16 M. L. T. 504 **261**

——— ——— ——— — **O. 20, r. 12** **622**

——— ——— ——— — **O. 21, rr. 2 and 26** *Execution—Decree, transfer of, recognition of Judgment-debtor, right of, to appeal—Adjustment, uncertified, admissibility of, in evidence—Fraud not specifically alleged—Transferor admitting transfer—Consideration, want of, for transfer, if can be pleaded by judgment-debtor.*

A judgment-debtor is entitled to appeal against an order recognising a transfer of a decree, as the matter would be *res judicata* in subsequent proceedings.

Order XXI, rule 2, of the Code of Civil Procedure 1908, not only excludes proof of an uncertified payment but also of an agreement to release the debtor from all liability to pay his share of the decree-debt in consideration of a sum paid by him, which agreement had not been certified to the Court within the 90 days prescribed by law.

In the absence of any specific allegation of fraud, it is immaterial whether a transfer of a decree is supported by consideration or not, provided both the transferor and the transferee are before the Court and the transferor admits the transfer and declares himself satisfied **M.** SALICHEEMALA VENKATASWAMI NAIDU *v.* GUNTURU RANGAPPA NAIDU, 2 L. W. 109 **944**

——— ——— ——— — **O. 21, r. 16** **944**

——— ——— ——— — **O. 21. r. 46**—*Attachment—Simple mortgage-debt—Mortgagee in possession Mode of attachment.*

A debt secured by a simple mortgage should be attached under Order XXI, rule 46, Civil Procedure Code. The fact of the mortgagee being in possession, actual or constructive, of the mortgaged property makes no difference. **M.** CHULLILE PEETIKAYIL NAMMAD *v.* OTHENAM NAMBIAR, 27 M. L. J. 239 **508**

——— ——— ——— — **O. 21, r. 50 (1), (2)** **866**

——— ——— ——— — **O. 21, r. 54** **204**

——— ——— ——— — **O. 21, r. 69, cls. (1), (3)**—*Power of Court to adjourn sale after partially holding it—'Debt and costs', meaning of—Judgment-debtor's right to get sale adjourned by tendering balance.*

Where properties of the judgment-debtor were sold in three lots and after the sale of two lots, he tendered to the bidding officer that portion of the decree amount which would have remained if the purchasers of the first two lots had paid up the amounts, but the officer proceeded with the sale:

Civil Procedure Code—(1908)—contd.

Held, that the sale of the third lot was not vitiated by irregularity or illegality and could not be set aside to the prejudice of a *bona fide* purchaser at the Court auction.

The words 'the debt and costs' in clause (3) of Order XXI, rule 69, could not be interpreted to mean "the balance of the decree debt and costs which would remain if by a legal fiction the sales of previous lots (not yet completed by the payment of the whole purchase-money) were taken as completed by treating the whole of the purchase-money as actually paid up."

Obiter dictum.—A Court may even without an application from the judgment-debtor adjourn a sale after the sale of some lots under Order XXI, rule 69, clause (1). **M.** RAJA OF KALAHASTI *v.* VENKATARAMIAH ROW BAHADUR GARU, (1914) M. W. N. 873 **273**

——— **O. 21, r. 88** *Pre-emption — Co-sharer — Vendee, whether complete stranger.*

The object of Order XXI, rule 88, is to enable a co-sharer in a *mahal* to keep out strangers. It provides for only one class of pre-emptors and lays down one simple rule, namely, that any one who is a co-sharer of the undivided property of which a share is sold, is entitled to pre-empt that share when the highest bid is made by a person who is not a co-sharer. Hence no pre-emption suit could be maintained as against the vendee who was a co-sharer in a different *patti* but in the same *mahal*. **A.** DAMBAR SINGH *v.* MURARI LAL, 12 A. L. J. 1148 **95**

——— **O. 21, r. 90** **46**

——— **O. 21, r. 90**—*Limitation Act (IX of 1908), s. 18, Sch. I, Arts. 12 (a), 166—Auction-sale—Fraud—Application to set aside sale—Plea of limitation, whether can be raised in second appeal - One administrator representing others - Decree passed against such administrator, validity of — Auction-sale in such decree Sale not set aside within 30 days Suit to declare auction-sale not binding, whether maintainable —Succession Act (X of 1865), ss. 268 to 273.*

Where one administrator acts on behalf of the other administrators and fully represents the estate, a decree passed against him and against the estate represented by him is perfectly valid, though the administrator-in-charge might be liable to the legatees for the breaches of duty and for gross negligence resulting in loss to the estate. An auction-sale held in execution of such a decree is perfectly valid and binding on the estate until set aside.

Order XXI, rule 90, of the Code of Civil Procedure, unlike the old section 311 of the Code of Civil Procedure, 1882, includes applications to set aside sales on the ground of fraud.

A suit to declare an auction-purchase as not binding upon the estate fully represented by one of such administrators will not lie, but the sale might be set aside within 30 days from its date under Article 166 of Schedule I of the Limitation Act, IX of 1908.

A plea of limitation can be raised even in second appeal if it is patent on the face of the pleadings and requires no additional facts to decide the same **M.** GRACE ROSAMUND RHODES *v.* PADMANABHA CHETTIAR, 1 L. W. 1033; (1914) M. W. N. 921; 17 M. L. T. 18 **369**

Civil Procedure Code—(1908)—contd.

——— **O. 21, r. 90**—*"Whose interests are affected by the sale", meaning of—Attachment before judgment, effect of.*

The words "interests" in rule 90, Order XXI, must be limited to the properties the subject of the application.

Where the applicant, a mere money decree-holder, relies merely upon an attachment before judgment of property other than that sold and applies for an order to set aside the sale, it cannot be said that he has such a present "interest" in the property sold as to entitle him to make the application under that rule. **M.** KATHIRESAN CHETTIAR *v.* RAMASAWMY CHETTIAR, 27 M. L. J. 302; (1914) M. W. N. 871 **93**

——— **O. 21, rr. 91, 93**—*Suit by auction-purchaser to recover back purchase-money, whether maintainable.*

An auction-purchaser can bring a suit to recover back the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold at the date of the sale. **A.** MUHAMMAD NAJIB ULLAH *v.* JAI NARAIN, 12 A. L. J. 908; 36 A. 529 **59**

——— **O. 21, r. 101**—*Execution—Decree transferred to Collector—Court which passed decree, powers of—Jurisdiction.*

When a decree is transferred to a Collector the Court which passed the decree is for the time being *functus officio* for all purposes of execution; but as soon as the Collector has exhausted all the powers of execution conferred upon him, any matters requiring to be done, and usually regarded as in execution, must be done by the Court which made the decree. **B.** ARJUN RAGHU NAROLE *v.* KRISHNAJI VENIMADHAV VALIMBE, 16 BOM. L. R. 637; 38 B. 673 **266**

——— **O. 22, r. 3** **714**

——— **O. 22, r. 4 (3)**—*Abatement of appeal—Death of one of respondents - Legal representatives of deceased respondent not brought upon record—Respondent, deceased, abatement only as against.*

Where one of the respondents dies and his heirs are not made parties to the appeal, the appeal does not abate as a whole but simply as against the deceased respondent, and the decree passed in appeal holds good as against those respondents who are represented before the Appellate Court. **U. P. B. R.** SUBKARAN SINGH *v.* RAGHUBANS, 1 O. L. J. 581 **523**

——— **O. 22, r. 9**—*Limitation Act (IX of 1908), s. 5—Application to set aside abatement—Delay in obtaining Probate—Probate and Administration Act (V of 1881), s 4—Application by executor for Probate—Acceptance of office.*

The plaintiff sued defendants Nos. 1 to 4 for an account and the profits of a concern which they carried on jointly. The 2nd defendant died pending the suit on the 23rd November 1913 leaving a Will, thereby appointing the plaintiff and another as executors. The plaintiff applied for Probate on 5th March 1914, the other executor having renounced office. On 18th September 1914 the Court

Civil Procedure Code—(1908)—contd.

made a declaration that the suit had abated as against the 2nd defendant. The plaintiff made the present application on 2nd October 1914 to set aside the abatement, alleging that he hesitated for a long time to obtain Probate on account of the hostile attitude of the testator's son, that he had not yet obtained Probate and that he was under an impression that if he brought himself on the record as the legal representative of the 2nd defendant he could not sue himself:

Held, that the application was barred by limitation and no sufficient cause had been shown for excusing the delay in bringing the legal representative on the record.

Held, also, that the delay in making the application to set aside the abatement was not accounted for.

If an executor applies for Probate, he must be taken to have accepted the office of executor and he becomes the legal representative of the deceased testator and the property of the deceased vests in him as such. **M.** KANDASAMI CHETTI *v.* MURUGAPPA CHETTI, 16 M. L. T. 547 **472**

——— ——— ——— ——— **O. 22, r. 10,** *procedure under, not resorted to—Suit to be tried on original cause of action in all its stages—Devolution of plaintiff's interest* pendente lite, *if a change in cause of action—Competency of plaintiff to continue suit.*

A suit must be tried in all its stages on the cause of action as it existed at the date of its commencement.

Though there are well-recognised exceptions to the above rule, which show that a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis thereof, yet a devolution of the plaintiff's interest in the subject-matter of the suit *pendente lite* is not such an exceptional event and does not make the plaintiff incompetent to maintain the suit, there being no change in the cause of action on which the suit was originally brought.

In the event of such devolution of interest, the successor-in-interest of the plaintiff may, if he chooses, come on the record with leave of the Court under Order XXII, rule 10, but if he does not, the plaintiff is entitled to continue the suit and his successor will be bound by the result of the litigation. **C.** RAI CHARAN MANDAL *v.* BISWANATH MANDAL, 20 C. L. J. 107 **410**

——— ——— ——— **O. 23, r. 1**—*Withdrawal of suit—"Sufficient grounds"—Material irregularity—Revision—Letters Patent Appeal.*

The words "sufficient grounds" referred to in Order XXIII, rule 1 (2) *(b)*, of the Civil Procedure Code are *ejusdem generis* with the defect referred to in rule 1 (2) *(a)* of the said Order.

Discretion vested in a Court to allow a plaintiff to withdraw a suit is not judicially exercised when it is exercised in spite of the defendant's opposition to condone defects in the plaintiff's conduct of his case which were due entirely to the plaintiff's own default and for which no excuse was attempted.

An illadvised grant of permission to withdraw a suit with leave to sue again may be such a material irregularity as is contemplated by section 115 *(c)*, Civil Procedure Code.

Civil Procedure Code—(1908)—contd.

Where a single Judge of the High Court rejects a petition for revision, a Letters Patent Appeal lies against the order of rejection. **M.** AIYA GOUNDEN *v.* JAYAN MANDALATHIPATHI GOPANNA MAURADIYAR, 1 L. W. 726; 16 M. L. T. 253 **57**

——— ——— ——— **O. 24, r. 6** **511**

——— ——— ——— **O. 30, rr. 5, 7** **866**

——— ——— ——— **O. 32, rr. 3, 4** **712**

——— ——— ——— **O. 33, rr. 5, 6, 7**—*Pauperism inquiry—Jurisdiction of Court to decide questions other than pauperism—Plea of limitation, Court's power to decide.*

After a notice is issued, under rule 6, Order XXXIII, of the Code of Civil Procedure the Court, in an inquiry under Order XXXIII, rule 7, is not divested of its jurisdiction to decide whether the applicant has a good cause of action on the merits, and can, therefore, decide questions of limitation arising on the facts alleged in the application.

An application for leave to sue as a pauper presented five years after attaining majority, is clearly barred and the suit cannot be maintained. **M.** SUBRAMANIA CHETTY *v.* KULAYAPPAN, 1 L. W. 668 **90**

——— ——— ——— **O. 33, rr. 6, 7** **90**

——— ——— ——— **O. 34, r. 3** **701**

——— ——— ——— **O. 34, r. 4** **913**

——— ——— ——— **O. 38, r. 1** **81**

——— ——— ——— **O. 40, r. 1**—*Mortgage-decree—Personal decree, absence of—Receiver, appointment of—Mortgagee, right of.*

Per *Oldfield, J.*—The holder of a decree for the sale of mortgaged property, who is prevented from executing his decree, is entitled to have a Receiver appointed in respect thereof, if the security is insufficient to discharge the decree debt and the interest due on the mortgage-bond has not been paid.

Per *Sadasiva Aiyar, J.* The holder of a mortgage-decree who has not shown a right to a personal decree against the mortgagor, cannot have a Receiver appointed of the mortgaged properties, even though the mortgagee is obstructed by the mortgagor himself from executing his decree. **M.** VENKATA RAJAGOPALA SURYA ROW *v.* BASAVI REDDY, 1 L. W. 785; (1914) M. W. N. 771; 16 M. L. T. 407. **986**

——— ——— ——— **O. 41, r. 2** **673**

——— ——— ——— **O. 41, r. 4**—*Appeal by several persons—Death of one of them—Failure to bring on record his representatives within limitation—Partial abatement, effect of.*

Where an appeal is preferred by several persons against a decree passed against them on grounds common to all and one of them dies, the failure to bring on record his legal representatives within the period of limitation causes the appeal to abate so far as the deceased is concerned, but this partial abatement does not prejudice the appeal of the other appellants, as under Order XLI, rule 4, of the Civil Procedure Code any one of the appellants is empowered under the circumstance to appeal against the whole decree. **P.** MED SINGH *v.* KABIR-UN-NISSA, 88 P. R. 1914 **486**

——— ——— ——— **O. 41, r. 20** **25**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 41, r. 22, scope of**—*Cross-objections by one respondent against another—Practice.*

Under Order XLI, rule 22, an Appellate Court can allow a respondent to prefer cross-objections against another respondent. **A.** BALGOBIND *v.* RAM SARUP, 12 A. L. J. 892; 36 A. 505 **83**

——— ——— ——— **O. 41, rr. 23, 25**—*Appellate Court not definitely reversing lower Court's finding—Procedure—Practice.*

Where an Appellate Court does not definitely reverse the finding of the first Court that the suit was barred by limitation, but is of opinion that in the event of a finding that a certain person was not in possession on a particular date the suit was still liable to be dismissed on the ground of limitation, the proper procedure for the Appellate Court to adopt is to proceed under Order XLI, rule 25, and not under Order XLI, rule 23. **A.** RAM LAL *v.* TIRBENI SAHAI **454**

——— ——— ——— **O. 41, r. 23, O. 43, r. 1 (u)**—*Rejection of plaint by first Court—Order of Appellate Court setting aside order of rejection and remanding case for trial on merits, appeal from, whether competent.*

An order of an Appellate Court setting aside an order of the Court of first instance rejecting a plaint and directing it to proceed with the trial of the suit on the merits, is not an order under Order XLI, rule 23, and is not appealable under Order XLIII, rule 1 (*u*). **P.** TIRATH SINGH *v.* RAM CHAND **519**

——— ——— ——— **O. 41, r. 25** **454**

——— ——— ——— **O. 41, r. 26**—*Appellate Court, omission of, to fix time for filing objections to findings of lower Court—Irregularity, technical.*

The omission of an Appellate Court to fix a time, as required by Order XLI, rule 26, Civil Procedure Code, within which either party may present a memorandum of objections to findings of the lower Court, is a mere technical irregularity and may be ignored if it does not in any way prejudice the party complaining of the same. **U. P. B. R.** SURAJ BALI *v.* DAN BAHADAR SINGH, 1. L. J. 681 **736**

——— ——— ——— **O. 43, r. 1 (o)** **701**

——— ——— ——— **O. 43, r. 1 (u)** **519**

——— ——— ——— **O. 43, r. 1 (w)** **831**

——— ——— ——— **O. 45, r. 2** **402**

——— ——— ——— **O. 47, r. 1**—*Discovery of new and important matter—Review of order dismissing appeal under O, XLI, r. 11, whether entertainable.*

No review lies of an order dismissing an appeal under Order XLI, rule 11, Civil Procedure Code, merely on the ground of an alleged discovery of new and important matter. **C.** RAJANI KANTA DAS *v.* KALI PRASANNA MUKHERJEE, 41 C. 809 **381**

——— ——— ——— **O. 47, rr. 5, 8**—*Review—Court, power of—Successor of Judge who decides case, whether competent to grant review—Decision erroneous—Court, discretion of.*

Order XLVII, rule 8, of the Civil Procedure Code, empowers a Court to grant a review and to re-hear he case.

Civil Procedure Code—(1908)—concld.

Where a Judge who heard a case issues notice on an application for review, his successor is not prohibited from disposing of it. Order XLVII, rule 5, applies to Courts composed of more than one Judge.

Where a decision is on its face erroneous owing to the attention of the Court not having been called to a decision of the High Court which it was bound to follow, the Court has a discretion in such cases to grant a review and if the Court exercises its discretion, it would require a very strong case for interference by a High Court under section 115 of the Civil Procedure Code. **M.** SUBBIER *v.* CHINNAPPA ROWTHEN, (1915) M. W. N. 22 **365**

——— ——— ——— **O. 47, r. 7 (1)** **831**

——— ——— ——— **O. 47, r. 8** **366**

——— ——— ——— **Sch. II, paras. 14, 15, 20, 21**—*Mistake of law by arbitrator—Award on private reference, when cannot be filed.*

A mistake of law on a legal point specifically referrred to an arbitrator, does not vitiate his award, but if the point was not specifically referred and the decision is patently contrary to law, the Court will not file the award.

Where any of the grounds mentioned in paragraphs 14 or 15 of Schedule II of the Civil Procedure Code is proved, a Court cannot proceed to file an award where the matter has been referred to arbitration without the intervention of the Court. Even if the invalid portion of the award is separable, it would still not be enforceable by the summary procedure of rule 20. **C.** DINABANDHU JANA *v.* CHINTAMONI JANA, 19 C. W. N. 476 **697**

——— ——— ——— **Sch. II, para. 15** **106, 697**

——— ——— ——— **Sch. II, paras. 20, 21** **697**

Common Manager, appointment of—*See* BENGAL TENANCY ACT, s. 93.

Companies Act (VI of 1882), s. 4—*"Persons," meaning of—Repugnant to subject or context—General Clauses Act (X of 1897), s. 3, cl. (39)—Companies Act (VII of 1913), s. 2, cl. (13)—Association of more than 20 persons—Acquisition of gain—Registration.*

The word "persons" in section 4, Act VI of 1882, denotes individuals and does not include bodies of individuals, whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section.

An association of several firms consisting of more than 20 persons formed with the object of acquiring commercial gain is essentially within the purview of section 4 and requires registration. **N.** AKOLA GIN COMBINATION v. NORTHCOTE GINNING FACTORY, 10 N. L. R. 98 **613**

——— ——— **(VII of 1913), s. 2, cl. (13)**—Association of more than 20 persons—Acquisition—of gain—Registration. **613**

Company—*Articles of Association—Allotment of shares—Allotment by Secretary and Treasurer, validity of—Acceptance of share certificate—Right to impeach*

Company- concld.

—Shares subscribed to owing to fraud and misrepresentation—Right of rescission, when to be exercised.

Where the Articles of an Association do not specifically provide that the allotment of shares should be made by the Directors but, on the other hand, they provide that the general management of the Association shall be by the Secretaries and Treasurers subject to the supervision of the Directors, and that the Directors may from time to time entrust and confer upon them such of the powers, exercisable under the Articles by the Directors, as they may think fit, and the forms of application for the shares put forward the Secretaries and Treasurers as the persons to whom applications were to be made:

Held, that the allotment of shares by the Secretaries and Treasurers was valid.

Allotment is a duty primarily falling on the Directors and if the Directors have no right under the Articles to delegate this duty, then a purely ministerial officer such as the Secretary cannot allot.

Where the judgment of individual Directors is required for allotments by reason of special features, they cannot delegate.

A person to whom shares have been irregularly allotted has the right to apply to have his name taken off the register, but he cannot do so after he has accepted his share certificate.

The contract made by allotment is a contract to issue shares and when the shares have been issued and accepted, the title of the allotee becomes complete and he is in an entirely different position to that occupied by him before allotment.

The right to rescind an allotment of shares on the ground of fraud and misrepresentation must be exercised at the earliest possible moment when the allotee becomes aware of it.

As between private persons the right to rescind a contract on the ground of fraud may actually be lost by the conduct of the persons entitled to apply even within the period provided by the Statute of Limitation for the enforcement of such a right, so in the case of shareholders want of promptitude in repudiating will by reason of its far-reaching consequences always be held fatal to the claim. **M.** PUSARALA SANYASI v. GUNTUR COTTON, JUTE AND PAPER MILLS CO., LTD., 16 M. L. T. 538. **349**

Compensation. *See* CRIMINAL PROCEDURE CODE, s. 250.

——— ———, assessment of—Assessors, failure to appoint, effect of—Irregularity **476**

——— ——— False charge Frivolous or vexatious **1004**

——— ——— Improvement—Ejectment—Structures by tenant—Acquiescence or carelessness of landlord **936**

——— ———Improvement by mortgagee—Construction of well **712**

——— ——— payable out of fine—Full amount of fine not realized—Compensation, if payable **650**

——— ——— Suit to recover amount paid by purchaser for incumbrance on property represented free from incumbrance **909**

Complaint. *See* CRIMINAL PROCEDURE CODE, s. 4 (*h*)

——— ——— *dismissed by one Magistrate—Fresh complaint to another—Transfer of case—Criminal Procedure Code (Act V of 1898), ss. 526, 437.*

A complaint under sections 420, 409, Indian Penal Code, dismissed on the complainant's statement that he had come to terms with the accused and did not wish to offer any evidence, can be re-instituted in the Court of another Magistrate who has jurisdiction to entertain it.

Where in a case there is a good deal of evidence (both oral and documentary) in English and the Magistrate in whose Court the case is pending does not know English, it may be necessary and perhaps advisable to transfer the case to some Magistrate who knows that language. **A.** MOHAMMAD v. ALI RAZA, 16 Cr. L. J. 73. **665**

Compromise—Compounding a case—Written compromise signed by both parties put in—Magistrate, whether entitled to call for further evidence **1000**

——— ———Mortgage by one partner of whole partnership property—Mortgage disputed by other partner—Suit by mortgagor for contribution in terms of compromise **924**

——— ———Offence compoundable without sanction of Court—Presentation of petition of compromise—Power of Court to alter charge—Acquittal—Trial—Inquiry **993**

——— ——— out of Court—High Court, whether can give effect to, on revisional side **176**

——— ———, Suit under Civil Procedure Code (Act V of 1908), s. 92, whether can be compromised—Compromise before deciding whether endowment is public or not, if lawful. **360**

——— ——— **decree**—*Suit to set aside—Previous application for review on same ground dismissed—Suit, whether maintainable.*

A party whose application for review of a compromise decree on the ground that he had not consented was dismissed, cannot sue to set aside that decree on the same ground. **C.** KAILASH CHANDRA v. GOPAL CHANDRA, 18 C. W. N. 1204 **125**

Compromise-deed — Arrangements about certain estate—Rgistration **423**

Confession—Accused's statement not incriminating himself, whether confession **329**

——— ———to Police Officer—Statements made by accused in order to exculpate himself—Test of admissibility—Admission of deposition when witness not found, when allowed—Circumstantial evidence **161**

——— ——— to *Thuggi* on inducement to confess, whether admissible—Questions and answers based on such confession, admissibility of **129**

Consideration—Gift of family property by father to son—Natural love **211**

——— ———, receipt of—Mortgage—Admission before Sub-Registrar **913**

——— ———Recital of consideration in document, evidentiary value of—Burden of proof, shifting of **899**

Construction—Suit by one while sanction given to two **202**

——— ——— ——— —**of deed** **249**

——— ——— ——— ——— ——— ———Charge—Mortgage **752**

——— ——— ——— **of document**—Intention of parties **751**

——— ——— ——— ——— ——— —Mortgage **71**

——— ——— ——— ——— ——— *Sale or mortgage—Agreement to re-sell—Rent—Interest.*

Where a vendor sold his house to his vendee for Rs. 399 and on the same day executed another document by which he took the house on hire from the vendee at Rs 2-4-0 a month, and the vendee contemporaneously agreed by a third document that if within three years the vendor paid Rs. 399 as principal and paid the rent from month to month, he would re-sell the house to the vendor:

Held, that these three documents read together amounted to a mortgage of the house, that is to say, a transfer of the property with the right of redemption within a fixed period and an agreement to pay rent in lieu of reasonable interest. **B.** NAGINDAS JEKISONDAS *v.* NANABHAI DULLABHRAM, 16 Bom. L. R. 774 **753**

——— ——— ——— ——— **of lease.** *See* LEASE.

Contract—*Agreement to compound offence, promissory note executed in consideration of, whether legal—Necessary condition—Revision—High Court's power of interference—Mere errors of procedure, effect of.*

As the offence of causing grievous hurt cannot be legally compromised except with the consent of the person to whom grievous hurt is caused, a promissory note executed as consideration for compounding such an offence committed against a person who had died previous to the complaint, is illegal and cannot be enforced. Such an agreement to pay money in consideration of compounding a criminal offence cannot be supported even on the ground that the party who executes the agreement would also be liable for damages.

The High Court as a Court of Revision has no power to consider justice apart from such justice as the law requires and cannot refuse to interfere on the ground that moral, as opposed to legal, justice, is a ground for refusing to interfere in revision.

Mere errors of procedure or technical defects not affecting the legal justice of a case will not be encouraged by a Court of Revision. **M.** MOTTAI REDDY v. THANAPPA REDDY, 37 M. 385 **181**

——— ——— ———Auctioneer not carrying out terms of contract, liability of **131**

——— ———, breach of—Damages in excess of earnest money **226**

Contract Act (IX of 1872), s. 11——*Contract by minor—Minor, right of,—Property purchased for minor by some one else, minor's rights in—Sale of property by father, whether valid.*

A contract by a minor is void and not merely voidable. Therefore, when a minor enters into a transaction where a contract by him is an essential condition preliminary to the transaction or contractual obligations on his part flow from the transaction, it must be regarded as void.

Contract Act—contd.

But where a contract by a minor is not a necessary condition for upholding the rights of the minor in property, his rights should be maintained.

Therefore, a purchase of property for the benefit of a minor by his maternal uncle is valid, and if the property is alienated by the minor's father, the minor is entitled to recover. **M.** MUNIA KONAN v. PERUMAL KONAN, 37 M. 390 **195**

——— ——— ——— **s. 23**—*Agreement to pay money for procuring adoption, validity of—Public policy.*

An agreement to pay a bribe to procure the adoption of a boy is one against public policy and is, therefore, void. **M.** THURI KOTHANDARAMA REDDIAR *v.* THESU REDDIAR, 27 M. L. J. 446; 1 L. W. 928 **779**

——— ——— **s. 55** **121**

——— ——— **s. 63** **958**

——— ——— **ss. 69, 70**—*Landlord and tenant—Cost of keeping premises clean—Tenant, whether liable—Suit to recover costs—Jurisdiction.*

A landlord is not entitled either under section 69 or section 70 of the Contract Act to recover from his tenant the costs of sweepers and *bhishtis* employed under an order from the Municipal Board to keep the premises clean.

Such a suit is neither for an enhancement of rent nor for the recovery of dues under section 13 of the Provincial Small Cause Courts Act and is cognizable by a Small Cause Court. **A.** NOBIN CHANDER BOSE v. GADDA BERHAI, 12 A. L. J. 931. **77**

——— ——— **s. 70** **77**

——— ——— **s. 74**—*Earnest money—Breach of contract—Damages, in excess of earnest money.*

Where a clause is entered in a contract providing for the forfeiture of a deposit made by the contractor, and the person for whose benefit the clause is entered in the contract does not content himself with retaining the deposit as a forfeiture but sues for actual loss incurred by him through the default of the other party, on the ground that the deposit amount is insufficient to cover such a loss or on the ground that the contract provides for both the forfeiture of the deposit and also for the right to recover the loss, *he cannot recover more than the difference between the loss incurred by him and the deposit money.* **M.** VELLORE TALUQ BOARD v. GOPALASAMI NAIDU, 17 M. L. T. 84 **226**

——— ——— **s. 104**—*Stoppage in transit—Sufficient notice—Telegram to carrier not to deliver.*

Where an unpaid vendor sent goods by rail to and at the request of the vendee and on becoming insolvent, while the goods were still in transit, telegraphed to the Railway Company asking them not to deliver the goods:

Held, that the telegram was sufficient notice to the carriers, as no particular form of notice is required to effect a valid stoppage in transit under section 104 of the Contract Act. **S.** RIJHUMAL v. MICHUMAL, 8 S. L. R. 65. **424**

——— ——— **ss. 201, 209, 218**—*Principal and agent—Suit to recover money—Limitation—Moveable property—Money, whether moveable property—Agency, termination of—Limitation Act (IX of 1908), Sch. I, Arts. 89, 115—Agent's contract to account, suit on—Article applicable.*

Contract Act—contd.

As money is moveable property within the meaning of Article 89 of Schedule I of the Limitation Act, a suit by a principal against his agent for money received and not accounted for is governed by Article 89 of the Limitation Act and is barred if not brought within three years of the date of the termination of the agency.

An agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue.

Therefore, where an agent in obedience to a telegram sent by his principal hands over the charge to another person, his agency terminates that very day as his authority is revoked.

An agent's contract to account to his principal, whether express or implied, is specially provided for in Article 89 of Schedule I of the Limitation Act and it cannot be included under Article 115 of the Act.

Per *Seshagiri Aiyar, J.* In an agent's contract the fixing of a date for rendering accounts cannot stop the termination of the agency. **M.** VENKATACHALAM CHETTY *v.* NARAYANAN CHETTY, 28 M. L. J. 140 **740**

——— ——— **ss. 209, 210** **740**

——— ——— **ss. 230, 231**—*Principal and agent—Agent contracting in his own name—Suit, right of—Agent and sub-agent—Privity of contract between principal and sub-agent*—Dubashes, *position of Sub-agent—Security money with agent—Principal Adopting agent's acts, rights and liabilities of—Equity—Evidence Act (I of 1872) s. 92—Contracting party whether principal or agent, parol evidence to prove, whether admissible.*

Per *Wallis, Offg., C. J.*—Where an agent enters into a written contract in his own name and without mentioning his agency, he can sue and be sued upon that contract.

The position of Dubashes in the Madras Presidency is much the same as that of Banian in Northen India.

Where a party acts merely as as sub-agent, there is no privity of contract between that party and the principal under section 192 of the Contract Act.

Per *Seshagiri Aiyar, J.*—Where the question is whether under the terms of a contract a contracting party is acting for himself or on behalf of a principal, it is not a question relating to the terms of a contract within the meaning of section 92 of the Indian Evidence Act, and parol evidence is admissible. *Prima facie*, a contract by a person in his own name without more is a contract by him as a principal.

The principle of section 231 of the Contract Act is that as against the agent transacting business in his own name, the principal can claim the full benefit of the contract, and as against the party contracting with the agent, the principal is bound by the equities subsisting between the agent and the contracting party.

Where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens. **M.** SOUTH INDIAN INDUSTRIALS *v.* MINDI RAMJOGI, 27 M. L. J. 501 **822**

Contract Act—concld.

——— ——— **s. 232** **822**

——— ——— **s. 247**—*Partnership—Infant partner, liability of—Liability of infant partner to be adjudged insolvent—Position of infant in joint Hindu family business—Insolvency of one partner, effect of—Position of Receiver—Provincial Insolvency Act (III of 1907), s. 16.*

An infant may be admitted to the benefits of a partnership, though he cannot be made personally liable for any obligation of the firm.

An infant partner of a firm cannot as such be adjudicated an insolvent.

There is no difference in principle between the nature of the the liability of an infant admitted by agreement into partnership business and that of another on whose behalf an ancestral trade is carried on by the guardian.

Therefore, a Hindu infant on whose behalf a family trade is carried on is not personally liable for the debts incurred in such a trade, but his share therein is alone liable.

When a partner has been adjudged an insolvent, the partnership is not necessarily dissolved and the Receiver appointed under section 16 of the Provincial Insolvency Act merely replaces the insolvent partner in respect of the business of the firm and cannot claim, as Receiver in insolvency, to take exclusive possession of the entire assets of the firm. **C.** SANYASI CHARAN MANDAL *v.* ASUTOSH GHOSH, 42 C. 225 **836**

Contribution—Jurisdiction — Small Cause Court—Suit to recover amount paid by purchaser for incumbrance on property represented free from incumbrance—Compensation **909**

——— ——— ——— Mortgage—Mortgage by one partner of whole partnership property—Mortgage disputed by other partner—Compromise—Disputing partner undertaking to pay part of mortgage-debt—Mortgage subsequently declared not binding on disputing partner's share—Mortgage-debt realized from partner executing deed—Suit by mortgagor for contribution in terms of compromise—Other partner, liability of. **924**

——— ——— ———, *suit for—Maintenance grant to widow by three brothers—Charge created on their share of properties—Sale of some properties—Maintenance decree satisfied by one purchaser—Purchaser, liability of—Contribution between purchaser and legal representatives, principle of.*

Three brothers executed an *ekrarnamah* granting a certain annual maintenance to the widow of their fourth brother, by making themselves jointly and severally liable therefor and by creating a charge on half shares of their *zemindari* properties. The maintenance fell into arrears with the result that the widow obtained a decree. The plaintiff, who had purchased the share of one of the three brothers in one of his properties, satisfied that decree of the widow and sued the holders of the different properties for contribution:

Held, that the three brothers or their representatives were equally liable; and

that as between the plaintiff and the representatives of his vendor the liability should be determined on

Contribution—concld.

the basis of the value of the properties respectively in their hands at the time when the decree for maintenance was passed. **C.** SASHI SEKHARESWAR ROY *v.* SASHIBALA DEBI **480**

Conviction—Identification, when sufficient to convict—Grave suspicion, whether sufficient for conviction **329**

Co-operative Societies Act (II of 1912), ss. 19, 20—*Charge, enforceability of—Civil Procedure Code (Act V of 1908), s. 73.*

Under section 73 of the Civil Procedure Code, 1908, a Co-operative Society cannot enforce a charge under section 19 of the Co-operative Societies Act, unless they have a decree or a charge under section 20 of the latter Act. **C.** ABDUL KADIR *v.* SHAHABAZPUR CO-OPERATIVE BANK, 18 C. W. N. 1140 **81**

——————— **s. 20** **81**

Co-parcener, right of, to relinquish his share **211**

Copyright Act (III of 1914), s. 2—*Infringement of copyright—Law Reports—Judgments—Extracts and facts collected by Reporter, whether can be copied.*

It is generally true that in the reports of judgments the reporter has no copyright, but it cannot be said that in the selection of cases and in the arrangement of reporting the reporter has not the protection of the law. He is entitled to report such judgments as he obtains by expenditure of his time, labour and money, but where he fails to exert his own energies, he cannot be allowed to avail himself of other people's industry.

Therefore, where the defendant reproduced, not only the judgments which had been reported by the plaintiff, but also such parts of the plaintiff's reports as formed no part of judgments and also took from the plaintiff's reports extracts and facts which had been collected by the plaintiff from the records of the cases:

Held, that the defendant had infringed the plaintiff's copyright. **C.** JOGESH CHANDRA CHAUDHURI *v.* MOHINI CHANDRA RAY, 18 C. W. N. 1078 **30**

Co-sharer, not recorded as such, whether bound by partition proceedings—Prohibition under s. 233 (*k*), U. P. Land Revenue Act, applicability of **119**

——————, right of, to collect his share of rent separately—Recovery of co-sharer's fractional share of rent, suit for, not maintainable—Division of joint lands of tenants necessary—Tenant paying rent to one co-sharer alone, released from further liability. **237**

Costs, award of—Proceedings under Legal Practitioners Act initiated in District Court—Reference to High Court—Power of District Judge to award costs of proceedings before him **125**

Court Fees Act (VII of 1870), s. 7 (iv) (f)—*Suit for administration of estate—Suit for accounts—Valuation for jurisdiction and Court-fees identical.*

No doubt a suit for administration of an intestate estate is in some respects a suit of a unique kind, but after all it has many features in common with a suit for winding-up an insolvent estate, or a suit for

Court Fees Act—concld.

dissolution of partnership with taking of accounts and allotment to each partner, after all debts, etc., are settled up, of his net share. In all of these suits the taking of accounts is a prominent and necessary feature and the mere fact that, after accounts have been taken, the Court, *ex necessitate rei*, acts in winding-up on rather different lines in the different classes of cases, does not take any of them out of the purview of the 'suit for accounts.'

A suit 'for an account of any property and for its due administration' falls within the purview of section 7 (*iv*) (*f*), Court Fees Act. The valuation of such a suit for the purposes of jurisdiction and Court-fees is the same. **P.** SHUJA-UD-DIN *v.* AISHABI, 100 P. R. 1914 **342**

——————— **ss. 9, 10**—*Valuation determined by Commissioner—Plaintiff failing to pay additional Court-fee within prescribed period—Suit to be dismissed—Plaint not to be rejected—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Option to abandon part of claim for which Court-fee not paid in time.*

If as the result of an inquiry under section 9 of the Court Fees Act a Court directs the plaintiff, if he wishes to continue the suit, to pay the required additional Court-fee within a time fixed by the Court and the plaintiff fails to do so, the plaint should not be rejected under Order VII, rule 11, Civil Procedure Code, but the suit itself should be dismissed under section 10 of the Court Fees Act.

A plaintiff who has not properly valued his claim or paid a sufficient Court-fee is not entitled at the last moment to an option to abandon part of his claim and retain only that part for which he has paid a sufficient Court-fee. **B.** VALLI ISE AMANJI *v.* MAHMAD ADAM ASMAL, 16 BOM. L. R. 763 **746**

——————— **s. 10** **746**

Criminal breach of trust. *See* CRIMINAL PROCEDURE CODE, s. 179; PENAL CODE, s. 405.

——————, offence of, when complete **136**

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 195, 476—*Complaint—Sanction.*

Where the order of the Court was "I hereby complain against *R* ..... that he on ..... filed two false and forged bonds in suit No. ..... in the Court of ..... and thereby committed an offence under sections 471/467 and 209, Indian Penal Code. The papers will be sent to the District Magistrate with the request that they may be made over to a competent Court for disposal:"

Held, that this was a complaint as defined in section 4 (*b*) and not a sanction under section 195 or section 476 of the Code of Criminal Procedure. **A.** RAJA RAM *v.* EMPEROR, 12 A. L. J. 881; 15 CR. L. J. 700 **148**

——————— **ss. 12, 460, 528**—*Transfer of case—Magistrate made Chairman of Municipal Board, whether still Magistrate and subordinate to District Magistrate—Jurisdiction.*

A Magistrate, who is gazetted to the office of the Chairman of a Municipal Board and takes charge of that office, is divested of his territorial jurisdiction

Criminal Procedure Code—contd.

as Magistrate and is no longer subordinate to the District Magistrate. The latter, therefore, cannot transfer any criminal case to him for trial. **A.** NATHI MALL *v.* EMPEROR, 12 A. L. J. 890; 36 A. 513; 15 CR. L. J. 693 **141**

——————— **s. 107** —*Breach of public peace—Magistrate should base his order on evidence on record and not on personal knowledge outside record—Findings to justify order—When object lawful, order improper.*

The final decision in a case should be based simply and entirely upon evidence legally brought on to the record. Therefore, a Magistrate who possesses outside knowledge of matters which are not evidence in a case under section 107, Criminal Procedure Code, should keep that knowledge out of his judgment and endeavour to base his decision entirely upon the relevant evidence in the case.

To justify an order under section 107, Criminal Procedure Code, the Magistrate should find that even the person proceeded against is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that probably may occasion a breach of the peace or disturb the public tranquillity.

The Hindu residents of a town whose object was to take the *Dasehra* procession, or to cause it to be taken, down a particular route, not forcibly and in defiance of any prohibition which might be issued by the authorities, but with the sanction and under the protection of the authorities, cannot be rightly bound over under section 107, Criminal Procedure Code, to keep the peace. **A.** BRIJNANDAN PRASAD *v.* EMPEROR, 12 A. L. J. 1246; 16 CR. L. J. 46; 37 A. 33 **638**

——————— **ss. 107, 117**—*Security ordered without any inquiry—Order, whether illegal.*

An order under section 107, Criminal Procedure Code, is bad in law if it is made without making an inquiry into the truth of the information upon which proceedings were initiated. **A.** MULCHAND *v.* EMPEROR, 12 A. L. J. 1262; 16 CR. L. J. 61; 37 A. 30 **653**

——————— **ss. 107, 125** *Security for keeping peace—Bond for keeping peace, cancellation of—District Magistrate, jurisdiction of—Admission of case, wrong, effect of—Revision, High Court's power in—Questions of fact, when to be considered in revision.*

Section 125, Criminal Procedure Code, does not confer upon a District Magistrate either an appellate or revisional jurisdiction, but it confers an original jurisdiction in respect of orders binding down persons to keep the peace. A person so bound down has no remedy by way of appeal to the District Magistrate. The proper course for him is to bring his case in revision before the Sessions Judge.

A High Court, having once admitted a case in revision and having fixed a date for the hearing thereof, ought to dispose of it on the merits after hearing the applicant for revision.

In criminal revisions, the High Court does not ordinarily consider questions of fact, except where the matter has been before only one Court below. **O.** SHEO SINGH *v.* EMPEROR, 1 O. L. J. 541; 15 CR. L. J. 721 **169**

Criminal Procedure Code—contd.

——————— **ss. 107, 526**—*Transfer of case—Power of District Magistrate to send case under s. 107 to second class Magistrate.*

It is not competent to a District Magistrate to transfer a case under section 107 of the Criminal Procedure Code to a Magistrate of the second class, who is incompetent to conduct and complete the proceedings **A.** GOBIND SAHAI *v.* EMPEROR, 12 A. L. J. 1136; 16 CR. L. J. 55; 37 A. 20 **647**

——————— **ss. 109, 122**—*Magistrate's power to reject surety—Sufficient ground—Defence witness, whether can stand surety—Revision.*

Sureties for good behaviour should not be rejected merely on the strength of the report of a Tahsildar and a Sub-Inspector of Police, without some further proceedings or at any rate without giving the sureties an opportunity of meeting any allegations that may be made against them. The fact that a person offering himself as surety for the good behaviour of another has given evidence in favour of that person in a proceeding under section 109 or 110 of the Code of Criminal Procedure, which resulted in the passing of an order requiring security, would not be at all a good reason for refusing to accept the surety.

The discretion conferred on a Magistrate by section 122 of the Code is a wide one and the High Court should not lightly interfere with any reasonable exercise of the same. **A.** BAIRAGI *v.* EMPEROR, 15 CR. L. J. 727 **175**

——————— **ss. 110, 514**—*Bond for appearance in Court—Liability of surety.*

When a person stands surety for the appearance in Court, up to the conclusion of the case, of a man, who has been called upon under section 110, Criminal Procedure Code, to furnish security for good behaviour, the liability of the surety does not cease until the culprit, if so ordered, appears with his sureties and executes his bond. **P.** ABDUL KARIM *v.* EMPEROR, 32 P. R. 1914 CR.; 16 CR. L. J. 74 **666**

——————— **ss. 110, 112**—*Detention in custody on mere request of Police—Magistrate to consider reasons and to place them on record.*

Persons, who after investigation made have been found to be persons not proved to have been concerned in any cognizable offence and against whom there is no reasonable complaint or suspicion of their having been so concerned, should at once be released and any further detention of them is a detention not warranted by law. A Magistrate has no jurisdiction of any kind to act under section 110 of the Code of Criminal Procedure until he has sufficient information before him as will suffice for making an order in writing setting forth its substance and the further particulars required by section 112 of the Code. **A.** EMPEROR *v.* GANESH, 12 A. L. J. 336; 15 CR. L. J. 696 **144**

——————— **s. 110**—*Inquiry in progress—Detaining accused in jail—Illegality—General repute, evidence of.*

To send a person to jail while an inquiry under security proceedings is in progress, is an illegality which prejudices his interests in the inquiry.

Criminal Procedure Code—contd.

Therefore, such an inquiry can be said neither to be fair nor conducted with that regard for the rights and privileges of the person against whom the proceedings are taken, which the law requires.

Where the Chairman of the Managing Committee of a Municipality was proceeded against under section 110 of the Criminal Procedure Code, the proceedings being based on evidence of general repute, and he was detained in jail pending the inquiry:

Held, (1) that the fact of detaining him in jail while the inquiry was in progress prejudiced his interest in the trial and rendered the inquiry unfair;

(2) that the evidence of general repute must in this case be evidence of a reputation which the accused had acquired since his appointment to the chairmanship. **B.** BHAU SAVALARAM KOTASTHANE v. EMPEROR, 16 Bom. L. R. 943; 16 Cr. L. J. 91 **1003**

——————— **ss. 110, 516**—*Transfer of proceedings under s.* 110, *application for—Ground of transfer—Apprehension of not having fair and impartial trial.*

The petitioner made an application under section 526, Criminal Procedure Code, praying that the proceedings taken against him under section 110 of the Criminal Procedure Code be transferred from one district to another, on the grounds that he was arrested without a warrant, that his medical certificates were not accepted, that he was not informed of the charge for some days, that his request to reserve cross-examination was disallowed, that his prayer as to the production of certain documents was rejected, and that the names of some of his witnesses were struck out while a sum of Rs. 100 was demanded from him before summons could be issued to the rest of his witnesses:

Held, that these facts alone did not in any way show bias or prejudice in the mind of the Magistrate against the petitioner but they, taken with the fact of the institution of several criminal proceedings against the petitioner prior to the proceedings under section 110, Criminal Procedure Code, would likely give rise to an apprehension in his mind that he was not likely to have a fair and impartial trial in the Court before which security proceedings against him were pending and that, therefore, this was a fit case for transfer. **A.** JAFAR HUSAIN v. EMPEROR, 12 A. L. J. 736; 16 CR. L. J. 56 **648**

——————— **s. 112** **144**

——————— **s. 117** **658**

——————— **s. 117**—*Enquiries under Chap. VIII—Rules of evidence—General repute, evidence of—Admissibility of evidence, test of—Witness to general reputation—Examination and cross-examination—Practice.*

Enquiries under Chapter VIII of the Code of Criminal Procedure are governed by the ordinary rules of evidence. Evidence which would not be admissible at an ordinary trial should not be admitted at a trial under section 117 of the Criminal Procedure Code.

Evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community in which the person concerned lives or to which he belongs, or the personal opinion of the witnesses who are examined.

Criminal Procedure Code—contd.

The test of the admissibility of evidence of general opinion is whether it shows the general reputation of the man, not necessarily the opinion of the entire community to which he belongs but at least the opinion of a considerable number of persons. It must not be merely the repetition of what one or two persons have said to the witness.

A witness to general reputation may be examined and cross-examined as to his means of knowledge and when he gives his own opinion, he may be asked to give the grounds of his opinion and to give the names of the persons whom he has heard speak against the character of the person concerned. **A.** BECHAI v. EMPEROR, 15 CR. L. J. 705; 12 A. L. J. 937 **153**

——————— **s. 122** **175**

——————— **s. 122** — *Discretion—Opinion formed on Police report.*

The discretion given to a Magistrate by section 122 of the Criminal Procedure Code is a wide one. There must, however, be some sort of independent inquiry by the Magistrate, showing that a judicial discretion has been exercised in rejecting a surety.

Therefore, a Magistrate's order rejecting a surety merely on the Police report and without any independent inquiry by himself is bad. **A.** BHAWANI SINGH v. EMPEROR, 12 A. L. J. 1004; 6 CR. L. J. 54 **646**

——————— **s. 125** **169**

——————— **s. 133** **328**

——————— **s. 133**—*Nomination of jurors—Principle to be observed by Magistrates.*

It is not illegal for a Magistrate to address any inquiry to the person who first came forward to draw his attention to the existence of an alleged public nuisance, with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury but it would be highly improper on his part to appoint to serve on the jury the friends or supporters of the person at whose instance the proceedings are being taken.

It is, however, expedient that in all proceedings, initiated under section 133, Criminal Procedure Code, the Magistrate should bear in mind that he is supposed to be acting purely in the interest of the public and should be on his guard against any tendency to use the section as a substitute for litigation in Civil Courts in order to the settlement of a private dispute. **A.** FARZAND ALI v. HAKIM ALI, 12 A. L. J. 1241; 16 CR. L. J. 40; 37 A. 26 **632**

——————— **s. 133**—*Question of title raised—Magistrate, duty of, to decide bona fides of question—Procedure—Civil Court, reference to—Party failing to have recourse to Civil Court—Magistrate, power of—Power under s.* 133, *how to be used.*

Per *Sharfuddin, J. (Tennon, J. dubitante).*—When a person called upon to show cause under section 133, Criminal Procedure Code, raises a question of title, the trying Magistrate must decide whether the question has been raised *bona fide* or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim set up is a mere pretence should pass final orders and make

Criminal Procedure Code —contd.

the Rule absolute, but if he finds that it is *bona fide* raised, he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the Rule absolute.

The provisions of section 133, Criminal Procedure Code, should be sparingly used as any order passed under the section cannot be questioned in any Civil Court. **C.** MANIPUR DEY *v.* BIDHU BHUSAN SARKAR, 18 C. W. N. 1086; 15 CR. L. J. 698; 42 C. 158 **146**

——— ——— ——— **s. 133**—*Way or public place—Obstruction, removal of—Magistrate, power of.*

Section 133 of the Code of Criminal Procedure empowers a Magistrate to order the removal of an obstruction from any way or from any public place, and before the section can be applied there must be a finding that the obstruction in question is situated on a way which may be lawfully used by the public or on a public place. **A.** CHURAMAN *v.* EMPEROR, 12 A. L. J. 1024; 15 CR. L. J. 724 **172**

——— ——— ——— **s. 137** **328**

——— ——— ——— **s. 144 (4)**—*Order passed by acting District Magistrate—Petition for rescission, by whom to be disposed of.*

An order passed under section 144, Criminal Procedure Code, by a Joint Magistrate, while acting as a District Magistrate, can be rescinded or altered after his reversion, by the then District Magistrate himself and the latter cannot transfer an application for rescission or alteration to the former. **M.** SUNDARSANAM AIYANGAR *v.* ELAYAVALLI SRINIVASACHARI, 16 CR. L. J. 74 **666**

——— ——— ——— **s. 145,** *inquiry under—Magistrate, duty of.*

In an inquiry under section 145, Criminal Procedure Code, it is the duty of the Magistrate to determine who is in actual possession of the property at the time of his preliminary order.

Quaere—Whether proceedings under section 145 of the Code of Criminal Procedure can be taken where the two parties are in the position of principal and agent? **M.** VAITHIANATHA AIYAR *v.* SUPPALU AMMAL, I L. W 939; 15 CR. L. J. 708 **156**

——— ——— ——— **ss. 145, 522**—*Order under s. 522, whether bars proceedings under s. 145.*

An order under section 522, Criminal Procedure Code, which is never carried out, does not bar the jurisdiction of a Criminal Court under section 145. **C.** PRABHAT CHANDRA CHATTERJEE *v.* PRASANNA KUMAR SEN, 18 C. W. N. 1088; 15 CR. L. J. 700 **148**

——— ——— ——— **s. 145**—*Petitioner, possession of, on behalf of both parties—Jurisdiction to pass order.*

A Magistrate has no jurisdiction to pass an order under section 145, Criminal Procedure Code, when the possession of the applicant is neither exclusive nor superior to that of the opposite party but is on behalf of both the parties and the applicant merely wants a declaration to that effect. **M.** KANDASAMI ASARI *v.* NARAYANA ASARI, 2 L. W. 107; 16 CR. L. J. 52 **644**

——— ——— ——— **s. 162**—*Statements to Police Officers, admissibility of—Evidence Act (I of 1872) s. 157.*

Criminal Procedure Code—contd.

Under section 162 of the Criminal Procedure Code a Police Officer can be allowed to depose to what a witness had said to him in the course of the investigation for the purpose of corroborating the testimony of that witness before the trial Court.

Per *Shah, J.*—Section 162 of the Criminal Procedure Code excludes only the *writing*. **B.** EMPEROR *v.* HANMARADDI RAMARADDI, 16 BOM. L. R. 603; 15 CR. L. J. 690; 39 B. 58 **138**

——— ——— ——— **s. 165 (1)** **319**

——— ——— ——— **s. 179**—*Criminal breach of trust—Cheating—Jurisdiction.*

The complainant ordered and received a consignment of matches from a firm at Calcutta and found the consignment so seriously damaged as not to be marketable. But he had already sent in advance currency notes by registered cover from the Moradabad post office. The complainant filed a complaint at Moradabad, charging the accused with criminal breach of trust and cheating:

Held, that the criminal breach of trust, if committed at all, was committed in Calcutta and was not triable in Moradabad.

Held, further, that the entire offence of cheating, if committed at all, was completed at Moradabad and the Magistrate of Moradabad had the jurisdiction to try the case. **A.** YUSUF ALI *v.* WAHAJUDDIN, 12 A. L. J. 1022; 15 CR. L. J. 719 **167**

——— ——— ——— **s. 179**—*Hundis sent for encashment to Bombay from Dharapuram in Erode—Receipt of hundi and misappropriation of proceeds in Bombay—Petitioner resident of Bombay—Jurisdiction of Sub-Divisional Magistrate, Erode, to try offence—Criminal breach of trust, offence of, when complete.*

Where the petitioners who were brokers residing and carrying on business in the Bombay Presidency, were charged with having committed criminal breach of trust before the Sub-Divisional Magistrate of Erode in respect of the proceeds of certain *hundis* entrusted to them for encashment by the complainants, merchants of Dharapuram in Erode, and the *hundis* were received and cashed by the petitioners in Bombay and the sale-proceeds retained and misappropriated there:

Held, that the Sub-Divisional Magistrate of Erode had no jurisdiction to try the case and section 179 of the Criminal Procedure Code did not give him jurisdiction.

The offence of criminal breach of trust is completed by the misappropriation or conversion of the property dishonestly, *i. e.*, with the intention of causing wrongful gain or wrongful loss. It is only the *intention* which is essential. Whether wrongful gain or loss actually results is immaterial; it is a consequence but no essential part of the offence, and a person is not accused of the offence by reason of it. **M.** RAMBILAS, *In re*, 16 M. L. T. 505; (1914) M. W. N. 894; 15 CR. L. J. 688 **136**

——— ——— ——— **s. 195**—*Sanction to prosecute—Application made after four months—Delay, whether excusable.*

An application for sanction to prosecute ought to be made promptly. A delay of four months is too long. **A.** SAGARMAN *v.* EMPEROR, 15 CR. L. J. 698 **146**

Criminal Procedure Code—contd.

——————— **s. 209**—*Accused, whether can be committed on evidence to be given in future—Magistrate, when bound to discharge.*

A commitment of an accused to the Sessions must depend on evidence actually before the Court and not on evidence that may be given in future

A Magistrate is bound to discharge an accused under section 209, Criminal Procedure Code, if he believes that he has committed no offence **C.** SREEMANTA CHATTERJEE *v.* SURENDRA NATH, 16 CR. L. J. 5 **309**

——————— **s. 212, 347**—*Magistrate, power of, to commit to Sessions after summoning and examining defence witnesses.*

The discretion given to a Magistrate to commit a case to the Sessions, under section 347 of the Code of Criminal Procedure, is neither restricted nor taken away merely because he issues summons to the defence witnesses under section 212 of the Code of Criminal Procedure and examines them. **M.** THE SESSIONS JUDGE, MADURA, *In re*, 15 CR. L. J. 704; 17 M. L. T. 83 **152**

——————— **s. 215** **657**

——————— **s. 227** **306**

——————— **ss. 234, 239**—*Charge—Joint trial of two persons for two distinct offences—Misjoinder—Re-trial of appellant.*

To enable more persons than one to be charged and tried together for more offences than one, the offences must all form part of the same transaction.

Where there is a misjoinder of charges, the convictions and sentences must be set aside and a re-trial ordered in the case of the accused who appeals, whether he has been prejudiced by the misjoinder or not. **L. B.** PO MYA *v.* EMPEROR, 7 L. B. R. 272; 16 CR. L. J. 44 **636**

——————— **ss. 236, 237** **152**

——————— **s. 239** **313, 636**

——————— **s. 239**—*Same transaction, determining factor of—Continuity and community of purpose and object.*

In deciding whether offences are so connected as to form one and the same transaction, the determining factor is not so much proximity in time as continuity and community of purpose and object

Section 239 of the Criminal Procedure Code is merely an enabling section and does not in any way trammel the discretion of the Court **C.** SUPDT. & R. L. A. B. *v.* MANMOHAN ROY, 16 CR. L. J. 3; 21 C. L. J. 195 **307**

——————— **s. 239**—*"Same transaction," meaning of—Trespass and on ejection assembling men to force entry, whether part of same transaction—Joint trial, whether legal.*

The act of a trespasser in entering into a factory, and, subsequent to his ejection therefrom, his act in assembling men to force an entry into it, are acts unconnected with each other and do not form part of the same transaction, within the meaning of section 239 of the Criminal Procedure Code, and a joint trial for such offences is illegal. **M.** ANANTHA PADIYARA, *In re*, 15 CR. L. J. 695 **143**

Criminal Procedure Code—contd.

——————— **ss. 247, 403**—*Previous acquittal without jurisdiction, whether bar to second complaint.*

A previous acquittal wholly without jurisdiction is no bar to a Magistrate taking cognizance of a second complaint.

Therefore, a Magistrate, who on a complaint made by a servant of a *zemindar* for maiming his master's elephant issues process under section 426, Indian Penal Code, to the accused but acquits the accused under section 247, Criminal Procedure Code, on the ground that the complainant is dead, acts without jurisdiction and is not debarred from hearing a second complaint by another servant. **C.** MADHO CHOWDHURY *v.* TURAB MIAN, 18 C. W. N. 1211; 15 CR. L. J. 726 **174**

——————— **s. 250**—*Charge of bribery—False charge—Compensation—Frivolous or vexatious.*

As long as a case is frivolous or vexatious, the fact that it is also false is no bar to the application of section 250, Criminal Procedure Code.

A charge of bribery may not be frivolous, but, if false, is undoubtedly vexatious. **U.B.** NGA MYL *v.* NGA KYAN, U. B. R. (1914), II, 31; 16 Cr. L. J. 92 **1004**

——————— **s. 250**—*Compensation, order to pay—Opportunity to show cause, sufficiency of.*

Where a Magistrate passed an order to the following effect: "Judgment delivered. Accused acquitted. . . . . Complainant to pay Rs. 50 compensation to each of the accused under section 250, Criminal Procedure Code, and show cause why he should not pay. Subans Singh (complainant) is absent. His brother verbally shows cause which is insufficient. Order made absolute:"

Held, that the complainant was in fact given no opportunity of showing cause, and that, therefore, the order could not be sustained. **C.** SUBANS SINGH *v.* MAHABIR PROSHAD SINGH, 18 C. W. N. 1277; 15 CR. L. J. 707 **155**

——————— **ss. 254, 255, 345**—*Offence compoundable without sanction of Court—Presentation of petition of compromise—Power of Court to alter charge—Acquittal—Trial—Inquiry.*

Where a Court has drawn up a charge of an offence compoundable without sanction of Court and this charge, having been read and explained to the accused, has been pleaded to, that Court should, upon the presentation to it of a petition of composition by the person mentioned in the last column in the table in section 345, Criminal Procedure Code, at once accept the petition and acquit the accused and has no power to alter the charge already drawn up.

Obiter: - When the charge has been drawn up and read and explained to the accused and he has pleaded, the "inquiry" becomes a "trial." **P.** HASTA *v.* EMPEROR, 29 P. R. 1914 Cr., 16 Cr. L. J. 81 **993**

——————— **s. 255** **993**

——————— **s. 256**—*Conviction for less serious offence when facts disclose more serious offence, whether should be set aside—Failure to question accused if he is willing to cross-examine prosecution witnesses, effect of.*

Criminal Procedure Code—contd.

A conviction for a less serious offence need not be set aside merely because the facts disclose a more serious offence, provided the Court has jurisdiction to try the offence of which it has convicted.

A failure to ask the accused, after framing the charge, whether he is willing to cross-examine the prosecution witnesses again, is a mere irregularity and the conviction is not thereby vitiated. **M.** MUNIAN CHETTY *v.* EMPEROR, 16 CR. L. J. 5 **309**

——— ——— ——— **ss. 258, 439**—*Revision—Acquittal, when can be set aside—Transfer of case.*

A Magistrate fails to deal with a case before him with judicial care and impartiality if he lays great stress on all considerations that might affect the credibiliy of the several prosecution witnesses and omits to take into consideration what might be advanced in their favour, *e. g.*, fails to appreciate or even to correctly cite in his judgment the evidence of an important witness.

Such circumstances fully justify a High Court to set aside an order of acquittal passed by the Magistrate and transfer the case to another district. **C.** BAZU *v.* RAIKA SINGH, 18 C. W. N. 1244, 15 Cr. L. J. 722 **170**

——— ——— ——— **s. 298 (1) (c) 657**

——— ——— ——— **ss. 337, 339, 298 (1) (c), 215**—*Approver—Forfeiture of pardon—Approver to be committed for trial along with other accused if forfeiture proved—Plea of pardon may be decided by Magistrate—Plea may be re-opened in Sessions Court—Burden of proof—Forfeiture, question of fact—Judge—Jury.*

Where an approver fails to act up to the condition of his pardon before the inquiring Magistrate, the Magistrate can re-commence the inquiry as against the approver and commit him to take his trial along with the other accused.

Under the old Code the act terminating a pardon was the withdrawal by the granting authority, under the present law, it is the forfeiture by the approver.

Per *Beachcroft, J.*—The requirement that an approver is to be examined as a witness in the case, is satisfied when he is examined as a witness in the Magistrate's Court. It is not compulsory either for the prosecution or for the defence to examine him in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness.

When an approver is put on his trial he may plead his pardon. The plea should be taken at the commencement of the proceedings before the Magistrate, for it strikes at the jurisdiction to take any proceedings at all against the approver, and it would then be necessary for the Magistrate to consider whether the pardon had been forfeited. But if he decides against the approver, or even if the plea is not taken before the Magistrate, it can be pressed in the Sessions Court and that Court ought to try the question whether the pardon has been forfeited before trying the general issue. If, however, there is a possibility of the evidence on the two issues overlapping or being identical the Judge may use his discretion and order the approver to be tried separately from the other accused.

Criminal Procedure Code—contd.

The onus of proving forfeiture of pardon is on the Crown.

The question of forfeiture of pardon is a question of fact, therefore, its decision rests with the Jury and not with the Judge. **C.** SASHI RAJBANSHI *v.* EMPEROR, 19 C. W. N. 295; 16 CR. L. J. 65 **657**

——— ——— ——— **s. 339 657**

——— ——— ——— **s. 345 993**

——— ——— ——— **s. 345**—*Compounding a case—Written compromise signed by both parties put in—Magistrate, whether entitled to call for further evidence.*

Where the parties are entitled of themselves to compound a case and put in a written paper signed by themselves stating that the offence is compounded, they have proved that the offence is compounded and a Magistrate is not entitled to call for further evidence to prove it. **B.** EMPEROR *v.* GANA KRISHNA WALUNJ, 16 Bom. L. R. 939; 16 Cr. L. J. 88 **1000**

——— ——— ——— **s. 345**—*Compromise out of Court—High Court, whether can give effect to, on revisional side.*

The parties to a criminal case have no *locus standi* to ask the High Court sitting on the revisional side to treat the compromise which they have made of their own free will out of Court as one coming under section 345, Criminal Procedure Code. **C.** ADHAR CHANDRA DEY *v.* SUBODH CHANDRA GHOSH, 18 C. W. N. 1212; 15 CR. L. J. 728 **176**

——— ——— ——— **s. 347 152**

——— ——— ——— **ss. 350, 544**—*Transfer of Magistrate pending trial—Expenses of prosecution witnesses recalled, whether to be paid by accused.*

Where on the transfer of the trying Magistrate the accused claims under section 350, Criminal Procedure Code, to have the witnesses re-examined by the succeeding Magistrate, the witnesses should be re-summoned without payment of any fees. **L. B.** ELIAS *v.* EZAKIEL, 15 CR. L. J. 687 **135**

——— ——— ——— **s. 403 174**

——— ——— ——— **s. 424**—*Appellate Court, whether entitled to alter conviction for principal offence into one of abetment—Abettor present at commission of offence, whether can be convicted of principal offence.*

An Appellate Court cannot alter a conviction of an accused into one of abetment.

If an accused who abetted an offence was present at the commission of it he is rightly convicted of the principal offence. **M.** PERUMAL NAIDU, *In re*, 15 CR. L. J. 694 **142**

——— ——— ——— **s. 428**—*Remand by Appellate Court for additional evidence and finding, whether legal.*

Section 428 of the Criminal Procedure Code does not empower an Appellate Magistrate to call for a fresh finding from a Subordinate Magistrate, nor can he act upon such finding if submitted by the Sub-Magistrate. **M.** MUTHUKARUPPAN SERVAI *v.* VELLAYYA KUDUMBAN, (1914) M. W. N. 778; 16 CR. L. J. 79 **671**

——— ——— ——— **s. 437 665**

——— ——— ——— **s. 439 170**

Criminal Procedure Code—contd.

——— ——— **ss. 439, 562**—*Revision—Power of High Court to set aside order under s. 562 and to pass sentence*

A High Court cannot set aside an order under section 562 of the Code of Criminal Procedure and of its own authority substitute for that order a sentence of whipping or of imprisonment. **A.** EMPEROR *v.* GHASITE, 12 A. L. J. 1244; 16 CR. L. J. 43; 37 A. 31 **635**

——— ——— ——— ——— **s. 460** **141**

——— ——— ——— ——— **s 476**—*Execution of decree, proceedings in—Judicial proceedings—Jurisdiction of Court.*

Proceedings in execution of a decree are 'judicial proceedings' and, therefore, a Court has jurisdiction to pass an other under section 476, Criminal Procedure Code, with reference to matters which have come to its knowledge in execution proceedings. **O.** SHAHAMAT KHAN *v.* GULAB KHAN, 17 O. C. 309; 1 O. L. J. 568; 16 CR. L. J. 91. **1003**

——— ——— ——— ——— **ss. 476. 537 (b)**—*Order to prosecute—No order directing accused to be taken to nearest Magistrate—Irregularity in proceedings, effect of.*

An order directing the prosecution of an accused, under section 476, Criminal Procedure Code, is not illegal but irregular if it does not at once direct the accused to be taken before the nearest first Class Magistrate, and the irregularity is such as is expressly cured by section 537 (*b*), Criminal Procedure Code. **M.** SUPPAYA THARAGAN, *In re*, 37 M. 317; 16 CR L. J. 39 **631**

——— ——— ——— ——— **s. 488**—*Application for maintenance by wife—Presence of relations or friends to bear her costs, whether ground for dismissal of application.*

A wife's application for maintenance against her husband should not be dismissed on the mere ground that she has relations or friends willing to maintain her or to bear the costs of the proceedings. **M.** CHANDA *v.* RAMA MISARI, 16 CR. L. J. 80 **672**

——— ——— ——— ——— **s. 488**—*Maintenance—"Neglects or refuses to maintain his wife," applicability of.*

The expression "neglects or refuses to maintain his wife" in section 488, Criminal Procedure Code, does not apply where the husband states that he is willing to maintain his wife and the wife deposes that she is willing to live with her husband but he refuses to maintain her. **P.** PHULA KHAN *v.* EMPEROR, 46 P. W. R. 1914 CR.; 16 CR. L. J. 86 **998**

——— ——— ——— **s. 488**—*Maintenance—Wife—Husband.*

Under section 488, Criminal Procedure Code, a woman cannot be granted a maintenance order against a man unless she proves herself to be his legal wife according to *his* personal law. **L. B.** PWA ME *v.* SAN HLA, 7 L. B. R. 270; 16 CR. L. J. 39 **631**

——— ——— ——— ——— **ss. 488, 490**—*Maintenance—Recovery of arrears—Jurisdiction.*

An order for the recovery of arrears of maintenance may be made either by the Magistrate who passed the original order or by a Magistrate having jurisdiction in the district where the person ordered to pay maintenance has gone to reside. **L. B.** MA THAW *v.* EMPEROR, 7 L. B. R. 116; 15 CR. L. J. 701 **149**

Criminal Procedure Code—contd.

——— ——— ——— ——— **s. 488**—Order for maintenance of an illegitimate son **526**

——— ——— ——— ——— **s. 491** **335**

——— ——— ——— ——— **s. 494**—*Accomplice—Withdrawal of prosecution, effect of—Prior statements of accomplice, whether should be produced.*

An accomplice, who is tried jointly with the accused, ceases to be on trial with the accused as soon as the prosecution against him is withdrawn under section 494 of the Criminal Procedure Code, and becomes a competent witness in the case.

Prior statements of such a witness made to and verified by a Magistrate must be made accessible to the accused for the purposes of cross-examination and, if necessary, contradiction. **C.** SHERATI SHEIKH *v.* EMPEROR, 18 C. W. N. 1213; 15 CR. L. J. 693 **141**

——— ——— ——— **s. 514** **666**

——— ——— ——— ——— **s. 522**—*Violence against fencing, not against any individual—Order under s. 522, whether competent—Penal Code (Act XLV of 1860), s. 349, applicability of.*

The term "force", as defined in section 349 of the Penal Code, applies to force when used in connection with the human body.

Therefore, where an accused is convicted of the offence of rioting for causing violence to a fencing, and not to any person, an order under section 522, Criminal Procedure Code, should not be passed inasmuch as there is no use of criminal force to any individual. **C.** SADASIB MANDAL *v.* EMPEROR, 18 C. W. N. 1150; 15 CR. L. J. 720 **168**

——— ——— ——— ——— **s. 523** **647, 648, 665**

——— ——— ——— ——— **s. 528** **141**

——— ——— ——— ——— **s. 537 (b)** **631**

——— ——— ——— ——— **s. 544** **135**

——— ——— ——— ——— **s. 545**—*Compensation ordered payable out of fine—Full amount of fine not realised—Compensation, if payable.*

It is quite competent to a Court, when ordering compensation to be paid out of the fine imposed, to provide by its order for the proportionate distribution of the amount realised. In the absence of any such direction, an order providing for payment of compensation out of the fine imposed ought not to be construed as meaning that nothing was payable until the full amount of fine was realised, but as meaning that compensation will have priority over the claims of revenue **M.** KHADDAM VENKATA RAO, *In re*, 2 L. W. 22; 16 CR. L. J. 58 **650**

——— ——— ——— **s. 552**, *order under—Custody of wife, application for—No allegation of girl's wish in complaint—Order of restoring wife, passed without inquiry, illegal—Complainant, remedy of.*

Where a husband complained to the District Magistrate that his father-in-law was wrongfully detaining his wife and refused to send her to his house, without alleging that she was being so detained contrary to her own wish, and the District Magistrate passed an order under section 552, Criminal Procedure Code, directing her restoration to the

Criminal Procedure Code—concld.

husband without making any inquiry into the matter of the complaint:

Held, that on the facts the case was not one to which the provisions of section 552, Criminal Procedure Code, should be applied and that, if the husband had any grievance, he should seek his remedy in the Civil Court. **C.** NATHU MISTRY v. NARI LAL MISTRY, 15 CR. L. J. 712 **160**

—— —— —— — **s. 562** **635**

Cross-examination—*Witness—Serious imputation made against witness but not substantiated—Imputation, whether ought to be withdrawn by Counsel.*

In the course of the cross-examination of a witness a very serious suggestion was made, which imputed dishonourable, if not dishonest, conduct to the witness. The suggestion, however, was not substantiated:

Held, that the imputation ought to have been withdrawn. **M.** CROMPTON & CO. v. SECRETARY OF STATE, 26 M. L. J. 549. **610**

Custom. *See* Pre-emption.

—— — —**Adoption**—*Illatom* form of adoption—Presence of son of adoptive father, whether invalidates *Illatom* adoption—Hindu Law—Presumption **54**

— — —— ——*Sister's son*—Bajwa Jats *of Nikodar Tahsil, Jullundur District*—*Onus.*

The adoption of a sister's son or a gift to such a person is not allowed by custom of the *Bajwa Jats* of Jullundur district, and the onus of proving the contrary is upon the person setting up the custom. **P.** NATHA SINGH v. MANGAL, 90 P. R. 1914 **812**

——— —— — — —— *by widow of her co-wife's son, effect of—Gift by sonless proprietor of land to several persons in equal shares—Suit by collaterals on death of donees without issue.*

An adoption by a widow of her co-wife's son does not have the effect of making him her heir to the prejudice of her father's agnatic heirs.

Where a sonless proprietor made a gift of his landed property in equal shares to his daughter, her son and the son of his other pre-deceased daughter and on the death of the 1st daughter's son his share passed to the daughter, on a suit by the collaterals on her death for recovery of lands gifted to her and her son:

Held, that the donor did not create a joint tenancy with remainder to the survivor and that, therefore, the suit was not barred by reason of one of the donees being alive. **P.** NABI BAKSH v. MEHR BIBI, 89 P. R. 1914; 15 Cr. L. J. 610 **797**

— — — —**Alienation**—*Hindu Law*—Brahmins *of* Dheriala Saigan *village, Gujar Khan Tahsil, Rawalpindi District—Burden of proof—Ordinary test—Shifting of onus.*

To determine whether *Brahmins* living in a village are governed by custom or Hindu Law, ordinarily one most important test is whether the *Brahmins* in question are a compact village community or at least a compact section of the village community. In such cases there is a strong presumption in favour of custom.

A village was founded a very long time ago by

Custom—concld.

the ancestors of *Brahmins, got* Saigan, that from the date of its foundation the majority of the proprietors had been *Brahmins* of this *got*, that the *Brahmins* had from the very beginning constituted a compact village community, that out of 800 or 900 persons living in the village some 600 or 700 were *Brahmins*, that there was no *biri* in this village, that *Brahmins* did not perform any priestly functions, though a good many of them had taken to service, that such of the *Brahmins* who were not in service depended for their livelihood entirely upon agriculture, that the income of those who were in service was supplemented by their income as land-owners, and that so far as regards succession they were not governed by Hindu Law, as among them daughters were excluded:

Held, that in view of these facts the initial presumption that the *Brahmins* in this village were governed in matters of alienation of ancestral landed property by Hindu Law and not by custom, was sufficiently rebutted and the onus was shifted on to the party who asserted that in matters of alienations they were governed by their personal law and that their powers of alienation were not restricted as those of agricultural tribes. **P.** JAI RAM v. SARDAR SINGH, 23 P. R. 1914; 195 P. L. R. (1914) **512**

——— — **or Hindu Law**—Khattar Aroras *of Multan city—Succession—Daughter, whether can succeed—Custom—Burden of proof.*

In matters of succession, *Aroras* of Multan city are governed by the Hindu cap.

Therefore, a daughter of an *Arora* of Multan city is entitled to succeed to the estate of her deceased father.

The burden of proving that they follow any custom in derogation of the Hindu Law lies heavily on the person alleging the custom. **P.** MOTAN DAS v. MORNI BAI, 37 P. W. R. 1914 **450**

—— — **or personal Law**—*High class Hindus—Presumption*—Sobti Khatris *of Gujrat District*—Onus.

In the case of high class Hindus, the presumption is that they are governed by their personal law and the *onus* lies on the party setting up custom to prove that they are governed by custom.

The *Sobti Khatris* of the Gujrat District are governed in matters of succession by the customs prevailing amongst agriculturists. **P.** ISHAR DEVI v. BINDRABAN, 5 P. R. 1915 **656**

——— —, **proof of**—Custom recorded in *Wajib-ul-arz* at variance with *Mitakshara* Law, weight of—Court, duty of **98**

— —— **Succession**—*Presumption*—*Onus*—*Barki Sayads of* Basti *Pirdad Khan, Jullundur District*—*Daughters, whether exclude nephews.*

The presumption according to Customary Law being in favour of the exclusion of a daughter by a near collateral, the onus is on the daughter to prove an exception to this rule.

Among Barki Sayads of *Basti* Pirdad Khan Jullundhur District a daughter succeeds to the ancestral estate of the father to the exclusion of his nephews. **P.** ATA MUHAMMAD KHAN v. JIWANI, 2 P. W. R. 1915; 33 P. L. R. 1915 **492**

——— ——, **validity of**, to be determined when custom established—Revision—Interlocutory orders, when can be reversed. **954**

Customary easement. *See* EASEMENTS ACT, s. 18.

Damages, liability for—Malice—Erroneous decision, procuring of **296**

——————, measure of—Tenant, right of, to cut trees—Lease providing for payment of full value of trees by landlord on resuming **271**

——————Monthly servant leaving without notice, whether entitled to damages—Master—Notice **270**

——————, suit for—Lessee, failing to pay Government revenue as contracted, liability of—Damages, measure of **406**

Debts contracted for family purposes by eldest member of joint Hindu family, how far binding on family **393**

Decision, perverse, on facts—Erroneous admission of evidence—High Court in revision, interference by **106**

Declaratory decree—*Revenue Court decree allowing maintenance, enforcement of—Decree—Execution proceedings or suit in Civil Court.*

A decree passed by a Revenue Court in accordance with an award entitled a woman to receive a fixed sum as maintenance in half-yearly instalments and provided that if the maintenance was not paid, she might enforce its payment by taking proceedings in a competent Court:

Held, that the decree was merely a declaratory decree as to the right to receive maintenance, and could be enforced by a suit in the Civil Court, and not by an application for execution of the decree. **A.** ANUPA KUER *v.* ACHCHAIHAR SINGH, 13 A. L. J. 38 **597**

——————————**suit,** maintainability of—*Cestui que trust* **55**

——————*maintainability of, where paternity of an illegitimate son is denied—Criminal Procedure Code (Act V of 1898), s. 488—Order for maintenance of an illegitimate son.*

Defendant No. 1 brought a claim for maintenance in the Magistrate's Court under section 488, Criminal Procedure Code, against the plaintiff whom she averred to be the father of her illegitimate son, defendant No. 2. She obtained an order for maintenance. Basing his cause of action upon that order, the plaintiff brought the present suit for a declaration that the defendant No. 2 is not his son and that he had never an illicit connection with the defendant No 1:

Held, that the suit for a declaration that defendant No. 2 was not an illegitimate son of the plaintiff was maintainable. **O.** KAILASA v. RAGHUBAR, 17 O. C. 331; 1 O. L. J. 735 **526**

——————*Pre-emption—Succession—Mortgage of ancestral land—Sale of equity of redemption, whether sale for purposes of pre-emption—Widow of donor still alive—*Riwaj-i-am*—Sale of ancestral house—Ancestral and acquired property.*

A mortgaged his ancestral as well as acquired land to *B* and later on he gifted the mortgaged property and an ancestral house to *B* in lieu of the mortgage-money, *plus* past services and maintenance of *A's* widow till her death. *A* died leaving his widow. The reversioners of *A* brought a suit claiming:

(1) immediate possession as heirs to *A*;

(2) pre-emptive rights in respect of the gift as if it was a sale;

(3) declaration protecting their reversionary rights:

Held, that the plaintiffs could not get possession of the land as heirs in the life-time of the widow.

Held, also, that as regards the area already mortgaged, the transaction should be treated as a valid gift of the equity of redemption in lieu of services and hence the plaintiffs could not get the land by pre-emption.

Held, further, that as the acquired property can be given to any one at the pleasure of the owner, the reversioners could not challenge the alienation of this property.

Held, lastly, that the reversioners were entitled to a declaratory decree only as regards the ancestral house it not having been mortgaged before the gift of the equity of redemption took place. **P.** YARAN *v.* GULRANG, 164 P. W. R. 1914 **882**

Decree, form of—Hindu Law—Joint family—Liability of sons for debts of deceased father—Right of creditor to sue any or all sons **362**

Defamation. *See* PENAL CODE, s. 499.

——————————Slander—Invited guest turned away because he had taken meals at widow marriages—Excommunication—Outcasting—Caste questions—Jurisdiction of Civil Courts—Penal Code (Act XLV of 1860), s. 499, Expl. 4. **460**

Dekkhan Agriculturists Relief Act (XVII of 1879), ss. 3 (w), 10, 53—*Suit falling under s. 3 (w)—Revision, who can entertain.*

Against the decision of a first Court in a suit falling under section 3 (*w*) of the Dekkhan Agriculturists Relief Act, a First Class Subordinate Judge cannot entertain a revision, though a District Judge can do so, under section 53 of the Act. **B.** SITRAM MORAPPA NAWALE v. KHANDOBA, 6 Bom. L. R. 756 **606**

——————————**ss. 10, 53** **606**

Discretion—Opinion formed on Police report **646**

——————**of Court**—Decision erroneous **366**

Divorce. *See* MUHAMMADAN LAW.

——————*Dissolution of marriage—Petition by husband—Parties of Indian domicile—Wife, security for costs of—Succession Act (X of 1865), s. 4.*

In a case for the dissolution of marriage brought by a husband against his wife, where the parties are of Indian domicile and so subject to section 4 of the Indian Succession Act and where the wife has no separate property or means of her own, the Court can order the husband to give security for his wife's costs of the suit. **C.** BATEMAN *v.* BATEMAN, 41 C. 963 **488**

Divorce Act (IV of 1869), s. 10 599

Document, construction of. See CONSTRUCTION OF DOCUMENT.

——————*Intention of parties to instrument —Contents of document and evidence of surrounding circumstances to be considered—Payment of debt, right to enforce, not necessary in mortgage by conditional sale—Sale-deed providing for vendee to return property and cancel sale if consideration money paid within certain period Mortgage by conditional sale—Transfer of Property Act (IV of 1882), s. 58 (c)—Redemption.*

The intention of the parties to an instrument is to be gathered, not from the name given to it, but from its contents and the relations sought to be created by its terms, as also from such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the instrument was related to existing facts.

A right to enforce payment of the debt is not a necessary corrolary to a mortgage by conditional sale.

Where a sale-deed provides that if the vendor pays back the consideration money with interest within a certain period the vendee shall return the property conveyed and cancel the sale, the transaction evidenced by the sale-deed is not an absolute sale but a mortgage by conditional sale within the meaning of section 58 of the Transfer of Property Act, and a suit for its redemption can lie. **O.** BALDEO PRASAD *v.* CHET RAM, 1 O. L. J. 703 **706**

Document, proof of — One attesting witness called, effect of **84**

Earnest money, forfeited, whether can be recovered **121**

Easement—*Easement of necessity—Use of way, absolutely necessary, whether constitutes—Obstructing right of way for boats—Non-user for two years—Suit, if barred—Limitation Act (IX of 1908), s. 26.*

The fact that it is absolutely necessary for a person to have the use of a way, does not constitute an easement of necessity.

Where a plaintiff sues for obstructing the right of way for boats in the rainy season, the non-user of the way within two years previous to the institution of the suit is no bar under section 26 of the Limitation Act. **C.** RAM GOPAL SEN *v.* ABHOYA CHARAN GHOSH **485**

——————*Enjoyment for 20 years—Limitation Act (IX of 1908), s. 26—Kobala admitting right of easement—Evidence Act (I of 1872), s. 13—Appeal—Misjoinder of causes of action, plea of, whether allowed to be raised.*

Where an easement is enjoyed peaceably and openly as of right without interruption for a period of 20 years, the requirements of section 26 of the Limitation Act are fully complied with, and the right becomes absolute.

A *kobala* admitting the right of the plaintiff to an easement is relevant and as such admissible under section 13 of the Evidence Act.

The plea of misjoinder of causes of action cannot be allowed to be urged for the first time in the High Court. **C.** GIRISH CHANDRA *v.* KUNJA BEHARI KOWAR **781**

Easement—concld.

——————*Prescription—Right to take water—Servient owner, whether can change the path—Right of way, how exercised—User—Extent—Motive.*

When a right of way by a particular tract has been acquired by a dominant owner, the servient owner cannot force upon him, in lieu thereof, a different track, any more than the dominant owner himself can, at his discretion, take recourse to a different path.

The extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period.

Therefore a prescriptive right to take water in a particular way and at a particular place infers no right to take the supply of water in any other way and at any other place.

Obiter dicta.—Water, as it issues on excavation of a well or a tank, is not to be considered as produce of the soil and a right to enter on land and to take such water may be acquired as an easement. The elements of this right are: a right to go on the land of the servient owner; and a right to take the water.

In so far as a right of way is concerned, it is necessary to establish a private right of way by prescription that in going across the lands to any particular point or for any particular purpose, a particular route must be used.

The owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other.

No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious. **C.** JIBANANDA CHAKRABARTI *v.* KALIDAS MALLIK, 20 C. L. J. 97; 18 C. W. N. 1296; 42 C. 164 **213**

Easements Act (V of 1882), ss. 4, 15 *Easement against Government—Period of user—User for sufficiently large number of years—Burden of proof, shifting of—Evidence Act (I of 1872), ss. 124, 126—"Communication in official confidence," meaning of—Report by one officer to another, admissibility of—Detrimental to public interest—Sufficient cause—Public officer in charge of record, opinion of, whether final—Presumption—Finding of fact—Second appeal.*

A plaintiff who claims a right of easement by prescription against Government must prove sixty years' open peaceful and uninterrupted user under section 15 of the Easements Act.

The rule of law that where a plaintiff in a suit against the Government has proved his possession for a sufficiently large number of years, the burden of proof is shifted on to the Government, applies to suits for possession and if applied to suits for easement as well the plaintiff will have no right to claim the privilege where he has not even completed the period of prescription necessary against a private individual.

The words "communication in official confidence" used in section 124 of the Indian Evidence Act import no special degree of secrecy and no pledge or direction for its maintenance but include generally all matters communicated by one officer to another in the performance of duties. These words have the same meaning as "professional confidence" used in section 126 of the Evidence Act.

Easements Act—contd.

Where, therefore, the document that was sought to be put in evidence was a report made by one officer to another, after inspection of a spot in person, and where that was objected to on the ground that its production would be detrimental to public interest, that is a sufficient cause for a Court to refuse to compel its production. The public officer in charge of the record if the sole Judge of the detrimental character of the document, and his assertion as to its character is final and binds the Court.

Where the presumption which a Court ought to raise to shift the burden of proof on facts proved before it, is fixed by no rule of law, the privilege of raising that presumption is entirely with the Court of fact and it is not open to the High Court sitting in second appeal to direct what presumption the Court should have raised, and how to vary the burden of proof in the progress of the trial of a case.

Obiter dictum.—In English Law, the privilege as to production of public documents before Courts of law extends even to those which pass from hand to hand, in a public office, in the usual course of business with no special mark of secrecy upon them and the ground upon which the privilege rests is that it would be detrimental to the public interests to produce it. **M.** NAGARAJA PILLAI v. SECRETARY OF STATE **723**

——— **s. 7, ills. (h), (i),** *distinction between—Natural stream, test and essentials of—Owner of land below, right of, to dam back natural stream—Riparian owner, right of — Damming of natural stream to better cultivate, whether ordinary agricultural operation.*

Where a stream has a continuous flow at the beginning but subsequently diversifies itself over a vast area of land, it is a natural stream and the owner of the adjacent land below has no right to put a dam across it to the injury and damage of the upper land-owners.

Per *Wallis, Offg., C. J.*—As the erection of a *bund* to dam back the water of a natural stream is an infringement of a natural right, as declared in section 7, illustration (*h*) of the Easements Act, the water of such a stream passing in a defined channel should be allowed to flow without material alteration in its quantity or direction.

Per *Seshagiri Aiyar, J.*—The essential attributes of a natural stream are that it must have a fairly defined course; it must move; and its water must be capable of identification. It need not always be confined with banks; nor need it have a continuous flow or a width of particular dimensions.

The distinction between illustrations (*h*) and (*i*) of section 7 of the Easements Act is this: In the former case the water must flow in a natural stream, in the latter, although there may be no defined channel the water must have a regulated course. The one deals with the developments of a stream, while the other deals with its beginnings. At the beginning of a stream, it is not to be expected that water will flow within well-defined bounds.

It is open to a person to protect himself against extraordinary floods. The right of any other person s not in question in such a case, as each one has a right to use means to prevent a possible sudden danger.

Every riparian owner should so conduct operations on his property as not to affect injuriously those above and below him.

To put up a dam to enable one to better cultivate his fields is not an ordinary agricultural operation. **M.** GOPALA KRISTNA YACHENDRULA VARU *v.* SECRETARY OF STATE, 16 M. L. T. 597; 2 L. W. 45; 28 M. L. J. 98 **800**

——— ——— **s. 15** **723**

——— ——— ——— **s. 18**—*Landlord and tenant—Customary easement.*

The right to crush sugarcane and to express, boil and concentrate the juice on a piece of land in the *abadi*, is incidental to the cultivation of sugarcane and is of the nature of a customary easement referred to in section 18 of the Easements Act, and can be acquired by a tenant against his landlord. **A.** RAJAB ALI *v.* RAJJOO KHAN, 12 A. L. J. 963 **122**

——— ——— ——— **ss. 59, 60**—*License—Revocation—Transferee of licensor, right of.*

The transferee of a licensor cannot revoke the license where the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution **A.** DAS BEHARI LAL *v.* AKHAI KUNWAR, 13 A. L. J. 1 **445**

——— ——— ——— **s. 60** **445**

Ejectment. *See* LANDLORD AND TENANT.

——— ——— ———Addition to holding by encroachment—Possession for more than 12 years prior to commencement of Act — *Ryots* — Presumption **888**

——— ——— ———*Ex-proprietary tenant, out of possession—Possession with vendee—Vendee occupying as sub-tenant, no proof as to—Sub-tenant, vendee not to be treated as.*

A person in whose favour ex-proprietary rights accrued but who has been out of possession, cannot assert them twelve years after the sale by virtue of which those rights accrued, and cannot, in the absence of any proof to the effect that the person now in possession occupied the land as his sub-tenant, eject that person as such **U. P. B. R.** NAGESHAR *v.* RAM TAHAL, 1 O. L. J. 692 **722**

——— ———, notice of—Adverse proprietary possession pleaded—Possession with tenants **709**

——— ——— notice of—Favourable rate of rent, tenant, holding at **624**

——— ———, notice of, contested—Under-proprietary rights claimed - Tenant to make out *prima facie* case only—Settlement Court deciding status of person, applies to all members of his family **683**

——— ——— ———, *notice of—Co-sharers, several, in one tenancy*—Patwari's *papers, entry in, showing one co-sharer's name only—Notice against one co-sharer alone, whether valid.*

Where besides the person whose name is recorded in the *Patwari's* papers, there are several other co-sharers in the tenancy as tenants-in-chief, a notice of ejectment must be issued agai nst all the co-sharers, so that in a suit to contest that notice

Ejectment—concld.

all of them may appear before the Court as parties and the questions raised in the suit be properly decided. **U. P. B. R.** ABBAS BANDI BIBI *v.* SARJU PANDE, 1 O. L. J. 531 **95**

— Notice of eviction served by Talukdari Settlement Officer under Bombay Land Revenue Code—Suit for injunction to restrain Settlement Officer from carrying out eviction—Notice of suit under section 80, Civil Procedure Code, whether necessary **749**

——— ——. *power of, not absolutely reserved under lease*—Thekadar *not authorised to eject tenants without landlord's consent*—*Notice of ejectment signed by landlord alone, whether sufficient*—*Signature of* thekadar, *whether necessary.*

Where the power of ejecting tenants is not absolutely reserved under the lease but it is simply provided that it should not be exercised without the consent of the landlord, a notice of ejectment signed by the landlord alone is insufficient and must bear the signature of the *thekadar.* **U. P. B. R.** BHAGWATI PRASAD SINGH *v.* SURAJ BALI, 1 O. L. J. 579 **263**

——— ——. Shikmi *tenant, entry as*—*Civil Court decree finding tenant proprietor and mortgagor of holding and allowing redemption, effect of,*

A person entered in the *Patwari's* papers as *shikmi* tenant, but having a Civil Court decree in his favour which says that he is the proprietor of the holding and entitled to redeem it, cannot be ejected from that holding so long as that decree holds good. **U. P. B. R.** SANWAL SINGH *v.* PRAG DAT, 1 O. L. J. 517 **86**

Electricity Act (IX of 1910), ss. 14, 19—*Damages, right of*—*Access to property cut off*—*Operator, whether can claim damages.*

Where a Gas Company was cut off from reasonable access to its own property by acts done in the exercise of its powers by an Electric Supply Company, and those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be:

Held, (1) that upon a true construction of Act IX of 1910, the damage claimed to have been suffered by the Gas Company was the subject of compensation under section 19 of the Act;

(2) that section 14 did not apply and the Gas Company could not be deprived of its remedy in respect of the portion of the cables.

Obiter dictum.—An operator cannot claim damages for acts of his own or done on his behalf and at his expense by the owner. **B.** BOMBAY GAS COMPANY AND BOMBAY ELECTRIC SUPPLY *In re,* 16 BOM. L. R. 964 **692**

——— ——— — **s. 19** **892**

Encumbrance, suit to annul—Conditions to be fulfilled **436**

Endorsement. *See* Limitation Act, s. 19.

Endowment, sufficient evidence of **621**

Enhancement of rent, *suit for*—*Rent unvaried for 20 years before suit*—*Bengal Rent Act (X of 1859), s. 16*—*Presumption, how displaced*—*Tenure appertaining to endowment*—*Government sanction, whether necessary for suit for enhancement of rent.*

Enhancement of rent—concld.

Where it is found as a fact that a tenure, though held at a rent which has not been varied for a period of 20 years before suit, came into existence for the first time long after the date of the Permanent Settlement, the presumption provided for in section 16 of Act X of 859 is displaced and the tenure is liable to an enhancement of rent.

The mere fact that the tenure appertains to a public endowment of which the beneficiary is a *Thakur,* does not make Government sanction necessary for maintaining a suit for alteration of rent. **C.** BALABHADRA PRISTE *v.* JAGANNATH MAHAPRABHOO **908**

Enquiry—Offence compoundable without sanction of court **993**

Equitable estoppel Landlord, whether bound by equities binding on his *thekadar*—Compensation, assessment of—Assessors, failure to appoint, effect of—Irregularity **476**

Equity of redemption. *See* MORTGAGE.

Estoppel. *See* EVIDENCE ACT, s. 115.

——— — Assent, doctrine of **757**

— ——Mortgage—Auction-purchaser — Notice **427**

— — ——. plea of, when available **817**

— — Statement made by party or his Pleader Admissibility in evidence **98**

Evidence of bad character—Facts necessary to prove **625**

— Compromise petition—Reciting release of co-parcener's right in family property, admissibility of, without registration **490**

— — of general repute **1003**

— ——Government order, proof of **151**

— Minor—Alienation of land by guardian for valid debt—Recitals in documents as to its binding nature, whether sufficient—Evidence. **66**

— Old alienation—Court, duty of, to regard alienee's evidence indulgently—Recital in deed, whether sufficient proof of legal necessity **376**

— Possession of one part, whether possession of another part **86**

— Practice—Witness improving on his former statement—Colouring matter of blood on clothes and nail-parings of accused—Murder. **667**

——— — Receipt extinguishing mortgage, whether requires registration. **360**

——— — Recitals in *inam* title-deed, if conclusive as to enjoyment—Evidence *aliunde,* admissibility of, to disprove such recitals **187**

——— — Report of Municipal Overseer, admissibility of **670**

——— ——— Cess Act (IX of 1880, B. C.), s. 95—Returns, whether admissible in evidence in favour of the person filing them—Words as to address, directory **126**

——— Re-union after separation **43**

——— — Rules of evidence—General repute, evidence of—Admissibility of evidence, test of—Witness to general reputation—Examination and cross-examination—Practice **153**

——— ———, value of—Mere suspicion, whether sufficient evidence—Oral or documentary evidence to prove statements made in departmental inquiry, whether admissible. **307**

Evidence Act (I of 1872), ss. 2, 17, 21, 114—*Consideration—Recital of consideration in document, evidentiary value of—Burden of proof, shifting of.*

A recital of payment of consideration in a mortgage document is an admission by the mortgagor within the meaning of sections 17 and 21 of the Evidence Act and may be proved against a person claiming under him, though not a party to the document.

Whether a specific piece of evidence is enough for discharging the burden of proof is a question primarily concerned with the weight to be given to that piece of evidence and is not a question of law.

Where each party has adduced evidence tending respectively to prove and disprove a fact in issue, the importance of burden of proof disappears almost entirely.

The mere proof of acknowledgment of receipt of consideration does not necessarily shift the burden of proof, or must not necessarily be taken as insufficient to shift the burden of proof. GADIAN CHETTI v. VEERAPPA CHETTI. **M.** 28. M. L. J. 92 **899**

——— ——— **ss. 11, 18, 19 and 21**—Oral evidence as to statements of deceased executant—Cancelled registered document, admissibility in evidence of—Admissions against one's own interest, when lose their force as such—Unregistered document, whether can be referred to for ascertaining executant's state of mind at or about time of its execution **547**

——— ——— **s. 13** **841**

——— ——— **ss. 13, 32**—*Transaction—Admission against interest—Documents containing recitals as to whether property belongs to particular persons—Admissibility in evidence.*

The word "transaction" in section 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons.

In a case where certain properties were claimed as the property of a particular family, the following documents were put in evidence:—

(1) Sale-deeds executed by the widows of the family asserting that the properties covered by them belonged to their husbands;

(2) written statements filed by them in suits to which they were parties and in which they had made recitals;

(3) Recitals in a sale-deed between third persons in which, in describing the boundary of the property sold, the suit property was described as that of the particular family.

Held, (Per *Ayling,J.*).—That the documents mentioned in (1) and (2) were admissible in evidence under section 13 (*a*) of the Evidence Act, as "transactions;" but the documents mentioned in (3) were not admissible in evidence either under section 13 (*a*) as a "transaction" or under section 32 as an admission against interest.

Per *Seshagiri Aiyar, J.*—That all documents were inadmissible in evidence. **M.** SARIPALLI VENKATARAYAGOPALA RAJU *v.* FOTA NARASAYYA, (1914) M. W. N. 779 **747**

——— ——— **s. 16** **962**

——— ——— **s. 17** **998**

——— ——— **ss. 18, 19** **547**

Evidence Act—contd.

——— ——— **s. 21** **547, 899**

——— ——— **s. 24**—*Murder — Confession to Thugyi on inducement to confess, whether admissible —Questions and answers based on such confession, admissibility of.*

The *thugyi* or headman of a village is a person in authority within the meaning of section 24 of the Evidence Act. Therefore, the confession made by an accused to the *thugyi* on being sent for by him after he was told that he would not be punished if he had not taken part in the offence, is irrelevant and inadmissible in evidence, as what the *thugyi* told the accused was an inducement to make a statement.

Other questions and answers in the examination of the accused based on this inadmissible statement are also inadmissible. **L. B.** NGA KYAHIN T *v.* EMPEROR, 15 CR. L. J. 681. **129**

——— ——— **s. 25**—Confession made to some person in presence of Police Officers, admissibility of—Admission of offence just after commission, effect of—Presumption **654**

——— ——— **ss. 25, 33**—*Confession to Police Officer—Statements made by accused in order to exculpate himself—Test of admissibility—Admission of deposition when witness not found, when allowed—Circumstantial evidence.*

Section 25 of the Evidence Act does not say, that all statements made to the Police are inadmissible but it excludes only confessions made to them: there being a distinction between mere admissions and confessions which are statements either directly admitting the guilt of the accused or statements which suggest the inference that he committed the crime with which he is charged. Further, the general rule is subject to that which admits statements leading to discovery whether such statements amount to a confession or not.

Statements put forward by the accused by way of his defence are admissible notwithstanding that they are shown by other evidence to be inconsistent with truth.

A useful test as to the admissibility of statements made to the Police is to ascertain the purpose to which they are put by the prosecution. Such statements are admissible if they are relied on, not because of their truth, but because of their falsity.

Sufficient ground for the admission of the previous deposition of a witness under section 33 of the Evidence Act is not established where the only evidence is the statement of a Police Officer that the witness is a man of another district and cannot be found, but where there is no evidence to show what was done to find the man.

In order to justify the inference of guilt the prosecution must show that the inculpating facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. **C.** EMPEROR *v.* KANGAL MALI, 41 601; 15 CR. L. J. 713 **161**

——— ——— **s. 26** **723**

——— ——— **ss. 32 (5), 50**—*Relationship—"Conduct," meaning of.*

In order to make a statement of a witness admissible in evidence under section 32 (5) of the Evidence Act it is not necessary that the special

Evidence Act—contd.

means of knowledge of the witness should be of a particular character: it is for the Court to decide whether the witness had such special means of knowledge or not.

Where the question is whether one person is related to another in any degree, the fact that according to the religious usage of the party the names of particular persons are usually recited or omitted during the performance of ceremonies, and the observance of pollution, are instances of conduct within the meaning of section 50 of the Evidence Act and are admissible in evidence. **M.** RAMAKRISHNA AIYAR *v.* CHINNA VENGAMMAL **110**

——— ——— **s. 32** **962**

——— ——— **s. 33** **161, 962**

——— ——— **s. 33**—*Evidence given in one suit, when treated as evidence in another suit—Practice.*

Evidence given in one suit can, by consent of the parties to another suit, be treated as evidence in that suit although the former suit was not between the same parties. **M.** KRISHNA REDDI *v.* SUNDARA REDDI, (1914) M. W. N. 931 **334**

——— ——— **ss. 33, 92**—*Proof of fraudulent dealing with third person's property—Purchaser of equity of redemption—Representative-in-interest.*

Section 92 of the Evidence Act does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. For the purposes of section 33, Evidence Act, a purchaser of the equity of redemption is a representative-in-interest of the mortgagor. **L. B.** MA SHWE LA *v.* MG. KYIN **111**

——— ——— **s. 35** **841**

——— ——— **s. 49**—"Usages of any body of men," whether cover *Panchayat's* inferences or conclusions—Relevant fact—Evidence as to admission and confession, whether admissible **625**

——— ——— **s. 50** **110**

——— ——— **s. 54** **995**

——— ——— **s. 58** **337**

——— ——— **s. 63**—*Translation of grant contained in official letter, whether public record—Secondary evidence—Admission in evidence—Madras Estates Land Act (I of 1908), s. 2.*

The translation of a grant contained in a letter from one official to another does not come within the provisions of section 63 of the Evidence Act and so cannot be admitted as secondary evidence of the grant. **M.** AMBALAVANA PANDARA *v.* KUPPACHI JANAKI **618**

——— ——— **ss. 68, 69**—*Illiterate witness—Mark of attesting witness on mortgage-deed—Proof of document—One attesting witness called, effect of.*

Section 68 of the Evidence Act requires that at least one attesting witness should be called for the purpose of proving the execution of the document. The witness may or may not be able to prove the document or he may have forgotten all the incidents relating to its execution or may dishonestly deny its execution altogether.

Evidence Act—contd.

In order to prove a document to have been signed by a witness or to have been in his handwriting, it should be shown to him and he should be questioned directly upon the point.

If a man fixes his mark on a mortgage-deed as a witness, he is an attesting witness within the meaning of section 69 of the Evidence Act. **A.** CHIRANJI LAL *v.* POORNA, 12 A. L. J. 1114 **84**

——— ——— **ss. 68, 71**—*Proof of document—Only living attesting witness denying execution—Pardanashin lady, dealings with, how conducted.*

Where the only living attesting witness of a document was illiterate and on being examined denied its execution:

Held, that the document could be proved by other evidence.

In case of dealings with the *pardanashin* ladies, it is very important to see that such ladies understand what they are doing. It is also most important to see whether there was real consideration.

It is not necessary that a lady should have actually signed a bond with her own hand. If she was illiterate she could not sign it. It is sufficient to find that the bond was executed in her name by some one whom she permitted to do so. **A.** BADRI PRASHAD *v.* GAMBHIR KUNWAR **500**

——— ——— **s. 69** **84**

——— ——— **ss. 79, 106, 114**—*Minor—Plea of minority—Burden of proof.*

In the case of a contract if a plea of infancy is set up, it is for the party who sets it up to prove it. **M.** JOHI BIBI *v.* VAJIAR KHAN SAHEB **407**

——— ——— **s. 90**—*Presumption—Genuineness of document 30 years old—Question of law or fact—Second appeal* Zemindar, *grant by*—Ashtabogam *and* Sarvamaniam, *meanings of.*

Where the question is whether the grant made by a *zemindar* was only of land with the occupancy rights therein or of land revenue merely, the fact that in the *inam* grant the terms "Ashtabogam" and "Sarvamaniam" are used, merely means that there is no superior holder and that all the rights of the grantor are conveyed without reservation. Such rights as communal rights, are not conveyed by such words and rights of occupancy also can be presumed to have been excluded, if there were tenants already on the land. The grant should be construed as one of land revenue, and not of the land itself.

Sankran Nair, J. The presumption which the Court has to raise under section 90 of the Indian Evidence Act as to the genuineness of a document 30 years old, is one of fact and stands on the same footing as any other piece of evidence and the question being one of fact, the High Court in second appeal will not interfere with a finding given on it by the lower Court.

Tyabji, J. (dissenting.)—Such a presumption is one of law and the High Court can in second appeal interfere and see if the findings of the lower Court are correct. **M.** PARANKUSA ZATINDRA MAHADESIKASWAMI *v.* SUBRAMANIA PILLAI **117**

——— ——— **s. 92** **111**

——— ——— **s. 92**—Contracting party whether principal or agent, parol evidence to prove, whether admissible **824**

Evidence Act—contd.

——— — **s. 92**—*Evidence, extrinsic, admissibility of—Transaction, real nature of, can be proved by oral evidence—Conduct and acts, subsequent, of parties to transaction—Sale really mortgage.*

Extrinsic evidence as to acts and conduct of parties to a transaction is admissible to show the real nature of the transaction (*e. g.*, to show that a sale-deed is really a mortgage-deed), not by what they intended to do, but by what they did or have been doing. **O.** ABDUL BASIT *v.* KHODA BAKHSH, 1 O. L. J. 714 **717**

——— — **s. 92**—*Registered sale-deed Oral agreement of mortgage, whether can be proved—Fraud, if alleged, should be specifically pleaded.*

Oral evidence cannot be given to show that the parties to a deed of sale intended the transaction to be one of mortgage and not of sale.

A party relying on fraud ought to allege it specifically in the plaint. **P.** GHAMAN *v.* KANHIYA MAL, 15 P. W. R. 1915 **426**

——— — **s. 92, Pro. (2)**—*Promissory note, suit on—Rate of interest not mentioned—Oral contemporaneous agreement, whether admissible to prove rate of interest—Admission by defendant as to rate of interest, effect of.*

Where a promisssory-note is silent about interest, section 92, proviso (2), of the Evidence Act (I of 1872) would bar the admission of any evidence to prove that interest was agreed to by a contemporaneous oral agreement.

But where the defendant admits that he agreed to pay interest at a certain rate, effect may be given to such admission without encroaching upon the rule. **C.** LUCHMI CHAND JHOWAR *v.* HEMENDRA PRASAD GHOSH, 18 C. W. N. 1260 **935**

——— — **s. 92 (2)**—*Promissory note silent as to interest—Contemporaneous oral agreement as to interest, whether provable.*

Where a promissory-note is silent as to interest, evidence of a contemporaneous oral agreement as to the rate of interest, cannot be allowed under proviso (2) of section 92 of the Evidence Act as it would have the effect of materially adding to the terms of the written contract. **C.** LACHMI CHAND JHOWAR *v.* HEMENDRA PRASAD GHOSH, 18 C. W. N. 1260 **736**

——— — **ss. 102, 103** **253**

——— — **s. 112**—*Legitimacy — Presumption—Non-access—Impotence—Question of paternity one of evidence only.*

The presumption created by section 112 of the Evidence Act can only be rebutted by proof of non-access, and to prove non-access, the evidence must be such as to exclude all doubt. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy.

Proof of impotence would be equivalent to proof of non-access.

Where the point for decision is one of evidence (*e. g.* paternity) only, the case would be governed by section 112 and not by the personal law of the parties.

The question of a child's paternity is not one of succession, inheritance, marriage, or caste or any religious institution or usage, within the meaning of section 13 of the Burma Laws Act, 1898. **U. P. B. R.** NGA TUNE v. MI CHON, U. B. R. (1914) II, 23; 16 CR. L. J. 84 **996**

Evidence Act—concld.

——— — **s. 112**—*Legitimacy—Son born seven months after marriage—Punjab Land Revenue Act (XVII of 1887), s. 44—Presumption of entries—Burden of proof.*

Where a boy was born about seven months after his father and mother were lawfully married and it was not disputed that they had had opportunity of access to each other at a time when he could have been begotten of them:

Held, that the boy was the legitimate son of his parents.

Where mutation has been effected in favour of *A* as the legitimate son of *B*, the burden of proving the illegitimacy of *A* will lie upon the person affirming it. **P.** MAHBUB ALI *v.* TAJ KHAN **969**

——— — **s. 112**—*Presumption of legitimacy—Alienation by father 276 days before birth of son—Right of son against purchaser for value—Burden of proof.*

Section 112 of the Evidence Act raises only a presumption of legitimacy and has no reference to the date of conception.

A purchaser for value is not bound to enquire whether the wife of the seller is *enceinte* and the right of a son in the womb cannot, therefore, prevail against him.

If the son wishes to rely on the defence that he was conceived before the date of the alienation, it is incumbent upon him to prove this by clear and satisfactory evidence. **M.** DATLA VENKATASUBBA RAJU GARU *v.* GATTEM VENKATARAYADU, 27 M. L. J. 580; 16 M. L. T. 508 **61**

——— — **s. 114** **204, 899, 962**

——— — **s. 115** **284**

——— — **s. 115**—Estoppel—Suit to recover excess commission, whether to open settled account—Laches—Acquiescence—Commission once charged on whole, whether allowed on part property sold **284**

——— **s. 115** — Estoppel — Daughters taking under Will, whether estopped from claiming as heirs—Partition, oral, whether valid **455**

——— **ss. 124, 126**—"Communication in official confidence," meaning of—Report by one officer to another, admissibility of—Detrimental to public interest—Sufficient cause—Public officer in charge of record, opinion of, whether final—Presumption—Finding of fact—Second appeal **723**

——— **s. 126** **723**

——— **s. 157**—Statements to Police Officers, admissibility of **138**

——— **s. 165** **995**

——— **s. 167** **50**

Execution of decree—*Application more than 12 years from date of decree—Civil Procedure Code (Act V of 1908), s. 48—Decree directing execution of conveyance—Undisposed of execution petition considered as pending—Fresh execution application—Continuation of old application*—Res judicata—*Particular construction of decree—Records of Court lost—Court's power to construct lost records.*

Barring the decrees granting injunctions section 48, Civil Procedure Code, applies to all other decrees.

Execution of decree contd.

A decree directing the execution of a conveyance might come under the expression "directs the delivery of any property" in section 48, Civil Procedure Code.

An application for execution is to be taken as pending until it is *validly* disposed of.

Therefore where there was nothing to show that an execution petition praying for the execution of a conveyance was either dismissed, or struck off, or otherwise disposed of:

Held, that the application was still pending and that a subsequent execution petition containing the same prayer was only a petition to continue proceedings under the old petition.

A particular construction of a decree operates as *res judicata* in subsequent proceedings between the same parties.

A Court has inherent power to construct its lost records. **M.** VENKATAMMA *v.* MANIKKAM NAYANI VARU, 16 M. L. T. 393 **244**

——— *Application to revive execution proceedings—Limitation.*

A decree for the demolition of a house was passed on 31st July 1907. On 15th of February 1909, an application was made for execution. On 26th of May 1909 the judgment-debtor put in an application asking for two weeks' time to demolish the house. The decree-holder consented to it. The Court in order to lighten its file by removal of one case from it ordered to strike off the application for execution. On 21st of July 1913 the decree-holder again made an application that steps should be taken to demolish the house:

Held, that the application of the 21st July 1913 was an application to revive the former application and the execution was not barred by time. **A.** GANGA PRASAD *v.* JWALA PRASAD **815**

——— *Decree directing payment of money within prescribed period—Provision for forfeiture of right to recover possession of land if money not paid within prescribed period—Payment made within prescribed period after decree's confirmation in appeal—Right to recover possession of land, whether forfeited.*

Where the decree of a Court directs a party, as a condition precedent to his recovering possession of certain property, to pay to another party within a prescribed period a certain sum of money, and also provides that if the former fails to pay as directed within the prescribed period, he shall forfeit his right to recover possession of the property and the party so directed pays the requisite amount within the same period, not from the decree of that Court, but from the decree of the Appellate Court which confirms the decree of the lower Court on that party's appeal, he does not forfeit his right to recover possession of the property. **B.** SATVAJI BALAJIRAO *v.* SAKHARLAL ATMA RAM, 16 Bom. L. R. 778 **754**

——— *Decree in foreign Court—Voluntary submission to jurisdiction—Transfer of execution proceedings to British Court, where judgment-debtor resides—Decree, whether can be executed.*

A decree passed against a person who voluntarily submits to the jurisdiction of a foreign Court can, on transfer, be executed in the Court within whose jurisdiction he resides. **B.** HARCHAND PANAJI *v.* GULABCHAND KANJI, 16 Bom. L. R. 620; 39 B. 34 **265**

——— ——— Decree, transfer of, recognition of—Judgment-debtor, right of, to appeal—Adjustment, uncertified, admissibility of, in evidence—Fraud not specifically alleged—Transferor admitting transfer—Consideration, want of, for transfer, if can be pleaded by judgment-debtor **944**

——— ——— Decree transferred to Collector—Court which passed decree, powers of—Jurisdiction **266**

——— ——— Judgment-debtor declared insolvent—Appeal by decree-holder—Step-in-aid of execution **262**

——— ——— Order directing execution—Decree—Appeal—Partner in a firm individually served—Service without notice, effect of—Failure to appear—Right of decree-holder to proceed with execution **866**

——— ——— **proceedings**—Attachment of property by two decree-holders—Sale ordered under first attachment—Private alienation of property after attachment—Deposit of decretal amount of first decree-holder—Assets, rateable distribution of—Second decree-holder, right of **264**

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——— ——— ——— Judicial proceedings—Jurisdiction of Court **1003**

——— ——— ——— Sale-proceeds, distribution of—Mortgagee, whether entitled to share without obtaining decree **273**

——— ——— **sale** Subsequent insolvency of debtor, if affects purchaser's right—Official Assignee, right of, to set aside sale and stop confirmation **421**

Ex parte decree, application to set aside **412**

——— ——— Decree passed against a deceased defendant, whether *ultra vires* **830**

——— ——— **proceeding**—*Minor defendants—Guardians* ad litem *not informed—Service, insufficient, of notice—Civil Procedure Code Act (V of 1908), O. XXXII, rr. 3, 4.*

A case cannot be heard *ex parte* against minor defendants where their guardians *ad litem* were appointed without notices having been sent to the proposed guardians or to the minors as required by Order XXXII, rule 3, Civil Procedure Code, and on this irregularity being brought to light, notices were issued against them but were not sufficiently served. **O.** LAL HANWANT RAM *v.* MUHAMMAD ABUL HASAN KHAN, 1 O. L. J. 708 **712**

Ex-proprietary tenancy—*Adverse possession.*

A person cannot acquire the "status" of an ex-proprietary tenant by adverse possession, though he can obtain by adverse possession an absolute title to the property. **A.** BALDEO *v.* ULFAT RAI, 12 A. L. J. 1153; 37 A. 22 **21**

Extradition Act (XV of 1903), ss. 7 (2), 15—*Execution of warrant by District Magistrate—Revisional power of High Court*—Habeas Corpus *Criminal Procedure Code (Act V of* 1898), s. 491.

Where a warrant is issued by a Political Agent under section 7 of the Indian Extradition Act, its execution by a District Magistrate in accordance with the Act is an executive act and the High Court has no power to interfere in the exercise of its revisional powers. There is nothing in this view which in any way conflicts with the power of the High Court to interfere otherwise than by way of revision. Thus, the power of the Court to interfere under section 491 of the Criminal Procedure Code is untouched by this decision.

If a fugitive criminal arrested under section 7 of the Indian Extradition Act considers himself aggrieved, he can invoke the action of the Government under section 5 of the same Act. **C.** GULLI SAHU *v.* EMPEROR, 19 C. W. N. 221; 21 C. L. J. 112; 16 CR. L. J. 31 **335**

——————— **s. 15** **335**

Favourable rate of rent, *tenant holding at—Ejectment, notice of, contested—Resumption Chapter applicable.*

A tenant holding at a favourable rate of rent cannot be ejected by notice. Proceedings under the Resumption Chapter of the Oudh Rent Act must be taken against him. **U. P. B. R.** COURT OF WARDS, ESANAGAR ESTATE *v.* GAURI SHANKAR, 1 O. L. J. 697 **624**

First report, *statement in, made by complainant—Admissibility in evidence* — Chaukidars—*Police Officers—Evidence Act (I of* 1872*), s.* 25—*Confession made to some person in presence of Police Officers, admissibility of—Admission of offence just after commission, effect of—Presumption.*

Any statement made by a complainant in his first report at the Police station is not admissible as proof of the facts therein mentioned, and cannot be used as evidence against the accused in his trial.

Village *chaukidars* are Police Officers within the meaning of section 25 of the Evidence Act.

An accused's confession to some person, although made in the presence of a Police Officer, is nevertheless admissible in evidence.

Where it is satisfactorily proved that immediately after the commission of an offence the accused made a statement incriminating himself, the reasonable inference from such a statement, in the absence of any rebutting evidence, is that the statement is a true representation of the actual facts. **O.** DAL *v.* EMPEROR, 1 O. L. J. 687; 16 CR. L. J. 62 **654**

Foreign Court, decree in—Execution **265**

Foreign judgment. *See* CIVIL PROCEDURE CODE, s. 13.

Forfeiture. *See* LANDLORD AND TENANT.

Forgery. *See* PENAL CODE, s 465.

Forma pauperis, *leave to sue in, application for—Personal right—Death of applicant before leave granted—Legal representative not entitled to continue application—Civil Procedure Code (Act V of* 1908), *O. XXII, r.* 3.

The right to make an application for leave to sue in *forma pauperis* is a personal right, and if the applicant

Forma pauperis—concld.

dies before the leave is granted and the suit is pending in Court, his legal representative cannot be allowed to continue the application, although he may present a like application fresh and independent. **O.** FARZAND ALI KHAN *v.* AMIR HAIDER, 1 O. L. J. 709 **714**

Fraud against creditors, transfer of part of debtor's property, if constitutes—Mortgage-debt, discharge of **834**

——— — Registration by Sub-Registrar within whose jurisdistion property not situate—Fictitious property not mentioned in deed **52**

General Clauses Act (X of 1897), s. 3 (39). **613**

Gift. *See* HINDU LAW.

——— *by old lady to her children—Undue influence—Presumption of domination or confidential relationship.*

Under English Law there is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law, even if made during the donor's illness and a few days before his death.

The Indian Law in this respect would be the same. Otherwise no gift by an old father to his son would be valid unless the son could show that the confidential relationship, *i.e.*, the intimate relationship of father and son, had ceased. **L. B.** MAUNG PU *v.* LUCY MOSS **39**

———Registration of gift without delivery of possession, whether valid under Muhammadan Law **466**

Grant—*Service* Inam — *Right of resumption* — Nakesh *service—Grant prior to Permanent Settlement—Distinction between service grant and grant burdened with service.*

Where the grant of certain lands as *inam* is (1) in consideration of past services done, (2) for enjoyment by the grantee from son to grandson, (3) and stipulates for the payment of *kattubadi* at Rs. 3 per annum, and (4) the service is *nakesh*, meaning thereby personal: the grant is resumable when the services are no longer required.

Per *Sadasiva Iyer, J.*—The question whether a grant is resumable or not, has to be decided on consideration of all the circumstances appearing in the evidence, including the nature of the service, the terms of the grant and the question whether the service is attached to it. A grant burdened with service even is liable to resumption, if the grantor by appropriate words reserves to himself the right of resumption.

Where the service for the discharge of which a grant is made is styled "Nakesh" and is purely personal to the grantor, the grant is more or less of the nature of a *darmilla* grant; and if it was made prior to the Permanent Settlement, it is resumable by the grantor when such service is no longer required.

Per *Ayling, J.*, dissenting)—Such a grant is a grant merely burdened with service, and not in lieu of wages, and is not liable to resumption so long as the grantor is willing to perform the services. In cases of such grant, there is no distinction between services whether public or private. **M.** KAMARAVUTU MRUTYUNJAYUDU *v.* RAJA OF PITTAPURAM, (1914) M. W. N. 936 **78**

Grove-holder, nature of, tenure of—Resumption—Groves not held as *muafi* at Settlement—Assessment of rent—Certified copy of extract from Settlement Record, mistake in, allegation as to—Deputy Commissioner, duty of—Settlement Records to be referred to **536**

Guardian, knowingly setting up false plea—Gross negligence **16**

Guardians and Wards Act (VIII of 1890), ss. 8, 16—*Application to be appointed guardian—Interference in family affairs—Court, duty of.*

A Court should refuse to take proceedings under the Guardians and Wards Act when they involve an unnecessary interference with family arrangements which are quite satisfactory.

As a general rule far less harm is done by leaving people to manage the affairs of their children in their own way than by attempting to do it for them through the agency of a District Court. **P.** HAYAT KHATUN *v.* SHARM KHATUN, 93 P. R. 1914 **524**

——— ——— **s. 16** **524**

——— ——— **s. 17**—*Minor, appointment of guardian for, principle of—Welfare of minor, fundamental principle—Hindu Law,—Discretion of Court in appointing guardian, when interfered by Appellate Court.*

Section 17 of the Guardians and Wards Act, which provides for the appointment of a guardian for a minor, does not mean that the welfare of the minor should be subordinated to the requirements of the law to which the minor is subject. It is a well-established principle that the welfare of the child is the paramount consideration in appointing a guardian for him, although regard must be had to the recognized rights of guardianship under the law to which the minor is subject. In other words, in a choice between fitness and propinquity, the former must prevail.

Under the Hindu Law, the nearest paternal relatives have no legal right to guardianship on the death of the parent of the child and in the absence of the father or the mother or the guardian appointed by the father, the selection of a guardian for a Hindu minor is to be made by the Court as it represents the Ruling Power subject, no doubt, to the principle that ordinarily the paternal kindreds are entitled to preference over the maternal kindreds. In other words, the fundamental principle to be considered is, what is for the welfare of the particular minor?

Although a Court of Appeal will not lightly interfere with the discretion of the Court of first instance in the matter of appointment of a guardian, yet where weighty reasons have been made out, the order of the first Court will be set aside.

In the circumstances of the present case the maternal uncle was preferred to the paternal uncle. NERODE BARANI DEBYA *v.* BHOLANATH SARKAR **300**

——— ——— **ss. 39, 47, 48** **275**

——— ——— **ss. 52, 53** **709**

Gujrat Talukdars Act (Bom. VI of 1888), ss. 29B, 33 (2) (cc) **749**

Habeas corpus—Execution of warrant by District Magistrate—Revisional power of High Court **335**

Habitual gang of thieves. *See* PENAL CODE, s. 401.

Heirs of tenant, *occupation by—Notice of ejectment, delay in issue of, effect of—Landlord's conduct—Acquiescence—Unstamped notice—Statutory period, fresh, commencement of.*

Where the heirs of a deceased tenant continued to hold for three years after their right to hold as such had ceased, and the landlord received no rent for that period but took measures for that purpose and eventually issued an unstamped notice of ejectment:

Held, that the landlord must under the above circumstances be taken to have acquiesced in the heir's holding, so as to give them a fresh statutory period, and that thus the unstamped notice was insufficient. **U. P. B. R.** UDIT NARAIN SINGH *v.* GUR CHARAN, 1 O. L. J. 717 **719**

High Court, power of interference—Appeal, second—Concurrent findings of Lower Courts based on no evidence **240**

——— ——— ———, power of, to add party in second appeal **25**

High Courts Act (24 & 25 Vic., C. 104), s. 15 **106**

Hindu Law. *See* CUSTOM; WILL.

——— ——— **Adoption**—*Consent of* sapinda—*Grounds of refusal personal, whether proper—Adoption with consent of remoter* sapindas, *when valid.*

A *sapinda* who is called upon to give his consent to an adoption by a widow ought not to be guided by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family, especially that part of it which the widow represents.

Therefore, an adoption made with the consent of other *sapindas* is valid, where the nearest *sapinda* refuses on the ground of losing his right of inheritance. VENKATARAMA RAJU *v.* BAPAMMA, 27 M. L. J. 638; (1914) M. W. N. 911 **888**

——— ——— ——— ———Illatom form of—Custom—Presence of son of adoptive father, whether invalidates—*Illatom* adoption—Hindu Law—Presumption **54**

——— ——— **Alienation** *by father—Son's right to question—Alienation made when he was in mother's womb.*

A Hindu son subsequently born alive is competent to contest an alienation made by the father when the son was in his mother's womb. **A.** DEO NARAYAN SINGH *v.* GANGA PRASAD, 13 A. L. J. 69 **871**

——— ——— ——— ———*by grandfather—Consent by guardians of minor—Benefit of minor—Alienation, validity of.*

If for the benefit of a minor the guardians of the minor consent to an alienation of a portion of his undivided family properties with the object of avoiding a partition of those properties the alienation is binding on the minor. **M.** ARUNACHALA PILLAI *v.* SAMPURNA THACHI, 27 M. L. J. 485 **208**

———*by widow, suit by reversioner to set aside—Legal necessity—Burden of proof—Old alienation—Court, duty of, to regard alienee's evidence indulgently—Recital in deed, whether sufficient proof of legal necessity—Sale-deed by widow incorporating conditional sale-deed by husband*

Hindu Law– contd.

invalid—Alienee, right of, to fall back upon original deed—Mulgeni *lessee*—Darkhast *grant land, whether appurtenance of leased property.*

In a suit by a reversioner to set aside an old alienation made by a widow on the ground that there was no legal necessity for the alienation, though the burden of proof as to necessity is not shifted on to the reversioner, yet the Court should approach the evidence as to the necessity adduced in respect of such an alienation by the alienee with a much more indulgent mind than where the alienation attacked took place only a few years before suit.

Recitals in documents do not of themselves afford sufficient proof of legal necessity.

If it is found that a widow was not justified in executing a sale-deed which purported to supersede and incorporate a previous conditional sale-deed executed by her husband, the alienee under the sale-deed and those who claim under him are entitled to fall back upon the rights created under the conditional sale-deed.

Land acquired on *Darkhast* grant from Government by a *Mulgeni* lessee is not an appurtenance of the properties held by him under the *Mulgeni* lease, as he is neither a trustee nor a mortgagee of the owner of the lands and his acquisition under Government grant is not an unfair gain or profit obtained by him in detriment to his lessor's interest or in a fiduciary capacity. **M.** KANTHU *v.* DASA UPADHYA **376**

——— **Alienation** *by widow — Necessity— Urgent necessity for lesser amount than realised by sale—Sale, whether valid.*

If in the case of a sale by a widow a small portion of the purchase-money was not required for urgent necessity, it does not follow that the sale itself was not due to necessity, unless it could be reasonably presumed or unless it is proved that the sale of lesser property for the exact amount required for urgent necessity was feasible. **M.** KANNU CHETTY *v.* AMIRTHAMMAL, 1 L. W. 877 **418**

——— Consent of next reversioner to alienation given in course of suit, effect of **528**

——— *of husband's estate —Interest*—Damdupat, *rule of.*

As according to Hindu Law recovery of more than double the sum lent on interest is not allowable, the payment of more than double the principal is not a pious duty. Therefore, in Berar where the rule of *damdupat* is in force, a Hindu widow is not justified in alienating her husband's property for the payment of a sum over and above double the principal. **N** RAMCHANDRA *v. Musammat* RADHA, 10 N. L. R. 91 **598**

——— Contest by remote reversioner – Cause of action—Limitation **737**

——— **Co-parcener**—*Assignment, right of—Gift of family property by father to son—Consideration - Natural love – Relinquishment by co-parcener, right of.*

It is only a transfer to a stranger of natural rights which carry with them obligations to third parties that could not be assigned under the law, but every man is perfectly entitled to waive or release any rights in property belonging to himself.

Hindu Law– contd.

Therefore a gift-deed, whereby a father relinquishes all his rights in the family property in favour of his only son, is valid and binding as it is supported by the consideration of natural love and affection.

A co-parcener can not only relinquish his share in favour of all the remaining co-parceners as a body, but he can do it in favour of even one of the several remaining co-parceners. **M.** THANGAVELU PILLAI *v.* PILLAI DORAISAMI, 27 M. L. J. 272; 16 M. L. T. 393 **211**

——— *Son—Co-parcener by birth—Will by father without son's consent invalid—Gift by widow.*

Directly a son is born to a Hindu in possession of an ancestral house, he becomes a co-parcener in the house, and the father cannot make a Will declaring who is to succeed to the property after the son's death without the consent of the latter.

A Hindu widow has merely a life-interest in the property left by her husband and, therefore, cannot make a valid gift of it without the consent of her reversioners. **P.** DIWAN CHAND *v.* JIWAN MAL **910**

——— **Flag of Pragwals,** *whether can be charged for payment of annuity——Moveable property—Mortgage—Auction purchaser—Notice—Estoppel.*

The flag used by the *Pragwals* at the confluence of the Ganges and Jumna at Allahabad is a valuable property and may be charged with the payment of an annuity and may be sold subject to that charge even in execution of a decree for arrears of the annuity.

A person who brings property to sale in execution of a decree without disclosing the existence of a mortgage which he holds on the property, cannot afterwards set up the mortgage against the purchaser, at all events where the purchaser had no notice of the mortgage. **A.** GANESH *v.* BABU RAM, 13 A. L. J. 9; 37 A. 72 **427**

——— **Guardian**—*Discretion of Court in appointing guardian, when interfered by Appellate Court.*

Under the Hindu Law, the nearest paternal relatives have no legal right to guardianship on the death of the parent of the child and in the absence of the father or the mother or the guardian appointed by the father, the selection of a guardian for a Hindu minor is to be made by the Court as it represents the Ruling Power subject, no doubt, to the principle that ordinarily the paternal kindreds are entitled to preference over the maternal kindreds. In other words, the fundamental principle to be considered is, what is for the welfare of the particular minor. **C.** NIRODE BARANI DEBYA *v.* BHOLANATH SARKAR **300**

——— *Right of guardianship—Paternal aunt, whether natural guardian—Alienation by* de facto *guardian - Limitation Act (IX of 1908), Sch. I, Art. 44.*

Under the Hindu Law no body else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties.

Therefore, under the Hindu Law a paternal aunt is not a natural guardian of a minor.

Hindu Law—contd.

An alienation by a *de facto* guardian for no necessity need not be set aside.

Article 44 of the Limitation Act does not apply to alienations by unauthorised guardians. **M.** THAYAMMAL *v.* KUPPANNA KOUNDAN, 27 M. L. J. 285 **179**

—— ——**Joint family**—*Bequest of self-acquired property by father to his sons—Presumption—Property taken by sons, whether joint property—Bequest invalid—Intestacy—Management of property by eldest member who was also executor in accordance with Will—Debts contracted for family purpose by eldest member, how far binding on family—Renewal of debt—Apportionment of security—Apportionment invalid—Security not extinguished—Power of Receiver in partition suit to acknowledge debt—Acknowledgment, effect of—Joint family trade—Promissory note executed on behalf of firm by one member, if other members can be sued.*

One *P V* died in 1887 leaving a Will, in and by which he directed that the residue of his property after payment of certain legacies should be divided at his death among his sons and grandsons, who were living with him as members of one family, into five equal shares as soon as his grandsons attained majority, that his eldest son shall be the executor to his Will and conduct the shop and business which he was carrying on in his name, and generally administer his estate. In pursuance of the directions of the Will the 1st defendant continued to manage the estate and incurred debts and executed mortgages for family and business purposes and no objection was taken as to his management by the other members of the family. In 1905 a suit was filed for a partition of the estate of *P V* by some of the members of the family and for an account of the properties left by him, on the ground that the estate became divisible under his Will, and during the pendency of the suit Receivers were appointed to pay interest and arrears of interest accrued due and payable on mortgages executed by the 1st defendant of the immoveable properties belonging to the estate. In the said suit it was decided that on a proper construction of the Will the bequest of the Will was invalid and that there was an intestacy in regard thereto. The plaintiff in whose favour promissory-notes were executed and title-deeds were deposited as collateral security therefor, sued to recover the moneys due to him from the 1st defendant and the other members of the family. The defendants, among other pleas, pleaded that the equitable mortgage was not binding on them and that the 1st defendant as executor had no power to make any such alienation and that the payment made by the Receivers towards the said debt did not save limitation:

Held, that the residue of the properties must be deemed to have been taken by the members as joint family property and that the debts contracted and the mortgages made by the 1st defendant were in the capacity of a managing member and, therefore, binding on the family.

Where a family is joint and continues joint after the death of a testator, his properties, which they get by his Will, would be joint properties, unless there is something in the Will which raises a presumption to the contrary.

Where a person borrowed money and executed promissory-notes and deposited title-deeds of immoveable property creating a valid equitable mortgage thereon and was taking subsequent advances on the strength of the same security, and some time after looked into the accounts, executed two promissory-notes for the total sum due and also two documents with a view to apportion the title-deeds of the immoveable property, which were already deposited, to each of the said promissory-notes and it was found that the said documents were invalid:

Held that the equitable mortgage originally created was not extinguished and that the mortgagee was entitled to enforce it.

The renewal of a debt does not *ipso facto* put an end to the security which a person has, unless such a renewal is accompanied by a fresh contract giving fresh security, and an attempt made to apportion the security which was invalid would not deprive the person of the security which he already has.

Where a joint family trades under a firm name, the members thereof can be sued on a note properly executed by one member in the firm's name.

A payment by a Receiver, who is appointed in a suit for partition or administration and who is authorised by the order of appointment to pay interest on debts, is sufficient to keep the debts alive against all the parties who are bound by the debts. **M.** VENKATARAMIAH PANTULU *v.* SUBRAMANIAM PILLAI, 16 M. L. T. 489 **393**

—— ——**Joint family**—*Co-parcener, exclusion of—Purchaser from co-parcener out of possession—Onus—Limitation Act (IX of 1908), Sch. I, Arts. 136, 144.*

Where a member of a joint Hindu family was refused partition of his share and remained out of possession and received no profits for over 12 years and was denied even maintenance:

Held, that he not merely did not participate in, but was excluded from, the joint family property.

Where a person purchases a property from a member of a joint Hindu family who was out of possession, the onus lies on him to show that his vendor was excluded within 12 years of the suit. **M.** SINNASAMI GOUNDEN *v.* SULBANA GOUNDEN, (1915) M. W. N. 29 **904**

—— ——*Desai inam*—Devolution of *inam* on managing member—Right of other members to share *Inam*—Grant of land and not merely of land-revenue—Jurisdiction of Civil Courts **87**

—— ——*Liability of sons for debts of deceased father—Right of creditor to sue any or all sons—Decree, form of.*

A creditor is not restricted to a suit against all the sons for the whole of the debt due by their deceased father, or if he sues one only, to a suit for a part of the debt proportionate to his share in the joint family property. In such a suit a decree should be for the

Hindu Law—contd.

whole amount payable out of the joint family property or the assets of the father in the hands of the son. **M.** SALEM TOWN BANK, LTD. *v.* RAMASWAMY AIYAR, 27 M. L. J. 236 **302**

——— ——— **Joint family**—*Managing member living separately—Mortgage in his sole name—Loan advanced out of family funds—Suit on mortgage—Non-joinder of other members, whether bars suit—Assignment—consideration.*

Where a person purporting to act for his sole benefit uses funds in which his brothers have a share for obtaining a bond, the fact that he may be accountable to his brothers affords no ground for dismissing the suit on the mortgage for non-joinder. The fact that there are disputes between the plaintiff and those interested in the profit of the transaction, would be no ground for holding that he has lost the sole right of suit.

Where there has been an assignment of mortgage, the mere non-payment of consideration to the assignor will not afford the mortgagor a good defence. **M.** ADAIKULAM CHETTI *v.* SUBBAN CHETTI, 16 M. L. T. 279; (1914) M. W. N. 684; 27 M. L. J. 621 **35**

——— ——— ——— ———*Nucleus of ancestral property - Separate acquisition by individual members—Presumption—Civil Procedure Code (Act V of 1908), s. 149 Appeal, delay in filing—Court-fee insufficient—Discretion.*

A joint Hindu family pre-supposes the possession of common property. Under the Hindu Law mere living together of the members of the family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilized for the purpose of making the subsequent acquisition, or the members must have thrown their joint earnings into hotchpot with the intention of giving up their individual rights in them.

Under section 149, Civil Procedure Code, a Court has a discretion in all cases to allow the payment of the Court-fee at any time. **M.** AKKARAJU NARAYANA RAO *v.* AKKARAJU SESHAMMA, 27 M. L. J. 677 **33**

——— ——— ——— ———*Partition, evidence of—History of family—Money transactions.*

The mere fact that no formal partition ever took place between the members of a Hindu family is not in itself conclusive against separation having occurred; the matter has to be decided upon an examination of the history of the family, of its mutual dealings, of its dealings with outsiders and upon admissions, if any, made by the members.

Money transactions between the members of a Hindu family, the one lending and the other borrowing and showing corresponding debts and credits in their books, go very far to prove disruption. **P.** MUNSHI RAM *v.* GAINDA MAL, 45 P. W. R. 1915 **390**

——— ——— ——— ———*Partition — Presumption—Certain properties left joint, whether co-parcenary right retained in those properties.*

When there is a partition in a joint Hindu family, the presumption is that it is a complete partition in status and of all the properties. If certain properties were left undivided, there is no presumption that the co-parcenary right is retained in those properties. **M.** SUNDARAMMA *v.* KAMAKOTIAH **514**

Hindu Law—contd.

——— ——— ——— ———*Separation of one member—Jointness of remaining members—Presumption—Burden of proof.*

Once it is admitted that one of the members of a joint Hindu family separated, the legal presumption is that there is a complete separation between all the members of the family, and the person who asserts that any members of the family remained joint after the separation, must prove his allegation. **O.** SURAJPAL SINGH *v.* GAJRAJ SINGH, 1 O. L. J. 698 **600**

———**Partition**—*One member separating from others—Presumption — Evidence — Re-union, separation.*

Where one co-parcener separates from the rest, there is no presumption that the latter remain united.

Where subsequent to the separation of one member, the other members take separate meals, acquire property in their own names, separately pay *kists*, etc., all these things point to a separation in interest between the members of the family and outweigh the effect of any recital of non-division made in stray documents. **M.** GADIAN CHETTIAR *v.* GADIAN CHETTIAR, 1 L. W. 799 **43**

——— ——— **Presumption** — Pattidari *body, persons related through males to member of, status of—Ejectment, notice of, contested—Under-proprietary rights claimed Tenant to make out* prima facie *case only Settlement Court deciding status of person applies to all members of his family.*

Hindu Law allows of a strong presumption that persons related through males to a member of a *pattidari* body are also themselves *pattidars.*

A tenant contesting a notice of ejectment on the ground that he has got under-proprietary rights in the holding, has simply to make out a *prima facie* case before the Revenue Court.

The judgment of the Settlement Court deciding the status of a person applies to anyone belonging to that person's family. **U. P. B. R.** RAGHUNATH KUAR *v.* COURT OF WARDS, 1 O. L. J. 587 **683**

——— ——— **Sale** *by managing member - Deed unregistered—Adverse possession against members of joint family, commencement of.*

Where there is no registered sale-deed to evidence a sale by the managing member of a joint Hindu family, limitation as against the members of the family commences from the date on which the purchaser takes possession of the property sold to him. **M** NACHIYAPPA CHETTY *v.* RAMASAMI CHETTY **383**

———**Stridhanam** — Saudayika — *Property given to daughter by father before marriage—Control of husband over such property.*

A husband has no right of control over the *Saudayika* property of gifts given to his wife by her affectionate kindred before or after her marriage **M.** MUTHUKARUPPA *v.* SELLATHAMMAL; 16 M. L. T 587; 2 L. W. 38; (1915)M. W. N. 48 **785**

———**Succession**—Mitakshara—Sanyasi—Bairagis, *whether can be classed as* Sanyasis.

The declared heir of a *Sanyasi*, under the *Mitakshara* School of Hindu Law, is a virtuous pupil.

It is doubtful whether the *Bairagis* can be classed as *Sanyasis*, because the order of *Bairagis* is not confined to the members of the twice-born castes. **B.** RAMDAS GOPALDAS *v.* BALDEVDAS KAUSHALYADAS, 16 BOM. L. R. 757 **607**

Hindu Law—contd.

——— ———**Succession** — Sonless *widowed daughter, right of—Possession adverse to deceased agnate—Limitation.*

According to Hindu Law a sonless widowed daughter is not an heiress of her father.

Where, therefore, a sonless widowed daughter remained in possession of her deceased father's property for over 30 years and it was not shown that she had re-married:

Held, that she was in possession of the properties adversely to the agnates of her deceased father and that their suit was barred by limitation **C** MUKUNDA LAL CHUCKERBUTTY *v.* MANMOHINI DEBI, 19 C. W. N. 472 **903**

——— ———Sudras — *Inheritance by illegitimate children.*

Under the Hindu Law the illegitimate children of the *Sudra* caste are heirs **L. B.** VASA NARAYANASWAMY *v.* ANANTHAYE **273**

———**Widow,** *gift by—Consent of reversioner, effect of—Alienation—Surrender—Re-grant—Evidence—Presumption—Estoppel—Partial alienation—Inheritance Full blood and half blood, preference between.*

A man who takes a deed is not ordinarily bound by statements contained in it, but where it is open to a plaintiff, in his character of next reversioner of a last male owner, to avoid or recognize a gift made by a widow, his conduct in taking a mortgage of the property which was the subject of gift from the representatives of the donee, is a representation to persons afterwards dealing with the property, whether as transferees of his mortgage or purchasers, that he is satisfied as to the transaction and does not propose to question it as next reversioner, and he is estopped from questioning the alienation of that property by the widow.

The effect of the consent of the next reversioner to an alienation made by a widow is conclusive.

Per *Seshagiri Aiyar, J.*—*Sapindas* of the full blood should be preferred to those of the half blood. A person claiming both through a male and a female is to be preferred to one who claims through the male only.

Therefore, where of the three claimants to the estate of a *propositus*, who are related in the same degree to him as being the great-grandsons of the grand father, the two are *sapindas* of the full blood while the third is that of a half blood, those of the full blood have preference over that of the half blood.

Unless apt language has been employed suggesting a surrender and a re-grant. Courts should be slow to spell them out from stray recitals in documents.

A surrender by a widow of her estate to be valid must be of the whole of the property.

In case of an alienation by a widow with the consent of the reversioners, Courts are bound to presume the validity of an alienation when the next reversioner consents to it, until it is rebutted by clear and cogent evidence.

But such a presumption does not arise when a reversioner accepts a deed of conveyance in his own favour.

Per *Kumaraswami Sastri, J.*—The consent of a reversioner to a widow's alienation is only evidence

Hindu Law—contd.

of the necessity or propriety. An alienation would not, as against reversioners other than those that consent, confer an indefeasible title to the alienee apart from any question of necessity or propriety, unless such an alienation can be supported on the doctrine of surrender or estoppel.

A mere assent of one who would be the heir if a widow died at that moment, would not entitle the widow to make alienations at her pleasure or squander the estate.

The doctrine of validation by assent is founded on the doctrine that a person may well be presumed not to act against his interest.

Where, therefore, a person who would be entitled to avoid a transaction unless certain conditions are satisfied, assents to it to his prejudice, the safe inference to draw is that the conditions existed.

In a case of surrender of partial alienation the consent must be *bona fide* and not a devise for the purpose of enlarging the widow's estate.

The assent of the reversioner has a double aspect, not merely raising a presumption, but also raising an estoppel, against the person assenting even though he might not have received any consideration or benefit.

Where an alienation is sought to be supported on the ground of consent, there is no distinction between gift and other transfers.

The widow and the next reversioner do not represent the entire inheritance and cannot deal with it as effectively as if the inheritance devolved on the next male heir.

It is not necessary that the assent or ratification on the part of the next reversioner should be before or at the date of alienation It is enough if he ratifies the transaction. **M.** NACHIAPPA GOUNDEN *v.* RANGASAMI GOUNDEN, 28 M. L. J. 1; (1915) M. W. N. 53; 2 L. W. 69; 7 M. L. T. 87 **757**

——— —**Widow.** property acquired by, with her own money—Will, inclusion in, of property in husband's estate Intention **14**

——— ———, *sale by*—Bona fide *transaction—Reversioners, right of.*

A *bona fide* sale by a Hindu widow of her husband's estate, when a greater portion of the consideration is for legal necessity and the price paid is not unreasonably low, is binding on the reversioners and the purchaser for value is entitled to retain the property. **M.** THALAGARA RAMANNE *v.* KALAGARE GANGAYYA, 27 M. L. J. 132 **178**

———**Will**—*Daughters taking estate of father under Will from mother—Oral partition—Survivorship, right of, whether extinguished—Evidence Act (I of 1872), s. 115—Estoppel Daughters taking under Will, whether estopped from claiming as heirs—Partition, oral, whether valid.*

Daughters taking the estate of their deceased father, according to a Will executed by their mother, are not estopped from claiming subsequently as heirs to their father on the ground that the Will executed by their mother in respect of such properties is invalid.

But when they divide the properties equally among themselves under an oral partition, they must be deemed to have given up their rights to

Hindu Law—contd.

succeed by the right of survivorship to the estate of a sister who may die subsequently.

A partition of immoveable property of whatever value can be effected by oral arrangement and need not be in writing and registered, as it is not an 'exchange,' 'sale,' 'mortgage,' or 'lease.'

Therefore the mere fact that the rights mutually relinquished under an oral partition are to continue for periods of greater or less duration, cannot have much bearing on the question whether written instruments are required to effect valid partitions. **M.** ALAMELU AMMAL *v* BALU AMMAL, 16 M. L. T. 592; (1915) M. W. M. 26 **455**

——— **Will**—*Gift—Devisees or donees, some members of joint Hindu family—Joint or separate—Interest of donees or devisees—Presumption.*

Where the devisees or donees are only some of the members of a joint Hindu family, and there is a clear intention to exclude the remaining members of the family and to confer on the devisees or donees interests to be held separate from any property which the joint family may happen to possess, there is no ground for assuming that the devisees or donees were intended to hold the property as co-parceners in the sense of the Hindu Law, though it may well be otherwise when the devisees or donees are all the members or heads of a joint family. **A.** PARBHU DYAL *v.* HARCHARAN **689**

———*Husband and wife—Joint Will—Devise of ancestral properties of husband and separate property of wife—Subsequent adoption by husband—Validity of Will—Construction of deed—Will or settlement—Revocability—Will for consideration.*

Where a document styles itself a Will in more places than one and is not written on a stamp paper and where according to the provisions of the document the beneficiaries are to take only after the death of its executants, who do not use any expression therein restricting their rights in the properties dealt with thereunder to mere life-interests:

Held, that the document is a Will and not a settlement.

A Will speaks only from the date of death of the testator.

A Hindu husband and wife executed a joint Will whereby it was provided that the husband of their junior daughter, who was then living with them and managing their affairs, should continue to do so along with his wife, and that after the death of the executants of the Will, their younger daughter or, if she should have a son, that son should inherit their properties, which consisted of the ancestral property of the testator and the absolute property of the testatrix. The son-in-law acted up to the terms of the said Will by residing with the executants thereof and managing their affairs until their death. Subsequent to the execution of the Will, the testator adopted a boy who survived him and died unmarried. In a suit by the reversioner of the adopted boy after the death of the adoptive mother to recover the property from the junior daughter and her husband:

Held, that the above provision in the Will did not amount to a contract to bequeath the property to the junior daughter or her son, that the continued residence of the son-in-law with the father-in-law and the performance by the former of the acts required of him as per terms of the Will did not amount to a consideration for a contract to leave the property by Will and make the Will executed by the testator irrevocable and that so far as the ancestral property of the testator was concerned, it passed to the heirs of the adopted boy but that as regards the separate property of the testatrix, the Will was perfectly valid. **M.** AIYASAMI UDAYAN *v.* APPASAMI UDAYAN, 1 L. W. 983; (1914) M. W. N. 889 **249**

——— **Worship,** *right of, in temple - Place of worship*—Sudra, *right of, to enter—Burden of proof.*

Per *Sadasiva Aiyar, J.*—Temples are intended for the worship of people belonging to all the four castes professing the Hindu religion without exception. It lies, therefore, upon a person who wishes to restrict a *Sudra* or one who has a higher caste status than *Sudra* from proceeding beyond the *Dwajasthamba* into the next hall, to establish by proof of a recognised usage of that particular temple that the individuals belonging to that community or class are not entitled to go beyond the *Dwajasthamba.*

Per *Tyabji, J.*—Whether a particular class of people are entitled to enter into a temple or not, depends upon the terms of the dedication. In the absence of any written trust-deed dedication is a reflex of the general religious notions prevailing amongst members of the community for whose benefit the temple is dedicated. **M.** GOPALA MOOPPANAR *v.* SUBRAMANIA IYER, 27 M. L. J. 253; 1 L. W. 675; (1914) M. W. N. 822 **7**

Hindu Wills Act (XXI of 1870), s. 2 **980**

——— **s. 2**—Hindu dying intestate - Letters of Administration to estate of deceased taken out by Administrator-General—Son of deceased minor on that date—Sale of one item of property by son on attaining majority—Subsequent sale by Administrator-General of same item of property, validity of **792**

Hundi—*Payment to endorsee—Railway receipt—Security — Forgery — Equity to recover - Endorsee liability of, to refund—Notice—Lost or stolen* hundi, *genuineness of—Holder, liability of—Marwari custom.*

Where the plaintiff paid to the defendant the amount of a *hundi*, not as to a Shah, bust as to an endorsee for collection of a *hundi* on the security of a Railway receipt, he has no equity to recover back the amount from the defendant if the security turns out to be a forgery.

In such a case the defendant is liable to refund the money or to trace the *hundi* to its source, provided notice is given within a reasonable time of the discovery of the forgery, that is, provided the plaintiff loses no time in making this communication and claiming the refund.

Obiter dicta.—In the case of a lost or stolen *hundi* the *hundi* is *ex hypothesi* genuine; and, therefore, the liability of a Shah who is paid does not rest on a guarantee of genuineness.

Hundi—concld.

The liability of a holder who endorses a bill of exchange and passes it on under English Law is only that of a surety for the drawer and the acceptor, but his position does not involve any liability to the acceptor.

The rule of Marwari custom and the idea underlying therein discussed. **B.** SETHNA *v.* JWALAPRASAD GAYAPRASAD, 16 BOM. L. R. 972 **896**

Hyderabad Assigned Districts Courts Law of 1889, ss. 7 (2) (b), 9 (1) (a)—*Assistant Commissioner invested with powers of Deputy Commissioner for trying original suits only, whether can appoint a guardian—Guardians and Wards Act (VIII of 1890), ss. 52, 53—Court of Justice*—Ultra vires—*Majority Act (IX of 1875), s. 3.*

An Assistant Commissioner invested with the powers of the Court of a Deputy Commissioner for the trial of original suits exceeding five thousand rupees in value, without limit as regards the value, is invested only with *some* of the powers of a Deputy Commissioner, *viz*, the power to try original suits, and is not the District Court for any other purpose. Therefore, if acting as the District Court, under the Guardians and Wards Act he appoints a guardian, his order is *ultra vires* and does not require to be set aside

Although the words "Court of Justice" in the Indian Majority Act are not qualified in express terms by the words "competent in this behalf", on general principles of law the act of a Court without jurisdiction is a nullity. **N.** BAPU *v.* BHI AJI, 10 N. L. R. 161 **709**

Improvement. *See* LANDLORD AND TENANT: TRANSFER OF PROPERTY ACT, s. 51.

——— ——— ——— by mortgagee—Construction of well—Compensation **712**

——— ——— Mortgagor and mortgagee—Mortgage of *kacha* house—*Pacca* double-storied house built on *kacha* house falling down—Mortgagor, liability of **521**

Inam. *See* GRANT.

——— title-deed, scope of—Recitals in *inam* title-deed, if conclusive as to enjoyment—Evidence *aliunde*, admissibility of, to disprove such recitals **187**

Income Tax Act (II of 1886), ss. 14, 15, 39—*Liability of executor as such—Jurisdiction to determine a person to be chargeable—Suit to set aside assessment—Payment under coercion.*

In order to succeed in a suit for a declaration that the Collector in realising certain sums from the plaintiff as income-tax acted without jurisdiction, and for a decree for the amount realised, it is incumbent on the plaintiff to show that the payment was made by him under coercion.

There is no personal exemption in the Income Tax Act of which an executor as such can take advantage.

Income accruing to an executor under the Will of a testator is income liable to be taxed within the meaning of the Income Tax Act, and the Collector acts within the limits of his jurisdiction in determining such person to be chargeable.

Income Tax Act—concld.

A suit for a declaration that the plaintiff as executor to the estate of a deceased is not liable to pay income-tax in respect of any income of the said estate is barred by section 39 of the Act. **C.** FORBES A. H. *v.* SECRETARY OF STATE, 19 C. W. N. 131; 42 C. 151 **893**

——— ——— **ss. 15, 39** **893**

Infringement of copyright—Law reports Judgments—Extracts and facts collected by reporter **30**

Inherent power. *See* CIVIL PROCEDURE CODE, 1908, s. 151.

Injunction, interlocutary, whether dissolved when perpetual injunction issued **296**

———*Religious office, transfer of—Land attached to office transferred, whether right to office also transferred—Injunction, whether allowable.*

A religious office cannot be transferred by purchase and, therefore, a purchaser of the land attached to the office as emoluments, acquires no right to the office and is not entitled to an injunction to protect his possession of it. **M.** KARAGA *v.* DEVAPPA **442**

Inquiry in progress—Detaining accused in jail—Illegality—General repute, evidence of **1003**

Intention—Murder—Hanging up unconscious body believing it to be dead—Death due to hanging—Intention—Offence—Grievous hurt **157**

Interest—Agreement that mortgaged property shall be deemed sold if interest not paid on certain date—Failure of payment—Suit for specific performance—Interest after specified date, whether allowable to mortgagee **877**

——— ——— *Damages for breach of contract, whether interest legal from date of breach.*

The award of interest on the amount of damages allowed for a breach of contract from the date of the breach is illegal. **M** KAVUTU PURNANANDAM *v.* LAKSHMINARASIMHA CHARYULU **429**

——— ———*Damdupat*, rule of **598**

——— ———Mortgage-debt—Compound interest payable until default—No provision after that date **124**

——— ———, *penal rate of—Mortgage suits—Contract rate of interest—Court rate of interest, meaning of—Interest, rate of, from date fixed for payment till date of realisation—Discretion of Court—Civil Procedure Code (Act V of 1908), s. 34—Transfer of Property Act (IV of 1882), s. 104.*

The rate of simple interest at 7½ per cent. per annum is a moderate one, in view of the general rate prevailing in this part of the country, and cannot be said to be oppressive and unconscionable.

In mortgage suits a Court may, in the absence of any rules framed by the High Court in this respect under the provisions of section 104 of the Transfer of Property Act, award interest at the contract rate even after the date fixed for payment till the date of realisation, provided that the rate is reasonable. The Court has, under section 34, Civil Procedure Code, full discretion to do so. **O.** ALLAHABAD BANK *v.* SURAJ KUAR, 1 O. L. J. 544 **177**

Interpleader *suit as to who is entitled to water-cess, whether suit for ascertainment of rent.*

An interpleader suit by tenant against landlord and Government merely to determine which party is entitled to collect water-cess from the tenants, is not a suit for ascertainment of rent within the meaning of Article 8, Part I, of the Estates Land Act. **M.** DORAISAMI REDDI *v.* VENKATACHALLAM PILLAI, 27 M. L. J. 734 **267**

Interpretation of Statutes—*Pensions Act (XXIII of 1871), ss. 11, 12—Legislative enactment, retrospective effect of—Assignment of land revenue Grant for political services—'Pension,' meaning of.*

A legislative enactment is prospective and not retrospective in its operation, except (*i*) when the Act only affects the procedure of the Court, and (*ii*) when the intention of the Legislature is clearly to give it a retrospective effect.

Therefore, the Pensions Act has not a retrospective operation and no alienations made before the Act came into force are invalid under section 12 of the Act.

A mere assignment of land revenue as such does not come within the protection given by sections 11 and 12 unless it fulfils other requirements of those sections.

An assignment of land revenue by Government may or may not be a pension, within the meaning of sections 11 and 12; therefore the answer to this question must depend on the facts of each case.

Ordinarily speaking, "pension" involves the idea of a fixed periodical allowance or stipend, and if it is granted on political considerations or for past services or as a compassionate allowance, it cannot be assigned.

Therefore, a grant of a fixed sum clearly made for political services is a political pension and comes within the protection afforded by section 12. **P.** KARAR HASSAN *v.* MUSTAFA HASSAN, 86 P. R. 1914 **743**

Intestacy—Management of property by eldest member who was also executor in accordance with Will—Debts contracted for family purpose by eldest member, how far binding on family—Renewal of debt **353**

Irregularity not affecting merits of case—Improper admission of additional evidence **50**

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———————Alienee of part of *melvaram* interest, whether landholder—Tenants under such alienee, whether *ryots*—Ejectment, suit for **510**

Jurisdiction—contd.

——— ——— ———Amendment of decree **946**

——— ——— ——— of British Indian Courts—Right to trusteeship—Temple in French territory—Parties French subjects **367**

———————*Burden of proof* - Agraharam *grant — Grantee owner of* kudivaram *— Presumption.*

It is for the party who wants to oust the jurisdiction of Civil Courts to prove the existence of facts which oust jurisdiction.

No presumption arises that the person to whom the *agraharam* had been granted was not the owner of the *kudivaram* at the time of the grant. **M.** RAMALA VENKATASWAMI *v.* KANUMALLA NARASIMHAYYA, 16 M. L. T. 596 **357**

——— ——— —— Cause of action arising in part **620**

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——— — ——— Execution of decree, proceedings no **1003**

— ——— ——— *Ex parte* decree, application to set aside - Appeal subsequently preferred—Jurisdiction to deal with application **412**

——— — Foreign judgment—Decree of Court of Cochin State—Execution in British India—Executing Court, power of, to impeach validity of decree—Jurisdiction—Suit in Cochin State—Temporary injunction *pendente lite*—Appearance of defendant—Jurisdiction objected to—Written statement also filed Submission, whether voluntary or under duress—Foreign Courts and Courts of Native States, judgments of—Suit in British India on such judgments, maintainability of **257**

———————, *how determined—Cause of action, whether affected by subsequent events - Subordinate Courts, right of.*

Plaintiff's remedy in a suit should ordinarily be restricted to the cause of action with which he comes into Court. The events that transpire since will not enable him to add to his reliefs nor will they cut down his rights.

Jurisdiction lies in the forum which is competent to grant the appropriate relief at the time of the institution of the suit.

A Subordinate Court has no right to question the order of an Appellate Court when the parties are willing to abide by it. **M.** NARAYANASAWMY NAIDU GARU *v.* KAMURI RAMAYYA, 16 M. L. T. 244; (1914) M. W. N. 713; (1914) M. W. N. 870 **475**

———————*Hundis* sent for encashment to Bombay from Dharapuram in Erode—Receipt of *hundi* and misappropriation of proceeds in Bombay—Petitiener resident of Bombay—Jurisdiction of Sub-Divisional Magistrate, Erode, to try offence—Criminal breach of trust, offence of, when complete **136**

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——— ——— ——Landlord and tenant—Cost of keeping premises clean, suit to recover **77**

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——— ———*Partnership business — Accounts, rendition of, suit for—Cause of action, meaning of—Proper Court—Place of suing—Civil Procedure Code (Act V of 1908), s. 20.*

The term "cause of action" comprises every fact which is material to be proved to entitle the plaintiff to succeed and includes an assertion of the right infringed, and of the manner in which the infringement is made.

The carrying on of a partnership business being, as a material part of the cause of action for a suit for rendition of the partnership accounts, sufficient to give the plaintiff a right to sue at the place where the business is carried on, the mere fact that the consolidated accounts of the business are kept at another place would not by itself, in view of the provisions of section 20, Civil Procedure Code, oust the Court at the former place of the jurisdiction.

A suit for the adjustment of partnership accounts can conveniently lie at any of the places where the partnership business is substantially carried on although the contract of partnership took place somewhere else, for the place where an obligation is to be performed is its main seat and place of jurisdiction. **O.** PREM NARAIN *v.* RAM LAL, 1 O. L. J. 561 **225**

——— ——— ——— to decide questions other than pauperism in pauperism enquiry—Plea of limitation, Court's power to decide **90**

——— ———Revision—Rejection of amendment application—No irregularity—High Court, power of, to interfere **808**

——— ———*Small Cause Court suit—Defendant pleading proprietary title, whether nature of suit altered.*

Whether or not a suit is of the nature triable by a Court of Small Causes depends upon the frame of the suit itself, and not upon the defence that the defendant may set up.

Therefore, a suit for the recovery of Rs. 15 being the value of certain trees cut down by the defendant, although filed in the Munsif's Court, is of the nature cognizable by a Small Cause Court and its nature is not altered even if a question of proprietary title is raised by the defendant. **A.** LALA RAM *v.* MAN SINGH, 12 A. L. J. 1032 **128**

———*Small Cause Court—Suit to recover amount paid by purchaser for incumbrance on property represented free from incumbrance—Compensation—Contribution.*

A suit to recover an amount which the plaintiff had to pay in respect of a property purchased by him from the defendant in consequence of the latter having falsely represented the property to be free from the incumbrance which the plaintiffs had to discharge, is a suit for compensation and not one for contribution and is, therefore, cognizable in a

Jurisdiction—contd.

Court of Small Causes. **A.** SARJU PANDEY *v.* MULLOO CHAUDHRY, 12 A. L. J. 1279 **909**

——— ——— ——— Suit based on contract decreed by Civil Court having jurisdiction over place of formation of contract—Place of contract transferred after decree to another Civil Court—What Court authorised to hear appeal from decree **519**

———*Suit for declaration between rival claimants to a tenancy—Jurisdiction of Civil or Revenue Court.*

The plaintiffs, who were formerly members of a joint Hindu family with the defendants, sued for a declaration that they had some interest in an occupancy-holding which belonged to the family. The defendants pleaded that the holding in question had been divided and that the plaintiffs had got consideration for the giving up of all interest therein:

Held, that the claim was one between rival claimants to the tenancy and as such was congnizable by a Civil Court. **A.** GANGA PRASAD *v.* RAM PRASAD **862**

——— ——— ——— Suit for declaration that plaintiff is an occupancy tenant—Jurisdiction of Civil or Revenue Court **719**

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——— ——— ——— **of Civil Court**—Money payable in respect of forest rights, suit for recovery of **380**

——— ——— ——— Standing crops, inquiry into ownership of—Use or enjoyment of land **684**

——— ——— **of Civil or Revenue Court**—*Claim by one proprietor against another for establishing occupancy-rights—When decree of Civil Court cannot be registered in Revenue Court—Return of plaint—Punjab Tenancy Act (XVI of 1887), ss. 77, 100.*

A suit by one of the proprietary body against another for declaring that the former is the occupancy tenant of land belonging to the latter, falls under section 77 (3) (*a*) and is consequently triable only by a Revenue Court.

When a suit of this nature has been decided by a Munsif having no revenue powers his decree cannot be registered as that of a Revenue Court by the Chief Court. The ordinary course in such a case is to return the plaint for presenting it to a competent Revenue Court. **P.** KIRPA RAM *v.* KIRPA RAM, 156 P. W. R. 1914; 282 P. L. R. 1914 **89**

——— ——— ——— ——— *Ejectment — Possession — Graveyard.*

The plaintiff succeeded in ejecting the defendant through the Rent Court from 5 out of 13 *biswas* of land and was referred to the Civil Court in respect of the remaining 8 *biswas* which were found to be a graveyard as alleged by the defendant. Subsequently on the plaintiff's suing the defendant in the Civil Court for possession of these 8 *biswas*, the defendant pleaded that the Court had no jurisdiction to

Jurisdiction—concld

entertain the suit, inasmuch as he was the plaintiff's tenant in respect of the 13 *biswas* and as in respect of these 8 *biswas* all that remained to be determined was the nature of the tenancy:

Held, that the defendant not having admitted his tenancy with respect to the 8 *biswas* in suit, no question of the determination of tenancy was involved in the case, and that the real question for decision being the existence or non-existence of a custom of burying bodies in the 8 *biswas*, interfering with the exercise of the plaintiff's proprietary rights, the suit was properly brought in the Civil Court. **O.** SAHEB DIN *v.* JANG BAHADUR SINGH, 1 O. L. J. 557 **231**

——— ——— — *Oudh Rent Act (XXII of 1886), s. 127—Civil Court decree for possession—Decree-holder not in possession—Possession, actual, with tenants from whom judgment-debtor realised rents.*

A person got against a *lambardar* a Civil Court decree for possession of a *patti* and was referred to the Revenue Courts as regards mesne profits, but even after the decree was passed, the *lambardar* continued to collect rent from the tenants in actual possession of the land comprised in the *patti*. Subsequently the decree-holder, treating the *lambardar* as a tenant under section 127 of the Oudh Rent Act, issued against him a notice of ejectment:

Held, that section 127 of the Oudh Rent Act was not applicable to the case and that the notice ought to be cancelled.

Held, further, that the remedy of the decree-holder lay in the Civil Court. **U. P. B R.** SURAJ BALI *v.* GOVINDA, 1 O. L. J. 701 **904**

——— ——— — *Oudh Rent Act (XXII of 1886), s. 127—Ejectment by notice—Adverse proprietary possession pleaded*—Prima facie *case made out—Possession, actual, with tenants.*

Where a person claims as against the landlord adverse proprietary possession of a land cultivated by his tenants, and that claim appears to be probable, that person cannot be treated as a tenant under section 127 of the Oudh Rent Act, and a notice of ejectment issued against him as such ought to be cancelled. The matter is for the Civil Courts to decide. **U. P. B. R.** BHAGWAN BAKHSH SINGH *v.* SHAFIQ-UZ-ZAMAN, 1 O. L. J. 707 **709**

——— ——— **of District Magistrate**—Bond for keeping peace, cancellation of **169**

——— ——— **of Revenue Courts**—Part of an estate, also an estate—Owner—Landholder **732**

——— ——— — Tree *pattas—Vari* payable for trees, if "rent" **60**

Jurors, nomination of—Principal to be observed by Magistrates **632**

Lambardar—*Agent—Power to consent to transfer of occupancy-holding - Partition proceedings, effect of instituting.*

The mere institution of partition proceedings does not put an end to the customary authority of the *lambardar*, as representative of the proprietary body, to consent to a transfer by an absolute occupancy tenant of his holding. **N.** CHOWBE JAIGOPAL *v.* RAMESHWAR, 10 N. L. R. 89 **606**

——— ——— — Agent—Presumption **608**

Land Acquisition Act (I of 1894), ss. 9, 25 (2)—*Object of s. 9—Objection under s. 9 not taken—Power of District Judge—Sufficient reason.*

The object of making an owner claim under section 9 of the land Acquisition Act in respect of land notified under the Act to be acquired, is to enable the Land Acquisition Officer to make a fair, reasonable and proper award based upon a proper inquiry after the proper means have been placed before him for holding such inquiry.

The bare fact that previous negotiations for sale had taken place between the claimant and the Government, is not a sufficient reason for not putting forward a claim under section 9 of the Act.

Section 25 (2) of the Act gives the Judge the right to decide as to the sufficiency or otherwise of the reasons for a man's non-appearance and not putting forward his claim under section 9 of the Act, and where no sufficient reason is given the Judge ought not to interfere with the award of the Collector. **A.** NARAIN DUTT *v.* SUPERINTENDENT OF DEHRA DUN, 12 A. L. J. 1319; 37 A. 69 **795**

——— ——— ——— **s. 25 (2)** **795**

Landlord and tenant—*Agreement to remit portion of* teerva, *how far binding—Contract Act (IX of 1872), s. 63—Promise to remit part of rent.*

A promise to remit a portion of rent, made merely out of grace and not out of any legal obligation, does not affect the right of the obligee to enforce his legal rights as regards payments due to him in future.

Where a promise to remit rent is coupled with conditions, it is not an absolute remission and the landlord is not estopped from enforcing his rights in full.

Where the agreement of parties is distinct and clear as to the rate of rent, subsequent conduct of parties is inadmissible in evidence to show that some other rate was intended by the parties. **M.** SUBBARAYA AIYAR *v.* KOLANDAVELU MUDALI **958**

——— ——— ——— Cost of keeping premises clean - Tenant, whether liable — Suit to recover costs - Jurisdiction **77**

——— ——— ——— Customary easement **122**

——— ——— ——— *Grove—Grove on* sir *land—Right of grove-holder—Ejectment.*

The plaintiff, *zemindar* of a village, permitted the defendant to plant grove on a *sir* plot on the payment of a nominal rent. Subsequently the plaintiff's *zemindari* right was sold but the grove existed as before:

Held, that the defendant grove-holder could not be ejected from the grove at the instance of the plaintiff. **A.** KAMTA SINGH *v.* PARMESHWAR **734**

——— ——— ——— *Improvement—Ejectment—Structures by tenant—Acquiescence or carelessness of landlord—Compensation.*

A tenant is not entitled on ejectment to any compensation for the materials of his structures

Landlord and tenant—contd.

unless the conditions of the lease suggest the inference that a permanent lease was contemplated or where the lessees were encouraged to build upon the area leased to them. In this connection, however, acquiescence of the landlord must be distinguished from his mere carelessness. **P.** KISHEN SINGH *v.* CHURCH MISSIONARY TRUST ASSOCIATION **936**

——— *Lease subsisting—Suit by lessor against trespasser, maintainability of.*

A landlord, though he has given a lease to a third person, is entitled for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser. **M.** SOMAI AMMAL *v.* VELLAYYA SETHURANGAM, 16 M. L. T. 532; 1 L. W. 1047; (1915) M. W. N. 12 **347**

——— Lease—Tenancy from year to year and for fixed period—Holding over—Determination of tenancy—Notice—Breach of condition—Acceptance of rent—Waiver **107**

——— *Lease—Tenant holding over—Relations, whether regulated by expired lease—Forfeiture of tenancy for non-payment of rent, condition whether incongruous.*

The terms of a lease which has terminated, may regulate the relations between the parties to the lease when the tenancy becomes one on sufferance, if they are not incongruous with a tenancy of that description.

Therefore, a condition of forfeiture inserted in such a lease for non-payment of rent holds goods after expiry of the lease under the circumstances. **M.** THAMBIKILAN MUTHIRIAN *v.* MUTHU REDDI **284**

——— Nanjai *holding*—Ryot's *right to use a portion of holding as seed-bed—Damages for non-cultivation*—Zemindar *must prove wrong use—Burden of proof.*

Prima facie the utilization of a reasonable portion of a *nanjai* holding for *nathankal*, *i. e.*, for growing seedlings for subsequent transplantation, is a proper use of the land and to make out a claim for damages for non-cultivation of the *nathankal* plots, the *zemindar* must show that the plots were wrongly used as such or that the *ryot* might and ought to have grown a crop to maturity on the same plots after removing the seedlings. **M.** RAMAKRISHNAM PILLAI *v.* ROBERT FISCHER, 27 M. L. J. 414 **797**

——— Suit to recover rent—Tenant setting up right of third party already on record **580**

——— *Surrender of tenancy, who can accept—Agent*—Lambardar—*Presumption.*

It is only the landlord that can accept a surrender or create a tenancy. Where the "landlord" is a body of two or more persons, anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body acting together or by an agent acting on behalf of them all.

The custom of appointing the *lambardar* as agent by implication and acquiescence is so nearly universal that it may be presumed that the *lambardar* has been appointed the agent of the proprietary body in every village, until the contrary is shown. But the presumption does not extend to the case of a minor *lambardar*, nor to that of his guardian. **N.** HALJNATH *v.* RAGHUNATH, 10 N. L. R. 93 **608**

Landlord and tenant—concld.

——— *Tenant, right to cut trees—Lease providing for payment of full value of trees by landlord on resuming—Damages, measure of.*

A tenant, even though he holds on a perpetual lease, is *prima facie* not entitled to cut and carry away timber trees from the holding.

Where, under the terms of a lease, the landlord is entitled to the land only on the payment of the full values of the trees to the tenant, the damages caused to the landlord by the cutting off the trees are only nominal. **M.** LATIFA BIBI *v.* NARAYANACHARI, 17 M. L. T. 202 **271**

——— Varam *agreement—Condition to cultivate land in due season, whether reasonable—Damages for non-observance of condition, measure of.*

The condition in a *varam* agreement which obliges the *ryot* to cultivate the land in due season is not unreasonable, provided that it is not read as insuring the rent in all seasons. In case such condition is not observed, the measure of damages is the average yield of neighbouring land. **M.** SEETHARAM IYER *v.* ROBERT FISCHER, 27 M. L. J. 415 **809**

Lease. *See* LANDLORD AND TENANT.

———, *construction of—Plain and unambiguous words—Words in written deed, how to be construed—Contemporaneous usage, when ground for interpretation of doubtful words—Damages, suit for—Lessee, failing to pay Government revenue as contracted, liability of—Damages, measure of—Loss sustained by sale—Transfer of Property Act (IV of 1882), ss. 123, 129—Gift—Registration of gift without delivery of possession, whether valid under Muhammadan Law.*

Where the true effect of the language used in a lease is perfectly clear, no reference is permissible to the conduct of the parties, because if according to its true construction the deed says one thing, it cannot be said that it means something else merely because the parties have gone on so long without understanding it.

Therefore, the words of a written instrument must be construed according to its natural meaning and no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

The doctrine that "contemporaneous usage is a strong ground for the interpretation of doubtful words or expressions" in a document, has no application where the document is neither ancient nor ambiguous.

In the case of sale of an estate by reason of the default of a lessee to perform his part of the contract, the measure of damages is the loss actually sustained by reason of the sale.

Obiter dicta:—

A party is not entitled to damages for breach of contract, if by the use of reasonable precautions he might have avoided loss.

The mere registration of a deed of gift in accordance with section 123 of the Transfer of Property Act cannot make up for the want of delivery of possession required by the rules of Muhammadan Law. **C.** RAHIM BAKHSH MANDAL *v.* SAJJAD AHMAD CHOWDHARY **466**

Lease—concld.

——— Endorsement by *Kanungo*—Date from which it takes effect—Subsequent registered lease—Priority **458**

——— Occupiers of houses in *abadi qassaban* in *mohalla atala*, village *Atarsuiya*, *Allahabad*—Transfer of house, right of **446**

——— *Registration of lease necessary—Lessee cannot save his ejectment by relying upon lease registration of which compulsory.*

A lessee cannot resist his ejectment by relying upon the lease which secures him in possession for an indefinite period and the registration of which is thus compulsory, inasmuch as the unregistered lease does not under law affect the land it relates to. **U. P. B. R.** RAM PRASAD *v.* SARJOO, 1 O. L. J. 585 **542**

——— Small and shallow river-beds, right in—Accreted land, lease of, whether recognized—Lease, whether in good faith **406**

——— Tenant holding over—Relations, whether regulated by expired lease—Forfeiture of tenancy for non-payment of rent, condition, whether incongruous **284**

——— Yearly rent fixed—Period of tenancy not settled—Holding over—Nature of tenancy—Registration of lease—Presumption—"Agreement to the contrary," meaning of—Notice sent by post—Calculation of period of notice—Duty of service of notice excluded—Day of expiry taken into account—On what date notice should expire—Notice signed by *am-mukhtear*, validity of **962**

Leave to appeal to King in Council—Decree of affirmance—Substantial question of law **402**

Legal necessity. *See* ALIENATION.

——— Agreement to sell by managing member of Hindu family **983**

Legal Practitioners Act (XVIII of 1879), s. 14—*Proceedings initiated in District Court—Reference to High Court Power of District Judge to award costs of proceedings before him.*

A District Judge has no power to award costs in a matter referred by him to the High Court under the Legal Practitioners Act. The High Court alone has power to give directions as to the award of costs incurred between the date of the petition and the date of reference to the High Court. **M.** VENKATA RAO *v.* MARWADI MOTIRAM, 1 L. W. 937 **125**

——— **s. 28**—*Pleader and client—Oral agreement for payment of fees and expenses, validity of.*

An oral agreement between a Pleader and his client for the payment of fees and litigation expenses is invalid and, therefore, unenforceable. **C.** ISHAN CHANDRA KAR v. RAM CHARAN PAL, 20 C. L. J. 445 **960**

Legislative enactment, retrospective effect of—Assignment of land revenue—Grant for political services—'Pension,' meaning of **743**

Letters Patent Appeal—Revision, order of single Judge in **57**

License—Revocation — Transferee of licensor, right of **445**

Limitation—Execution—Application to revive execution proceedings **815**

——— ———, plea of, Court's power to decide—Pauperism inquiry **90**

——— ——— Possession by one co-owner—Resumption—Burden of proof **922**

——— ——— Revision when other remedy open, time taken in, whether excluded to save limitation **219**

Limitation Act (XIV of 1859), s. 1 (15) **127**

——— ——— ——— **(IX of 1871), Sch, II, Art. 148** **127**

——— ——— ——— **(XV of 1877), s. 19**—*Acknowledgment of decree-debt, effect of—New Act, whether can revive barred right.*

Under section 19 of the Limitation Act of 877 acknowledgments of decree-debts had not the effect of initiating a new period of limitation.

A right barred under an old Act cannot be revived by a new Act without express words. **M.** AKKAMMA *v.* KOPPARAM RAGAPPA, (1914) M. W. N. 875 **368**

——— ——— ——— **Sch. II. Art. 11,** *applicability of—Limitation Act (IX of 1908), s. 30, scope of—Civil Procedure Code (Act XIV of 1882), ss. 278, 281—Dismissed for absence, claim under s. 278—Dismissal, whether under s. 281—Suit for possession—Limitation.*

Article 11 of the second Schedule of the Limitation Act of 1877 applies only to orders passed after inquiry.

Therefore, where a claim preferred under section 278 of the Civil Procedure Code of 1882 is "dismissed for absence," a suit for the same property is not barred if not brought within one year of the order, as the order for dismissal is not one under section 281 of the Code but under the sections which enable a Court to dismiss a miscellaneous case for default.

Section 30 of the Limitation Act of 1908 is not limited in its operation to cases in which the period of limitation has been expressly altered, but also applies to a case where the period of limitation has been altered as the result of an alteration of the description of the suit. **C.** UMACHARAN BHATTACHARJEE *v.* HIRONMOYEE DEBI, 18 C. W. N. 770 **943**

——— ——— ——— **art. 121** **436**

Limitation Act (IX of 1908), s. 5—*Omission of respondent's name in memorandum of appeal—Bona fide mistake, effect of—Admission of receipt of consideration in mortgage-deed, whether admissible in evidence.*

Where the omission of the name of a respondent from the memorandum of appeal is due to an oversight and *bona fide* mistake, the Court can extend the period in favour of the appellant under section 5 of the Limitation Act.

An admission of the receipt of consideration contained in a mortgage-deed is admissible in evidence against a purchaser by private treaty. **A.** GAYA PRASAD *v.* CHOTOO, 12 A. L. J. 941 **68**

——— ——— **s. 10** **841**

——— ——— **s. 12**—*Time requisite for obtaining copies, computation of—Due diligence—*

Limitation Act—(1908)—contd.

Application through agent—Agent's delay—Risk—Extension of time—Tender of copying fee on public holiday, whether proper.

The time requisite for obtaining copies must be measured from the date when an application for such copies is duly presented by, and the date on which such copies are duly tendered for delivery to, the applicant.

The time requisite for obtaining a copy is the time which it takes an applicant to obtain the copy using all due diligence. He must (1) present an application, accompanied by the prescribed fee, at a proper time and place to the appointed official; and (2) be prepared to take delivery of the copies at the time and place fixed for delivery. If he does not discharge both these duties he fails to exercise the due diligence required to obtain the copies. But he may do these acts personally or by an agent.

Where, however, he elects to work through an agent, he cannot claim credit for any delay caused by taking that course. The time allowed for obtaining copies through an agent is the same as would have been allowed if the applicant had himself applied for and taken delivery of them, irrespective of the question whether the agent's delay was or was not beyond the control of the principal. A principal who elects to use an agent in working against strict rules of time does so at his own risk.

The computation of time for obtaining copies of judicial records is subject to strict rules and no discretionary extensions of such time are permissible.

A suit was dismissed on the 30th November 1912. On the 14th December 1912 the plaintiff posted an application for copies of judgment and decree, and on the same day despatched a money order to pay the cost thereof. The application reached the hands of the Clerk of the Court on the 16th December 1912, but the money order which reached the delivery Post Office on the 18th December could not be delivered to the Clerk of the Court before the 21st December, because the 18th, 19th and 20th December being public holidays, the copying office was closed during those days. The copies were ready and were posted to the applicant on the 20th January 1913:

Held, in computing the period of limitation for an appeal against the decree, that

(1) the application for copies was not presented until the 21st December 1912;

(2) the Post Office being an agent of the applicant, the time to which the applicant was entitled should be measured from the date when the Post Office delivered the application and the necessary money to the official appointed to receive the same, and the day on which the official appointed to deliver the copies made such delivery to the Post Office;

(3) all time occupied by the Post Office in conveying the application and fees to the copying office, and in carrying back the copies to the applicant, was outside that computation;

(4) the tender of fees transmitted by money order on a public holiday was not a tender at the proper time. **N.** RAGHU v. MADHGIA, 10 N. L. R. 139 **819**

Limitation Act—(1908)—contd.

——— ——— ——— **s. 14** **219**

——— ——— ——— **s. 14**—Proceedings in Revenue Court, whether extend period of limitation **441**

——— ——— ——— **s. 15**—Stay by injunction—Injunction order set aside—Time, whether excluded **267**

——— ——— ——— **s. 18** **860**

——— ——— ——— **s. 19** **911**

——— ——— ——— **s. 19** — *Acknowledgment of liability—Endorsement of receipt of money—No actual payment—Endorsement, whether operates as acknowledgment.*

Where an endorsement of payment of money is relied on as an acknowledgment of liability under section 19 of the Limitation Act, the fact that no money was paid on that date does not make the endorsement inoperative if it was the intention of the parties that it should be treated as such **M.** LAKSHMI AMMAL v. RAMASWAMY IYENGAR **754**

——— ——— ——— **s. 19**—*Mortgage by all members of joint Hindu family—Acknowledgment by* karta *alone, whether sufficient to keep alive debt—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.*

Where a joint Hindu family property was mortgaged jointly by all members of the family not for a family purpose but only to secure a particular sum of money, the mere fact that one of the joint mortgagors had made an acknowledgment, if it turns out that he happens to be the *karta* of the joint Hindu family, would not be sufficient to keep alive the debt. **C.** BAIKUNTA GUI v. LAL CHAND SAMANTA **511**

——— ——— ——— **s. 20**—*Payment of principal—Handwriting of person making payment necessary—Payment of interest need not be in handwriting of person making payment.*

A part payment of the principal of a debt should be in the handwriting of the person making the payment, but this rule does not apply to payments of interest. **M.** MUTHU PILLAI v. MARIA SANDANAM PILLAI, 15 M. L. T. 505; (1914) M. W. N. 910 **507**

——— ——— ——— **s. 26** **485**

——— ——— ——— **s. 30** **943**

——— ——— ——— **s. 31** **274**

——— ——— ——— **s. 31** — *Mortgage executed before Transfer of Property Act, whether included in s. 31 (2).*

For the purposes of section 31 (2) of the Limitation Act there is no distinction between mortgages executed before 1882 and those executed after that date. **M.** CHOKKALINGA CHETTY v. KANNUSAMI PILLAI **938**

——— ——— ——— **Sch. I, Art. 12 (a)** **369**

——— ——— ——— **art. 16** **863**

——— ——— ——— **art. 42** **296**

——— ——— ——— **art. 44** **179**

——— ——— ——— **art. 62** **219**

——— ——— ——— **art. 68** **505**

——— ——— ——— **art. 83** **410**

Limitation Act—(1908)—contd.

——— Sch. I, art. 89 740
——— art. 91 813
——— art. 109 890
——— art. 115 740
——— arts. 115, 128, 131—*Maintenance—Suit for arrears—Relationship of parties—Adoption—Simultaneous adoption, validity of—Compromise decree evidencing contract—Interest by way of damages—Execution, right to proceed by way of.*

In a suit by the widow of one who was adopted by the defendant's step-mother simultaneously with the adoption of the defendant by the step-mother's co-wife:

Held, (1) that, as simultaneous adoptions are invalid and void, the plaintiff was not a member of the family of the original owner of the estate, nor was she related in any way to the defendant and could not, therefore, plead the limitation allowed by Article 128 of the Limitation Act;

(2) that inasmuch as the plaintiff's claim was based on a contract evidenced by a compromise decree, her case was governed by Article 115;

(3) that since the defendant had kept the plaintiff out of her just dues wrongfully, she was entitled to interest by way of damages;

(4) that Article 131 of the Limitation Act applies only where there has been a denial of the plaintiff's right to receive the maintenance in question as well as a cessation of payment;

(5) that where there has been a decree declaring a right to maintenance, the decree-holder can proceed by way of execution. **C.** NARENDRA CHANDRA LAHIRI *v.* NALINI SUNDARI DEBI 939
——— art. 120 219, 368
——— art. 120—*Hindu Law—Alienation by widow—Contest by remote reversioner - Cause of action—Limitation.*

A suit for a declaration that an alienation made by a Hindu widow is not binding on the plaintiff, a remote reversioner, is governed by Article 120 of the Limitation Act.

The cause of action accrues on the date of alienation. **A.** KUNWAR BAHADUR *v.* BINDRABAN, 13 A. L. J. 196 737
——— art. 126 873
——— arts. 128, 131 939
——— art. 134 1
——— art. 136 904
——— art. 141 1
——— arts. 142, 144—*Adverse possession—Purchaser at Court sale delivered formal possession by proclamation of property under tenants—Burden of proof that purchaser was not in possession.*

In 1881 a village was leased for a term of 10 years. The lease was to terminate on the last day of June 1891. In 1885 the lessor mortgaged the village. In 1887 the mortgagee sued on his mortgage and obtained a decree. In 1889 he purchased the village in execution of his decree and on 7th May 1890, when the property was still in the possession of the lessees, the purchaser obtained possession of the reversion by proclamation. In 1903 the successor of the lessor sued the purchaser for recovery of possession of the village on the ground that the property, being dedicated to a temple, was trust property and that consequently the auction-sale was void:

Held, that whether Article 142 or Article 144 of the first Schedule to the Limitation Act applied, the suit was barred inasmuch as the purchaser was in possession of the village adversely to the temple from May 1890.

Where a purchaser at a Court auction-sale had obtained through Court as full and complete a possession as was possible under the circumstances, strong evidence was required to show that the auction-purchaser was not in possession and did not collect the rent of the property. **M.** GOVINDA DOSS *v.* RAJAH VENKATA PERUMAL, 27 M. L. J. 195 537
——— Sch. I, art. 144 537, 904
——— art. 166 369
——— art. 181 46
——— art. 182—*Execution—Judgment-debtor declared insolvent—Appeal by decree-holder—Step-in-aid of execution.*

An appeal by the decree-holder against an order declaring the judgment-debtor an insolvent is "an application to take a step-in-aid of execution" within the meaning of Article 182 of the first Schedule of the Limitation Act, and, therefore, an application for execution filed within three years of such an appeal is not barred. **B.** LAXMIRAM LALLUBHAI JOSHI *v.* BHALASHANKAR VENIRAM MEHTA, 16 BOM. L. R. 612; 39 B. 20 262

Lis pendens. *See* TRANSFER OF PROPERTY ACT, s. 52

Lower Burma Land and Revenue Act (II of 1876), ss. 55 and 56—*Civil Procedure Code (Act V of 1908), s. 60—Standing crops, inquiry into ownership of—Use or enjoyment of land—Jurisdiction of Civil Courts.*

A claim to the ownership of crops is not the same thing as a claim to the use or enjoyment of the land on which the crops are grown. It is a claim to the use or enjoyment of something yielded by the land The Civil Courts have jurisdiction to determine claims and objections in respect of the attachments of standing crops.

When a Civil Court inquires as to possession of land incidentally and collaterally and only for the purpose of deciding who is entitled to the crop standing on the land, it does not exercise any jurisdiction as to the use or enjoyment of the land within the meaning of section 56 of the Lower Burma Land and Revenue Act. **L. B.** HLA DUN *v.* M. L. R. M. CHETTY FIRM, 7 L. B. R. 294 684
——— s. 56 684

Lunatic—*Person of weak memory or weak mental strength, whether of unsound mind.*

A man of weak memory or of only ordinary mental capacity or even mere weak mental strength cannot be called an idiot or a man of unsound mind. **M.** PACHI *v.* CHARNI, 16 M. L. T. 530 344

Madras Boundary Marks Act (XXVIII of 1860), ss. 24, 25 **817**

Madras City Municipal Act (III of 1904), s. 409, cl. (19) *By-law framed thereunder—"Food," meaning of—Aerated waters, whether food.*

The term "food" does not include "drinks" and, therefore, in the absence of a special inclusion a person exposing for sale aerated waters unwholesome and unfit for human consumption does not commit any offence under by-law 177 framed under section 409 (19) of the Madras City Municipal Act **M.** EMPEROR *v.* GANAPATHY IYER, 27 M. L. J. 732; 16 M. L. T. 585; 6 CR. L. J. 7 **311**

Mardras Compulsory Labour Act (I of 1858), s. 6—*Levying of* Kudimaramath *dues—Payment under protest—Suit for recovery—Limitation—Madras Revenue Recovery Act (II of 1864), s. 59—Limitation Act (IX of 1908), Sch. I, Art. 16.*

Steps taken to recover *Kudimaramath* dues under section 6 of Act I of 1858, are in effect proceedings under Act II of 1864, and a person aggrieved thereby must bring his suit for redress within six months from the date of the cause of action as provided by section 59 of Act II of 1864 and not within one year under Article 16 of the Limitation Act, 1908.

The phrase "proceedings under this Act" found in section 59 of Act II of 1864, has the same meaning as "means by which arrears of land revenue are recoverable" in section 6 of Act I of 1858. **M.** RAMASAMI AIYAR *v.* SECRETARY OF STATE, (1915) M. W. N. 154 **863**

Madras District Municipalities Act (IV of 1884), s. 53, Sch. A, cl. (3)—*"Money-lender," meaning of—Occasional money-lender—Public purposes—Capacity of "owner and occupier."*

The term "money-lender" as used in section 53 of the District Municipalities Act, read with Schedule A, clause (3) of the Act, implies a continuous and systematic lending almost amounting to a trade or business.

Where, therefore, a person casually or intermittently invests his surplus funds in mortgage or in personal security he is not to be considered a "money-lender" within the meaning of that section.

Where a person has a dual capacity of the trustee of a temple and the head of a *mutt*, and in the former capacity occupies a building owned by him in the latter capacity, he is still an "occupier" for refund of money paid by him in that capacity.

Where the suit is simply to recover a tax illegally levied no declaration as to future rights and liabilities should be given. **M.** MUNICIPAL COUNCIL OF TIRUPPATTI *v.* PRAYAG DOSSJEE VARU, 1 L. W. 513; 16 M. L. T. 98; 27 M. L. J. 231 **95**

Madras Estates Land Act (I of 1908), s. 2 **618**

——— **s. 3 (2) (d)**—*Agraharam—Grant—Presumption—Burden of proof.*

There is no presumption that the grantees of lands situated in an *agraharam* were not possessed of the *kudiaram* right on the date of the grant.

Where, therefore, such grantees allege that land revenue only and not land was the subject of the grant, it is for them in order to oust the jurisdiction of the Civil Court to establish by evidence that the *agraharam* is an estate within the meaning of section 3 (2) *(d)* of the Madras Estates Land Act. RAVULAPATI PAPI REDDI *v.* NANDURU PEDA VENKATACHARYULU, 16 M. L. T. 247; (1914) M. W. N. 794; 27 M. L. J. 567 **67**

Madras Estates Land Act—concld.

——— **ss. 3 (2), 151, 179**

—Part of an estate, also an estate—Owner—Landholder—Jurisdiction of Revenue Courts.

The Estates Land Act is not intended to be confined in its operation only to estates in their entirety which fall under one of the five clauses of section 3 (2). Parts of an estate are also within the scope of the Act. Where the tenants of a part of an estate set up occupancy rights in defence to an action in ejectment by the landholder, Revenue Courts alone have jurisdiction. **M.** CHIPURAPALLI APPAYYA *v.* KAKARLAPUDI RAMACHANDRA RAJU BAHADUR GARU, (1914) M. W. N. 763; 16 M. L. T. 362; 27 M. L. J. 490 **732**

——— **s. 3 (5)**—*Alienee of part of* melvaram *interest, whether landholder—Tenants under such alienee, whether ryots—Ejectment, suit for—Jurisdiction.*

An alienee in perpetuity of a portion of a *zemindar's melvaram* interest in land, becomes a "landholder" within the meaning of section 3 (5) of the Estates Land Act and the tenants under him "*ryots*" though the land itself may not be an "estate" within the meaning of section 3 (2) of the Estates Land Act.

Proceedings to eject tenants from such land lies only in a Revenue Court. **M.** KANTI VENKANNA *v.* CHELIKANI RAMA ROW GARU **510**

——— **s. 3 (5)**—*Landholder—Co-sharers, mortgage by—One co-sharer alone redeeming and taking possession—Recognition as landholder—Rent, suit for—Maintainability.*

Though under the first paragraph of section 3, clause 5, of the Madras Estates Land Act (I of 1908) both a mortgagor and a usufructuary mortgagee are 'landholders,' yet under the 2nd paragraph of the said clause the usufructuary mortgagee alone is the 'landholder' for the purposes of the said Act.

When there are a number of joint landholders, the test to be applied for ascertaining which among them is entitled to proceed and be dealt with as a 'landholder' for all or any of the purposes of the Madras Estates Land Act seems to be 'who amongst them is or are entitled to collect the rent of the whole' estate?

The power given to the Collector under paragraph 2 of section 3 (5) does not exclude the power of a Civil Court to recognise that person as landholder who is entitled to collect the whole rents.

Where an estate owned by several joint owners and subject to a usufructuary mortgage was redeemed by the plaintiff, one of such several owners, owning the largest number of shares, and he got possession of the estate with the knowledge and consent of the owners of the remaining shares therein:

Held, that the plaintiff, who redeemed the mortgage and got rightful possession of the whole estate from the usufructuary mortgagee, being the person entitled to collect the whole rents, was also entitled to be recognised as the 'landholder' for all the purposes of the Act, including the right to sue for rent solely. **M.** SUBRAMANIA PETHANNAR BHOOPATHI *v.* MUTHIAN CHETTIAR, 1 L. W. 1004; (1915) M. W. N. 157 **279**

Madras Estates Land Act—contd.

——————— **s. 3 (5)**—*Lessee from transferee of* zemindar—*Right to lease and cultivate —Estate-holder.*

A person obtaining a lease of land with the right of leasing it to others as well as of cultivating it himself from a person who derives his right by transfer from the *zemindar*, is an estate-holder within the meaning of section 3 (5) of the Estates Land Act, VINJAMURI VEERA VENKAYYA *v.* YENAMURTHI VEERABHADRUDU **735**

——————— **ss. 3 (11), 77**—*Jurisdiction of Revenue Courts—Tree* pattas—Vari *payable for trees, if 'rent.'*

Vari or tax payable in respect of trees held on tree *pattas* is not 'rent' as defined in section 3 (11) of the Madras Estates Land Act I of 1908, and a suit to recover such *vari* or tax is not cognisable by a Revenue Court under section 77 of the said Act. **M.** MURUGAPPA CHETTIAR *v.* RAMANATHAN CHETTIAR, 1 L. W. 881 **60**

——————— **s. 6**—*Addition to holding by encroachment—Possession for more than* 12 *years prior to commencement of Act*—Ryots—*Presumption —Ejectment.*

Tenants who have added to their holdings by encroachments and have been in possession of such encroachments for more than 12 years before 1st of July 1908 when the Madras Estates Land Act came into force, are deemed to be in possession of the whole of their holdings, including the encroachments, as *ryots* and to be entitled to occupancy rights under section 6 of the Act; but if their possession commenced within 12 years of the suit, they are liable to be ejected. **M.** BRINDAVANA CHANDRA *v.* JAGANNADHA SINGI SANTO, 2 L. W. 29 **888**

——————— **s. 13, cl. (3)**—*Wells sunk by tenants at their own expense—Landlord, whether entitled to charge higher rates of rent.*

Under the Estates Land Act a landlord is not entitled to charge higher rates of rent for the more valuable crops grown by the aid of the wells sunk by his tenant. **M.** RAGHAVA NAIDU *v.* MUTHYALU NAIDU, 28 M. L. J. 301 **364**

——————— **s. 77** **60**

——————— **s. 78**—*Affixing of* pattas *to land necessary.*

In order that a distraint under section 78 of the Madras Estates Land Act should be valid, it is not enough to show that the *patta* was either tendered to the tenant or affixed to his house. It must also be shown that it was affixed to a conspicuous part of the land. **M.** KOLAKUDI VEERAMA REDDI *v.* VASUDEVA REDDI, 17 M. L. T. 85 **991**

——————— **s. 112**—*Landlord and tenant—Suit under s.* 112—*Burden of proof—Payment of rent into Court to avoid sale, effect of.*

In a suit under section 112 of the Mardras Estates Land Act the burden of proof is rightly imposed on the landlord to show that he is justified in claiming rent at an enhanced rate; the fact of the payment into Court in order to avoid the sale does not shift the onus on to the tenant. **M.** RAJAH OF VIZYANAGARAM *v.* DOKARA PAIDAYYA **891**

Madras Estates Land Act—concld.

——————— **ss. 151, 179** **732**

——————— **s. 195**—*Civil Procedure Code (Act V of* 1908), *O. XLIII, r.* (1) (w), *and O. XLVII, r.* 7 (1 —*Revenue Court, review granted by —Order, whether appealable.*

No appeal lies to the District Court against the order of a Revenue Court granting a review in a summary suit. **M.** AIYARAPPA MUDALIAR *v.* GULAM GHOUSE, 2 L. W. 62 **831**

——————— **Sch. Part A, Art. 8**—"*Ascertainment of rent,*" *meaning of—Interpleader suit as to who is entitled to water-cess, whether suit for ascertainment of rent—Limitation Act (IX of* 1908), *s.* 15—*Stay by injunction—Injunction order set aside—Time, whether excluded.*

In order to entitle a landlord in a suit for arrears of rent to deduct the time taken in prosecution of a previous suit between himself and the tenant, the suit must be one relating to the ascertainment of rent within the meaning of Article 8, Part I, of the Madras Estates Land Act (I of 1908).

An interpleader suit by tenant against landlord and Government merely to determine which party is entitled to collect water-cess from the tenants, is not a suit for ascertainment of rent within the meaning of Article 8, Part I, of the Estates Land Act.

A party cannot claim to exclude, under section 15 of the Limitation Act, 1908, the time during which no injunction staying a suit was in force against him. **M.** DORAISAMI REDDI *v.* VENKATACHALLAM PILLAI, 27 M. L. J. 734 **267**

Madras Forest Act (V of 1882), s. 16—*Private land wrongly included in notification regarding proposed reserve, but omitted in demarcation—Private party in possession with* patta *and paying assessment—Conviction of trespass, if legal.*

Where, under a notification published under section 16 of the Madras Forest Act, V of 1882, certain land alleged to belong to the accused had been included in the tract proposed to be constituted a reserve forest but the same was excluded from the reserve at the time the latter was demarcated, and where the party alleging title continued in possession and enjoyment, a *patta* being issued to him and assessment received from him therefor, he cannot be convicted for trespass under the Forest Act. **M.** ALI MAHOMED MUKRI, *In re*, 2 L. W. 67; 16 CR L. J. 53 **645**

Madras Irrigation Cess Act (VII of 1865), s. 1—'*Engagement*', *meaning of—Madras Revenue Recovery Act (II of* 1864, *s.* 59—*Madras Land Encroachment Act (III of* 1905), *s.* 1.

The decree of a Court passed after the *Inam* Settlement and entitling a *mokhasadar* to irrigate free of water-cess more area than was exempted from water-cess at the *Inam* Settlement, may be treated as sufficient to establish an engagement of the kind referred to in section 1 of Act VII of 1865.

Where a right to take water is proved, even though no express agreement on behalf of Government not to levy any charge is proved, an engagement under Act VII of 1865, section 1, will be implied and no cess can be levied.

The effect of Act III of 1905 (Madras Land Encroachment Act) is not to take away rights which

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existed prior to the Act, and Government is not, by reason of that Act, coupled with Act VII of 1865, entitled to impose a cess upon those land-holders who before that Act were not liable to pay cess for using the water.

Where a river belongs to Government, it is open to it to construct sluices without prejudice to the rights of the *mokhasadars*, but their previously existing right to receive water free of water-cess will not be affected by construction of sluices. A suit to recover back water-cess paid under protest and after attachment should be brought within six months from the date on which the amount was paid, and the period of limitation applicable is that prescribed by section 59 of Act II of 1864. **M.** SECRETARY OF STATE *v.* SIMHADRI JAGHAPATHIRAJU, 2 L. W. 31; 17 M. L. T. 29; 28 M. L. J. 51 **692**

——— — .. ——— **s. 1**—Shrotriemdar—*Engagement—Irrigation, free of charge—Enjoyment for 60 years, if confers right to exemption*—Kassar, *meaning of*—Inam *title-deed, scope of—Recitals in* inam *title-deed, if conclusive as to enjoyment—Evidence* aliunde, *admissibility of, to disprove such recitals.*

The term *kassar* means excess water-rate.

Ordinarily mere abstinence on the part of the Government from imposing water-cess for 40 years after the grant of an *inam* title-deed, does not debar the exercise of their right to levy the same.

An *inam* title-deed is not conclusive of the question of an engagement to exempt the lands from the liability to pay cess and evidence *aliunde* is admissible to prove that the enjoyment contended for was either anterior or subsequent to the Inam Settlement.

A grant of land by the Government implies an undertaking on its part to supply water free of charge to the extent of the accustomed flow at the time of the grant, and where the customary flow cannot be ascertained, the area irrigated will be presumed as the measure of the quantity of water used at the time of the grant.

In the absence of anything to show that the Inam Commissioner was not authorised to deal with a question, his decision will bind the Government. **M.** PAPACHAR SETHUMATHAVACHARIAR *v.* SECRETARY OF STATE, 1 L. W. 941 **187**

Madras Land Encroachment Act (III of 1905), s. 1 **692**

Madras Motor Vehicles Act (XI of 1890), s. 6 (1)—*Charge against both coachman and owner, whether illegal.*

There is nothing in section 6 (1) of Act XI of 1890, restricting the prosecution of either the "coachman or the owner." The prosecution of both or one after another is not illegal. A conviction of one does not operate as a bar to the trial of the other. **M.** EMPEROR *v.* RICE, 15 CR. L. J. 695 **143**

Madras Revenue Recovery Act (II of 1864), s. 59 **692, 863**

Magistrate, when bound to discharge **309**

Mahant *of* math *or* sangat, *right to acquire property by—Subsequent treatment of property, effect of—Endowment, sufficient evidence of.*

A Mahant of a *math* or *sangat*, though required to observe celebacy, is not disqualified from acquiring property for his own personal benefit if he has funds of his own.

The evidence afforded by the subsequent treatment of the property for several generations by the parties concerned may in certain cases be legitimately used for determining the nature of the interest sought to be created.

Where there was no sufficient evidence to establish that the particular property in dispute was purchased from the income of the *sangat* or was dedicated to it by the founder of the *sangat* after his purchase and the succession to the property had not been consistent with its being endowed property:

Held, that the land in dispute did not form part of the endowed property. **O.** RAJMAN *v.* BRAHM SURAT, 17 O. C. 336 **621**

Maintenance. *See* CRIMINAL PROCEDURE CODE, s. 488.

——— — ——— Suit for arrears—Relationship of parties—Adoption—Simultaneous adoption, validity of—Compromise decree evidencing contract—Interest by way of damages Execution, right to proceed by way of **939**

Majority Act (IX of 1875), s. 3 **709**

Malabar Law Anandravan, *whether can acknowledge mortgage by* karnavan—*Right to acknowledge mortgage right—Limitation Act (XIV of 1859) s. 1 (15)—Limitation Act (IX of 1871), Sch. II, Art. 148.*

An *anandravan* cannot be said to be a person claiming under a *karnavan* within the meaning of section 1 (5) of Act XIV of 1859 or Article 148, Schedule II, of Act IX of 1871, and has, therefore, no right to save from limitation a mortgage by acknowledgment, nor can such acknowledgment be effective even if construed as one by a co-mortgagee. **M.** MUHAMMADE *v.* MAYI KUNHI HAJI **127**

——— ——— ——— Chetties, whether governed by Malabar Law **337**

Malicious prosecution, suit for damages for, when maintainable—Interlocutory injunction, whether dissolved when perpetual injunction granted—Limitation Act (IX of 1908), Sch. I, Art. 42—"Want of reasonable and probable cause," allegation of—Malice—Erroneous decision, procuring of—Damages, liability for **296**

Master and servant—*Monthly servant leaving without notice, whether entitled to wages—Notice—Damage—Set-off.*

Default of a servant after the day on which a periodical payment of wages accrued due would not deprive him of his right to recover such periodical payment. A master is entitled to reasonable notice and reasonable damages if such notice were not given, but such a plea must be raised by way of set-off and should be stamped. **L. B.** RIPLEY *v.* VAITHENATHA IYER **270**

Minor—*Alienation of land by guardian for valid debt—Recitals in documents as to its binding nature, whether sufficient—Evidence.*

Mere recitals in documents as to the binding nature of debts incurred by a minor's guardian are not enough to charge a minor with liability. There must be evidence *aliunde* to establish it. **M.** RAMINEEDI RAMACHANDRAYYA *v.* BOBBA JANKIRAMAYYA, 1 L. W. 805; (1914) M. W. N. 874 **66**

Minor—concld.

——, contract by—Property purchased for minor by some one else, minor's rights in—Sale of property by father, whether valid **195**

——*Guardian knowingly setting up false plea—Gross negligence*—Res judicata - *Personal interest in suits between members of same family.*

A minor is not bound by a decree passed against him, if he shows that his guardian was guilty of gross negligence in the conduct of the suit.

A guardian setting up a plea of adoption, false to his knowledge even if it be to benefit the minor, in a suit to recover possession of property, when he could have set up a Will which gave him a moiety of the property, is guilty of gross negligence.

In a suit to which no strangers are parties, each member of the family must ordinarily be considered to be litigating for his own benefit and not for the benefit of the estate. **M.** GOTTEPATI SUBBANNA *v.* GOTTEPATI NARASAMMA, 27 M. L. J. 486 **16**

——*Legal representatives of persons intermeddling with minor's estate—Liability, extent of.*

The representatives of persons who had intermeddled with the estate of a minor, are liable to account in respect of the dealings of those whom they represent to the extent of the estate which came to their hands. **C.** GOLAK CHANDRA CHOWDHURY *v.* PRABHAT CHANDRA RAY **612**

Minors Act (XL of 1858), person holding property by virtue of certificate under **700**

Minors' property—*Sale by guardian—Consideration partly for legal necessity partly not—Suit to set aside sale, when to be decreed—Conditions—Partition, if allowed between alienee and minor.*

If in a suit by a minor to recover possession of the properties alienated by his guardian, it is proved that a substantial portion of the purchase-money was not required for the minor's interests or benefit, the whole sale should be set aside on condition of the minor paying to the purchaser the remaining portion, but if a very substantial portion of the purchase-money was utilised for purposes binding on the minor, the sale should be upheld and the minor given a decree for recovery of the small portion of the purchase-money not utilised for his benefit

In such a case there can be no decree for partition between an alienee and a minor who has attained full age in respect of land sold by the guardian of the minor. **M.** RUKMANI SUNDARAMMAL *v.* MUTHAMMAL, (1915) M. W. N. 8 **489**

——*Sale by* de facto *guardian, validity of—Limitation Act (IX of* 1908), *Sch. I, Art* 91—*Suit to set aside sale.*

An alienation of the property of a minor by a person who is that minor's guardian *de facto*, but not *de jure*, is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property

Article 91 of the Limitation Act does not apply where the sale is void. **N.** HUSEN *v.* RAJARAM, 10 N. L. R. 133 **813**

Mischief. *See* PENAL CODE, s. 426.

Misjoinder of causes of action. *See* CIVIL PROCEDURE CODE, O. II, r. 2.

Mortgage. *See* REDEMPTION; TRANSFER OF PROPERTY ACT, s. 58.

——Attestation—Simple mortgage—Charge—Distinction between the two—Deed of mortgage not completed for want of formalities, whether can be used to establish charge—'*Rehn*,' use of the word, whether sufficient guide to distinguish between mortgage and charge **601**

——Benamidar, *whether can sue.*

A person who is named in a mortgage-deed as mortgagee is entitled to sue upon the bond, even if he is a *benamidar* **A.** PARMESHWAR DAT *v.* ANARDAN DAT, 13 A. L. J. 24 **507**

——*Charge—Construction of deed.*

Where by a deed of transfer the executant hypothecates his interest in the property and covenants to pay interest and also that he will not transfer the property so long as the debt remains unpaid, the deed constitutes a simple mortgage and not a charge. **A.** KALYAN SINGH *v.* DAMMAR SINGH **752**

——*Conditional sale—Foreclosure proceedings—Expiry of year of grace—Lease by mortgagor—Acknowledgment of ownership—Decree for possession obtained by mortgagee—Formal possession taken—Validity of foreclosure proceedings cannot be questioned*

M mortgaged a house and shops to *A* by a deed of conditional sale on the 24th July 1894. The deed provided that the mortgagor was to remain in possession and pay interest. In default the mortgagee could take possession. If the mortgage was not redeemed within three years, the property was to be sold outright.

In 1898 the mortgagee got the foreclosure notice issued, and after the expiry of the year of grace without redemption in November 1899 *M* executed a lease mentioning the foreclosure proceedings and saying that he took the house on lease and handed over the rest of the property. In 1901 *A* sued for possession of the house and rent, got an *ex parte* decree, and took formal possession in execution, the *dakhilnama* being signed by *M* and others. After that *M* again took possession of the house and some eight or nine years, *A* again sued for possession:

Held, that *M* or his representatives could not deny the plaintiff's title, nor question the validity of the foreclosure proceedings. **P.** KHAIRA *v.* JAGGU SHAH **833**

——*Consideration, receipt of—Admission before Sub-Registrar—Burden of proof—Mortgage with possession—Lease by one of two mortgagors only—Mortgage-deed mentioning liability of both mortgagors for rent—Agreement without consideration—Civil Procedure Code (Act V of* 1908), *O. XXXIV, r.* 4.

Where a mortgagor disputes the receipt of a portion of the mortgage-money, which he has, however, admitted before the Sub-Registrar to have been due by him on book account the onus lies upon him to show that the consideration did not pass in full.

A and *B* mortgaged certain properties with possession and on the same day that the mortgage-deed was executed, *A* took the mortgaged properties on lease from the mortgagee under a registered lease

Mortgage—contd.

The mortgage-deed made the rent a charge upon the mortgaged properties:

Held, that the agreement by *B* in the mortgage-deed to pay the rent was without consideration, and hence *B* was not liable to pay it, nor was his property under mortgage liable for any sums beyond the principal mortgage-money.

In framing mortgage decrees, Order XXXIV, rule 4 of the Civil Procedure Code should not be over looked. **P.** KISHEN CHAND *v.* SOHAN, 20 P. L. R. 1915 **913**

———*Contribution – Mortgage by one partner of whole partnership property – Mortgage disputed by other partner—Compromise—Disputing partner undertaking to pay part of mortgage-debt—Mortgage subsequently declared not binding on disputing partner's share - Mortgage-debt realized from partner executing deed—Suit by mortgagor for contribution in terms of compromise—Other partner, liability of.*

B. one of the two partners in a firm, granted a mortgage purporting to mortgage the whole of the partnership property. *L*, the other partner, disputed the right of *B* to subject the whole of the partnership property to the mortgage and contended that *B* was in fact only able to burden his own share thereof. Subsequently *L* brought againt *B* a partition suit in which the Court made a decree giving effect to a compromise which the parties themselves had effected. One of the terms of the compromise was that *L* should pay the mortgagee a certain amount and that *B* should free *L*'s portion of the property from the mortgage. The mortgagee thereafter brought a suit on his mortgage, and in that suit it was found eventually by the Privy Council that truly the mortgagr only bound *B*'s share and not the whole partnership property. The mortgagee realized the whole of the mortgage-debt from *B*, who then sued *L* for the amount payable under the compromise as contribution. *L* contended that such payment was conditional upon *B* freeing his share from the mortgage, and as his share was not freed by *B* but by the Privy Council decision, the suit must fail:

Held, that *L* was bound by the compromise, which remained unaffected by the Privy Council decision, and that he was liable to contribute. **P. C.** RAMLAL *v.* NARSINGDAS; 19 C. W. N. 193, 17 M. L. T. 45; 2 L. W. 163; 21. C. L. J 137; 28. M L. J 448 **924**

———*Discharge of previous mortgages—Charge—Priority.*

A co-mortgagor who discharges a prior mortgage has a prior charge over the property as against those who discharge a subsequent mortgage. **A.** KASHI RAM *v.* HET SINGH, 13 A. L. J. 34 **417**

——— executed before Transfer of Property Act, whether included in s. 31 (2) **938**

——— *Foreclosure decree—Extension of time for payment of money—Good cause—Appeal—Civil Procedure Code (Act V of 1908), ss. 105 (1), 99, O. XXXIV, r. 3, O. XLIII, r. 1 (o),—Preliminary order incorporated in decree may be questioned in appeal—Redemption decree passed by implication—Preliminary decree—Foreclosure—Redemption decree must be drawn up.*

No appeal lies against an order extending time for the payment of mortgage-money.

Mortgage—contd.

Where a non-appealable order is incorporated, or results, in a decree, section 105 (1) of the Civil Procedure Code allows the order to be questioned in an appeal from the decree.

Where the order of a Court amounts impliedly, though not expressly, to a redemption decree, it may be treated as such under section 99 of the Civil Procedure Code.

Though no extension of time for payment of money in satisfaction of a foreclosure decree can be granted without "good cause," those words should be liberally interpreted with leniency towards the debtor in the case of a first enlargement.

The "good cause" is not to be assumed either from non-payment or delayed payment. Order XXXIV, rule 3, requires that it should be shown to the satisfaction of the Court.

For each extension of time, subsequent to the first, a stronger case must be made out.

Every preliminary decree in a mortgage suit must lead to a final decree, either of foreclosure or of redemption; and when a preliminary decree is followed by redemption, a final decree for redemption should always be drawn up. An order extending time merely opens the way to payment, and when the payment is duly made, a final decree for redemption is as necessary as is a final decree for foreclosure. Where payment is not made, one or the other is consequential of the terms of the preliminary decree. **N.** BALKISHAN *v.* ATMARAM, 10 N. L. R. 150 **701**

———*Foreclosure suit—Subsequent mortgagor made party at his own request—Suit barred as against him—Whether he can plead limitation—Suit, whether to be dismissed—Proper order to pass.*

Where in a suit for foreclosure a subsequent mortgagee was made a co-defendant at his own request and with the consent of the plaintiff but after the period of limitation as against him had expired:

Held, (1) that the suit against him was barred;

(2) but that, inasmuch as he was made a defendant at his own request, he could not raise the plea of limitation;

(3) that the suit against him ought not to be dismissed, but that the order making him a defendant should be set aside. **N.** NARAYAN *v.* MAHADEO, 10 N. L. R. 173 **720**

———Hindu Law—Joint family—Managing member living separately—Mortgage in his sole name—Loan advanced out of family funds—Suit on mortgage Non-joinder of other members, whether bars suit **35**

——— by all members of joint Hindu family—Acknowledgment by *karta* alone, whether sufficient to keep alive debt—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6 **511**

———*Mortgagee entitled to possession on mortgagor's failure to pay instalment—Legal title, whether in mortgagee—Trespasser, possession of, whether adverse to mortgagee.*

Where, under the terms of a mortgage instrument, the mortgagee is entitled to possession only on the mortgagor committing default in payment of any of the instalments, the legal possession is not with the mortgagee, and the possession of a trespasser is not adverse as against him. **M.** VENKATA KRISHNA MOORTHI *v.* BHEEMAKKA **295**

Mortgage—contd.

——————, right of—Mortgage-decree—Receiver appointed **986**

——————Sale—Agreement of re-sale—Mortgage by conditional sale—Construction of document—Intention of parties **751**

——————Suit to declare mortgage-deed invalid—Mortgage found to be partly valid—Plaintiff, whether entitled to amend relief for redemption **443**

—— **debt**—*Compound interest payable until default—No provision after that date—Interest—Presumption.*

While a person owing money must be deemed to have borrowed it on the understanding that he would pay some compensation for its use, either as simple interest or damages, there is no presumption that he agrees to pay compound interest, as that is not an ordinary incident of the borrowing.

Therefore, where a bond provides for compound interest till a certain period but there is no provision for the payment of any interest after that date the creditor is not entitled to compound interest after that date but only to simple interest upon the amount of the principal and interest due on that date. **M.** THAITHOTTATHIL POKKAR *v.* RAMACHANDRA SHENOY, 16 M. L. T. 478 **124**

—————— **or sale,** *test of—Equity of redemption, surrender of, by mortgagor's widow—Transfer of property by mortgagee to third party—Suit for redemption*—Locus standi *of mortgagor's reversioner—Limitation Act (IX of* 1908*), Sch. I, Arts.* 134, 141.

The test to determine whether a particular transaction is a sale or a mortgage, is the intention of the parties.

A widow cannot by relinquishing her widow's estate to the reversioner affect the validity of alienations made by her before such relinquishment.

Where a mortgagee, in whose favour the equity of redemption has been surrendered, sells it to another person, this latter cannot be said to have "purchased mortgaged property" within the meaning of Article 134, Schedule I, of the Limitation Act; and a suit for redemption is governed by Article 141 and not by Article 134.

In order to make Article 134 applicable it is necessary that the purchaser must act in the *bona fide* belief that he is purchasing an absolute estate and not merely a mortgage interest. **M.** SINGARAM CHETTIAR *v.* KALYANASUNDARAM PILLAI, 1 L. W. 687; (1914) M. W. N. 735 **1**

——————**suit**—Ex parte *decree set aside—Suit on subsequent mortgage and decree against prior mortgagee—Proceedings in first suit re-opened—Subsequent mortgagee impleaded—Limitation Act (IX of* 1908), *s.* 18—*Priority not set up in subsequent suit*—Res judicata—*Civil Procedure Code (Act V of* 1908), *s.* 11, *Expl. IV.*

In a suit on a mortgage where a subsequent mortgagee was also impleaded in the name of his *benamidar*, an *ex parte* decree was passed, but the *ex parte* decree and also the sale held thereunder were set aside on the application of the mortgagors. Meanwhile the subsequent mortgagee brought a suit on his mortgage which was also decreed *ex parte*. The proceedings in the 1st suit having been re-opened, the subsequent mortgagee was made a party in his own name, but more than 12 years after the due date specified in the bond, and it was not disputed that prior to the proceedings the plaintiff's cause of action against the real subsequent mortgagee was kept concealed from him:

Held, (1) that whether section 18 of the Limitation Act was applied or the view be taken that the mortgagee was on the record from the outset in the name of his *benamidar*, the suit as against him was not barred by limitation; and

(2) that the plaintiffs having failed, in the suit on the subsequent mortgage, to which they were made parties, to set up their right of priority under their prior mortgage, they could not now set up that right and their suit was barred by Explanation IV to section 11 of the Civil Procedure Code. **C.** RAJENDRA KUMAR GHOSH *v.* ADINADI **860**

Mortgagor and mortgagee—*Agreement that mortgaged property shall be deemed sold if interest not paid on certain date—Failure of payment—Suit for specific performance—Interest after specified date, whether allowable to mortgagee.*

Where a mortgagor agreed with his mortgagee that if he failed to pay all the interest due on the mortgage-money on a particular date, the mortgaged property shall be deemed to be sold to him for a certain amount and he should be paid the difference between that amount and the mortgage amount with interest due thereon; and on his failing to pay the interest on the specified date, the mortgagee sued for specific performance of this contract:

Held, that, as equity regards as done what should have been done, the mortgagee became ths owner of the property on the date the mortgagor failed to pay the interest and that he is not entitled to any further interest on the mortgage-money, but that he should pay to the mortgagor the difference between the purchase money and the principal and interest due thereon up to the specified date. **L. B.** DINYAR D. HIRJI KHORSHED *v.* MAUNG INN. **877**

—————————— *Redemption—Costs of unsuccessful redemption suit, whether mortgagee can add to his security—Transfer of Property Act (IV of* 1882*), ss.* 58, 60, 92 - *'Mortgage money', meaning of—Tender—Validity of conditional tender.*

A mortgagee is entitled to add to his mortgage security the costs incurred by him in defending an unsuccessful redemption suit by the mortgagor and the mortgagor is bound to pay the same before redemption.

It is an undoubted rule of equity that in taking an account between a mortgagee and a mortgagor, the former is entitled to be reimbursed all moneys properly and reasonably expended by him with reference to the mortgaged property. The payment of such expenses may be regarded as an implied term of the mortgage contract or as a condition imposed by a Court of equity upon the party who has invoked its assistance and the amount is added to the sum due on the security.

The term mortgage money in sections 58, 60 and 92 of the Transfer of Property Act includes all moneys

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which, on taking an account between the parties, may be properly allowed to the mortgagee.

The Transfer of Property Act is not a consolidating Statute and the right of a mortgagee to a general account of the moneys due to him under the mortgage contract is saved by the provision of section 2 (*b*) of the Act and his right has not been cut down to an account merely of the principal sum and interest by the said sections. A tender of money admitted to be due by a mortgagor is not valid *pro tanto*, if a larger sum is in fact due, if the tender is accompanied by a demand for cancellation and delivery of the mortgage-deed.

A tender by a person who has entered into a contract for purchasing the equity of redemption is not valid if conditional on the delivery to him of the title-deeds. **M.** VARADARAJULU CHETTY *v.* DHANALAKSHMI AMMAL, 16 M. L. T. 365 **184**

Muhammadan Law—Khula *divorce—Agent—Benami transaction—Source of purchase-money—Principle of "advancement"—Father purchasing property in son's name, whether gift—Presumption.*

A *khula* divorce is a divorce where the wife alone is desirous of having the marriage dissolved and in such a divorce the wife may reserve an option to revoke it.

Once a transaction is found to be *benami*, it becomes a question of evidence as to who is the real purchaser. The mere fact of one man posing at the time of purchase as agent for the *benamidar* is not conclusive proof that the purchase-money belonged entirely to the *benamidar*. The English principle of advancement is not applicable in this country.

When a Mussalman father purchases property in the name of his son, no presumption arises in India that a gift of the property was intended to be made to the son.

Where the plaintiff has never been in actual possession of the lands and has exercised no control over them, though they were bought in his name, the best criterion is to consider from what source the purchase-money came. **L. B.** ABDUL RAHMAN KHAN LAUDIE *v.* MA KYE **102**

——— ——— ——— *Widow in possession of her husband's estate in lieu of dower—Transfer of such possession, how effective.*

The right of a Muhammadan widow to remain in possession of her husband's estate in lieu of unpaid arrears of her dower-debt is a right of a peculiar nature and can only be transferred along with the dower-debt itself. **A.** MOHAMMAD HUSAIN *v.* BASHIRAN, 12 A. L. J. 1141 **109**

Mulgeni lessee—*Darkhast* grant land, whether appurtenance of leased property **376**

Murder. *See* PENAL CODE, ss. 84, 300.

Mussalmans Wakf Validating Act (VI of 1913), *retrospective effect of.*

The Mussalman Wakf Validating Act, 1913, refers solely to *wakfs* created after the Act and has no retrospective effect. **B.** AMIRBIBI *v.* AZIZABIBI, 16 BOM. L. R. 977 **906**

Mutation, *ordinary practice in—Trustee, possession with, mutation in case of—Sale, mutation claimed on basis of—Possession to be shown in disputed cases—Vendor in possession and disputing vendee's claim to mutation—Vendee cannot claim mutation—U. P. Land Revenue Act (III of 1901), ss. 34, 35, 40.*

Where possession is with a trustee, mutation is ordinarily effected in favour of persons on whose behalf the possession is held.

In no disputed case, whether of sale, mortgage or lease, can mutation be given unless it is shown that the applicant has possession or that possession is doubtful.

Where the vendor is in possession and disputes the vendee's claim to mutation, the latter cannot get mutation in his favour. **U P B. R.** JOTI PRASAD *v.* BALWANT SINGH, 1 O. L. J. 684 **880**

Nakesh service. *See* GRANT.

Nanjai holding—*Ryot's* right to use a portion of holding as seed-bed—Damages for non-cultivation—*Zemindar* must prove wrong use—Burden of proof **797**

Necessity. *See* HINDU LAW.

Negligence. death by—Accident **664**

Nim-howla tenure—*No covenant against involuntary alienation of tenants or for re-entry—Purchaser of tenure at execution sale, right of—Landlord, whether entitled to sue original tenant—Decree, whether binding on purchaser.*

Where a *nim-howla tenure* was expressly made non-transferable to any one except the landlord but where there was no covenant against involuntary alienation or for re-entry, a purchaser at an execution sale of the right, title and interest of the tenants in the tenure acquires a good title by his purchase and it is not open to the landlord to sue the original tenants with a view to obtain a decree whereby he could proceed against the tenure in the hands of the purchaser. **C.** PROMODE RANJAN GHOSH *v.* ASWINI KUMAR NAG, 18 C. W. N. 1138 **23**

Occupancy-holding. illegal transfer of—Ejectment—Jurisdiction of Civil or Revenue Court—Suit for declaration that mortgage of occupancy is null and void, whether cognizable by Civil Court **419**

——— ——— ——— Succession. *See* AGRA TENANCY ACT, s. 22.

——— ——— ———, *transfer of, without landlord's consent or ratification—Transfer voidable—Rule affirmed in Central Provinces Tenancy Act (IX of 1883).*

A transfer of an occupancy-holding is voidable at the instance of the landlord unless he consented to the transfer at the time it was made or subsequently. This rule was merely affirmed in the Central Provinces Tenancy Act IX of 1883. **N.** JAIRAM *v.* SUNDERLAL, 10 N. L. R. 146 **698**

Occupancy rights, succession to—Right of collaterals—Claim based on agreement—Entry in Settlement Record, effect of—Agreement, how proved **404**

Occupation, unauthorised—Consent of landlord to tenant's occupation, absence of—Occupation, unauthorised—Rent, recovery of, suit for Fair and equitable rent to be determined—Lawful occupation subsequently becoming unlawful, effect of—Withdrawal of consent previously given, effect of—Landlord's impossibility to have given consent at commencement of tenant's occupation, effect of—"Occupied," interpretation of—Suit for determination and recovery of rent, maintainability of **242**

Offer by post to tender expenses, whether legal tender **121**

Order, *cancellation of—Court, one and same—Predecessor-in-office, order passed by—Successor-in-office not to go behind order passed by his predecessor.*

So far as one and the same Court is concerned, a successor-in-office cannot go behind the order passed hy his predecessor and cancel it as incorrect. **U. P. B. R.** SARUPA *v.* KARAM ULLAH, 1 O. L. J. 682 **872**

Oudh Laws Act (XVIII of 1876), s. 9, cl. 2)—*Pre-emption, right of - Sharer in* mahal *being related to vendor, preferential right of, over sharer not so related.*

Where certain lands held in under-proprietary tenure, situate in a village consisting of only one *mahal*, within the meaning of section 9 of Act XVIII of 1876, were sold to persons who owned a proprietary share in the village but were not related to the vendor, and a suit for pre-emption was instituted by the appellants who not only owned a proprietary share in the village but were also related to the vendors:

Held, that the appellants could claim pre-emption as co-sharers in the *mahal* under clause (2) and as they were related to the vendors while the vendees were not so related the appellants had a right preferential to that possessed by the vendees. **O.** BAKKHA SINGH *v.* GAYA DIN SINGH, 17 O. C. 339; 2 O. L. J. 148 **517**

Oudh Rent Act (XXII of 1886), s. 107B—*"Judicial decision," interpretation of—Settlement Court decree declaring* muafidar *to hold* muafi *heritably—Resumption.*

A Settlement Court decree declaring a person as entitled to hold certain land rent-free so long as there are heirs to succeed to him, is a "judicial decision" as contemplated by section 107B of the Oudh Rent Act. **U. P. B. R.** SHAIBUNNISSA *v.* KARAMAT ALI, 1 O. L. J. 693 **722**

——— ——— ——— **s. 107G** — *Grove-holder, nature of, tenure of—Resumption—Groves not held as* muafi *at Settlement—Assessment of rent—Certified copy of extract from Settlement Record, mistake in, allegation as to—Deputy Commissioner, duty of—Settlement Records to be referred to.*

The tenure of a grove-holder is liable to resumption on the expiry of the term during which the land remains grove.

Plots held at the time of the Settlement as groves, and not as *muafi*, ought to be assessed to rent under section 07G of the Oudh Rent Act when they are brought under cultivation.

Where it is alleged before a Deputy Commissioner that there is a mistake in a certified copy of an extract

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from the Settlement Records, he ought to refer to the original records in order to ascertain the truth in the allegation. **U. P. B. R.** BENI MADHO *v.* KANHAIYA LAL, 1 O. L. J. 583 **556**

——— ——— ——— **s. 107H**—*Under-proprietary rights, claim for—Gift, deed of,* muafi *held under—Maintenance, grant for—Proprietary rights, full, not gifted—Government revenue to be paid by grantor—Vested right in grantee, loss or surrender of, to be proved.*

The second paragraph of section 107H of the Oudh Rent Act does not apply to a case where there is no gift of full proprietary rights and the grantor binds himself to pay the Government revenue for the land given by him as *muafi* for the purpose of maintenance, unless it is proved that the land is given in consideration of the loss or surrender of a vested right in the grantee **U P. B. R.** NARPAT SINGH *v.* GUR BAKHSH SINGH, 1 O. L. J. 589 **686**

——— ——— ——— **ss. 108 (2), 127**—*Consent of landlord to tenant's occupation, absence of—Occupation, unauthorised—Rent, recovery of, suit for—Fair and equitable rent to be determined—Lawful occupation subsequently becoming unlawful, effect of—Withdrawal of consent previously given, effect of—Landlord's impossibility to have given consent at commencement of tenant's occupation, effect of—"Occupied," interpretation of—Suit for determination and recovery of rent, maintainability of.*

In section 127 of the Oudh Rent Act the absence of consent refers to the period for which the rent is claimed, but where the occupation was by previous consent or was otherwise lawful, a mere withdrawal of the consent by the landlord does not bring the case within the purview of that section.

The object of section 127 of the Oudh Rent Act is to give a landlord the option of suing a trespasser in the Civil Court for possession and damages, or treating him for the period of his unauthorised occupation as a tenant and suing him for the recovery of rent at such rate as the Rent Court may consider fair and equitable.

An occupation which was lawful in its inception is not excluded from the operation of section 127 of the Oudh Rent Act if it subsequently became unlawful, in the same way as an occupation which began by consent cannot be included in it merely by the spasmodic withdrawal of that consent.

The defendant, while a co-sharer in a village, himself cultivated some land, and continued to do so without payment of any rent after his share was sold to the plaintiff, the land being such as could not have become an ex-proprietary holding. The plaintiff sued the defendan for arrears of rent for the period subsequent to the sale, under sections 127 and 108 of the Oudh Rent Act. It was not alleged that the plaintiff had given his consent to the defendant's occupation at or after the purchase:

Held, that, as the defendant's right as against the plaintiff to use and occupy the land and the plaintiff's right to claim rent therefor came into existence for the first time after the sale and as there was no occasion for the plaintiff to have given his consent to the defendant's occupation at its commencement, the plaintiff was entitled to have the rent determined under section 127 of the Oudh Rent Act and claim

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its recovery under section 108 (2) of that Act in one and the same suit. **O.** LALA SINGH *v.* HAZARI SINGH, 1 O. L. J. 574; 17 O. C. 343 **242**

——— ——— ——— **ss. 126, 138**—*Intervenor—Good faith—Rent, payment of—Joint tenants—Co-sharer, right of, to collect his share of rent separately—Recovery of co-sharer's fractional share of rent, suit for, not maintainable—Division of joint lands or tenants necessary—Tenant paying rent to one co-sharer alone, released from further liability.*

In cases under section 138 of the Oudh Rent Act the main question for consideration is, whether the tenants paid the rents for the period in suit to the intervenor in good faith and whether the intervenor was in actual receipt and enjoyment of the rents from the tenants previous to the receipt of the rents sued for.

In the case of joint tenants, it is not open to a co-sharer to collect his share of the rents separately till the lands or tenants are divided. A suit by a co-sharer to recover his fractional share of rents is not maintainable under section 126 of the Oudh Rent Act.

Unless an arrangement between the co-sharers of a village amounts to a division of the joint lands or of the tenants concerned, the payment of rents by the tenants to any of the co-sharers, on whose behalf they are cultivating the joint lands, is sufficient to release them from further liability. **O.** MAHADEI KUAR *v.* SANT BAKHSH SINGH, 1 O. L. J. 570 **237**

——— ——— ——— **s. 127** **242, 904**

——— ——— ——— **s. 127**—Jurisdiction of Civil and Revenue Courts—Ejectment by notice—Adverse proprietary possession pleaded—*Prima facie* case made out—Possession, actual, with tenants **709**

——— ——— ——— **s. 138** **237**

Pardanashin lady, dealings with, how conducted **500**

Parties—*Defendant—Living person sued but dead person entered as defendant by mistake—Summons rightly served on living defendant*—Ex parte *decree passed—Decree whether* ultra vires *as passed against a deceased defendant.*

A widow was sued on a bond executed by her husband. But in the plaint instead of her name the name of her husband's another wife, who had predeceased him, was wrongly entered as the defendant in the case. However, she accepted the summons as a good summons and on her failure to appear on the date fixed for hearing, an *ex parte* decree was passed:

Held that the wrong description in the summons was a mere irregularity and that the decree was not a nullity on the ground that it had been passed against a person who was dead at the time the suit. **N.** MANJULA *v.* SHANKAR, 10 N. L. R. 144 **830**

Partition, evidence of **390**

——— ——— Hindu Law—One member separating from others—Presumption **43**

——— ———, if allowed between alienee and minor **489**

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——— ——— of *inam*, suit for—Necessity of certificate **87**

——— ——— ———, oral, whether valid **455**

——— ——— Site of building of one co-sharer allotted to another—Owner of building failing to express his intention to retain building on payment of ground-rent, effect of—Right to keep house after partition—Right to materials of house **933**

——— ——— **proceedings,** effect of instituting—*Lambardar*—Agent—Power to consent to transfer of occupancy holding **606**

Partnership. *See* CONTRACT ACT, s. 247

———*Joint adventure—Dealing by individual—Firm, liability of—Bill, drawer of, discounting acceptance when acceptor owes nothing to him—Liability.*

Where goods are purchased or money raised for a joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, etc., purchased on the credit of an individual adventurer previously to the contract, though afterwards brought into the joint stock as his contribution.

When a drawer of a bill discounts an acceptance given at a time when the acceptor owes no money to the drawer, the drawer does avail himself of the acceptor's creditor. **P. C.** KARMALI ABDULLA ALLARAKHIA *v.* MORA KARIMJI, 17 M. L. T. 35; 2 L. W. 133, 17 BOM. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 21 C. L. J. 122 **915**

Pauperism inquiry. *See* CIVIL PROCEDURE CODE, O. XXXIII.

Penal Code (Act XLV of 1860), ss. 23, 415, 428—*Wrongful gain and wrongful loss—Acting fraudulently or dishonestly.*

D who was a horse-dealer was entrusted by *C* with a mare to be disposed of at the best possible price. He received an offer from *L* which he did not accept. Subsequently *D* showed *L* a telegram which purported to have been sent by *C*, and thereby induced *L* to give a higher price for the mare. *L* stated that the price which he paid was the price which he would have paid even if the mare belonged to *D*:

Held, that no wrongful loss was caused to *L* within the meaning of section 23 of the Penal Code, by reason of the fact that he was induced to give a higher price of the horse and *D* could not, under the circumstances, be held to have acted fraudulently. **A.** DICK *v.* EMPEROR, 12 A. L. J. 1258; 16 CR. L. J. 49 **641**

——— ——— **ss. 24, 464, 477A**—*Wrong entries in Revenue registers—Fraud or dishonesty, no finding of—Intention—Offence, whether committed.*

Where the accused, a *patwari*, made wrong entries in the Revenue registers, but where there was no finding that he did so with intent to defraud or dishonestly, within the meaning of section 24, Indian Penal Code, he did not make a false document as defined in section 464, nor did he fraudulently alter any book or register within the meaning of section 477A of the Penal Code. **P.** MUHAMMAD SARDAR *v.* EMPEROR, 25 P. R. 1914 CR.; 16 CR. L. J. 19 **323**

Penal Code- contd.

——————— **s. 75**—*Previous conviction, proof of, when admissible—Relevancy of previous conviction—Evidence Act (I of 1872), ss. 54, 165.*

The proof of a previous conviction, not contemplated by section 75 of the Indian Penal Code, may be adduced, provided the previous conviction is relevant under the Indian Evidence Act.

Where the previous conviction of an accused is relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to his case and where it is also relevant on the question of punishment, a Court is justified in taking it into consideration in deciding the question of punishment after the accused is found guilty. **B.** ISMAIL ALIBHAI v. EMPEROR, 16 BOM. L. R. 934; 16 CR. L. J 83 **995**

——————— **s. 84**—*Unsoundness of mind—Mental derangement falling short of unsoundness—Murder—Lesser penalty—Youth ordinarily extenuating circumstance.*

The law requires that a man shall be held responsible for his acts although he may be suffering from mental derangement in cases where that mental derangement falls short of the unsoundness of mind described in section 84 of the Penal Code.

On proof of such mental derangement in a murderer, the lesser sentence may be passed.

Ordinarily youth is itself an extenuating circumstance, but it does not mean that in every case of murder, where the accused is under a certain age, the lesser penalty must be awarded. **U. P. B. R.** NGA KAN HLA v. EMPEROT, U. B. R. (1914) II 28.; 16 CR. L. J 95. **1007**

——————— **ss. 99, 100**—*Right of private defence of person—Plea need not be set up when shown by circumstances—Right, when to be exercised—Persons aiding in such defence, whether commit offence.*

If the circumstances show that the right of private defence was legitimately exercised, the Court should take it into consideration even though self-defence was not specifically pleaded.

Where danger to the person of the accused was imminent and where the evidence shows that he had no time to seek the aid of the public authorities:

Held, that he was entitled to use all force necessary to repel the attack, even to the extent of firing a gun at his assailants. Such acts for repelling the attack do not amount to a criminal offence nor are the persons aiding him in such acts, guilty of being members of an unlawful assembly. **M.** PACHAI GOUNDEN, *In re*, 15 CR. L. J. 710 **158**

——————— **ss. 99, 147, 332**—*Riot to resist illegal search—Beating Police acting in good faith under colour of their office—Right of private defence—Search beyond limits of Police Officer's station—Criminal Procedure Code (Act V of 1898), s. 165 (1).*

Where in the course of a search conducted beyond the limits of a Police Officer's station, a riot broke out with the object of resisting the search and the Police party were beaten:

Held, (1) that the search was illegal;

(2) that the resistence to an illegal search did not constitute an offence under section 332 of the Penal Code;

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(3) that the accused had no right of private defence, as the Police were acting in good faith under colour of their office, and even if they had the right, they exceeded it when they beat the Police. **S.** MIR SHAH NAWAZ KHAN v. EMPEROR, 8 S. L. R. 1; 16 CR. L. J. 15 **319**

——————— **s. 100** **158**

——————— **ss. 143, 447**—*Criminal trespass*—Bona fide *assertion of grazing right Unlawful assembly.*

A person cannot be convicted of criminal trespass because he asserts a grazing right which has never been declared against him and which he *bona fide* believes he has, nor can he be said to be a member of an unlawful assembly because he went with his party and protested against the land being ploughed up. **C.** REAJADDIN MOLLA v. EMPEROR, 18 C. W. N. 1245; 15 CR. L. J. 725 **173**

——————— **s. 147** **319**

——————— **ss. 147, 323**—*Criminal Procedure Code (Act V of 1898), ss. 236, 237, applicability of—Rioting, charge and conviction of—Appellate Court, power of, to set aside conviction of rioting and convict under s. 323.*

Where the accused were originally charged under section 147, Indian Penal Code, and convicted and sentenced under that section, but on appeal the Appellate Court held that there was no case under section 147, Indian Penal Code, but that there was a case against them under section 323, Indian Penal Code, and accordingly set aside the conviction and sentence under section 147, Indian Penal Code, and convicted the accused under section 323, Indian Penal Code, although no charge was originally framed against them under that section:

Held, that as no charge was framed against the accused of an offence under section 323, Indian Penal Code, they were not prepared to give any defence against that charge; and, unless the facts of the case brought it under section 236, Criminal Procedure Code, they could not be lawfully convicted of any other offence under section 237 of th Code. **C.** GENU MANJHI v. EMPEROR, 18 C. W. N. 1276; 15 CR. L. J. 704 **152**

——————— **ss. 147, 353**—*Charge of rioting—Common object wrongly stated, effect of—Acquittal - Conviction under another section, whether sustained—Proper course—Procedure.*

Where in an appeal against conviction for rioting, a Sessions Judge acquits the accused finding that there has been an error or omission in the statement of the common object as set out in the charge, but convicts them of an offence under another section, which the accused were not called upon to answer, he commits a manifest error and the conviction cannot be sustained, as the accused are prejudiced thereby.

In such a case the order of acquittal made by the Sessions Judge should also be set aside and the accused should be ordered to be re-tried on charges properly framed. **C.** HARNARAIN SARDAR v. EMPEROR, 18 C. W. N. 1274; 16 CR. L. J. 42 **634**

——————— **s. 149**—*Assembly not unlawful—Offence committed by one—Liability of others.*

Section 149 of the Penal Code does not operate

Penal Code—contd.

make all the members of an assembly which is not unlawful, equally guilty of an offence committed by one of them. **P.** MIHAN SINGH *v.* EMPEROR, 26 P. R. 1914 CR.; 16 CR. L. J. 60 **652**

——— —— **s. 185**—*Bidding for right to sell drugs without intention of performing the obligation —Offence.*

A person who bids at a sale held by a Collector of the right to sell drugs in a certain area, without any intention of performing the obligation under which he is laying himself at the time of bidding, and gives a false name, is guilty of an offence under section 185 of the Indian Penal Code. **A.** BISHAN PRASAD *v.* EMPEROR, 13 A. L. J. 109; 16 CR L. J. 54; 37 A. 128 **646**

——— ——— —— **s. 188**—*Verbal order to remove obstruction, whether legal -Disobeying such order, whether offence—Criminal Procedure Code (Act V of 1898), ss* 133, 137.

A verbal order to remove an obstruction has not the effect of a final order under section 137, Criminal Procedure Code, and is not lawful, and a person disobeying such an order is not guilty of an offence under section 188, Indian Penal Code. **C.** JANAKI NATH CHAKRAVARTI *v.* JNANENDRA NATH CHAKRAVARTI, 16 CR. L. J. 24 **328**

——— ——— **s. 193**—*Giving false evidence, charge of—Contradictory statements, when can be made basis of conviction.*

A charge of perjury based on two mutually contradictory statements can be successful only where the two statements are necessary and irreconcilably contradictory of each other.

Where the accused called a person as his relation at one time, by a term not necessarily implying near relationship, and said subsequently that he was not his relation, there is no necessary contradiction between the statements and no conviction for perjury can be sustained on such statements **M.** PARVATANENI KAMAYYA, *In re*, (1915) M. W. N. 34; 16 CR. L. J. 14 **318**

——— —— **s. 300**—*Murder—Circumstantial evidence—Unsatisfactory evidence of identification of body—Conviction, whether sustainable.*

A conviction of murder cannot be sustained where the only circumstantial evidence against the accused is that the deceased was seized by the accused and the husband of the deceased in the road, placed on a camel and carried towards a canal in which her body was afterwards found completely dismembered, specially when the evidence of identification of the body is unsatisfactory and there is no direct evidence connecting the accused with the commission of the crime **P.** CHUHAR SINGH *v.* EMPEROR, 40 P. W. R. 1914 CR.; 16 CR L. J. 89 **1001**

——— ——— **ss. 300, 323**—*Murder—Four accused joined in beating of which two only gave fatal blows—Responsibility of other two—Hurt.*

Where four persons joined in beating another, out of them two gave him fatal blows on the head which resulted in his death, while the remaining two struck him on the body with no exceptional violence, and were not shown to have realized that they were taking part in a murder or how grave the injuries inflicted by their comrades were. **P.** GUL SHAH *v.* EMPEROR, 41 P. W. R 1914 Cr.; 16 CR. L. J. 93 **1005**

Penal Code—contd.

——— ——— **s. 302**—*Accused's statement not incriminating himself, whether confession—Identification, when sufficient to convict- Grave suspicion, whether sufficient for conviction.*

An accused's statement which does not incriminate himself, is not a confession and cannot be used against his co-accused.

Identification, unless conclusive, cannot be made the basis of a conviction, specially when the identifiers are nervously upset and do not mention the striking features of the accused in their first information.

The gravest suspicion against the accused will not suffice to convict them of a crime unless evidence establishes it beyond all doubt. **L. B.** NGA PO THEIN *v.* EMPEROR, 16 CR. L. J. 25 **329**

——— **s. 302**—*Murder—Circumstantial evidence—Death sentence—Age of accused, whether to be considered in imposition of death sentence.*

Where the appellant was found guilty of having murdered a child of eight years, and the Sessions Judge who tried him imposed a sentence of transportation for life, having regard to his youth and to the fact that the evidence was purely circumstantial:

Held, that in the circumstances of the case the High Court was not prepared to interfere with the sentence.

There is no rule or principle of law which prohibits the imposition of a death sentence in cases where the evidence is purely circumstantial.

Per *Ayling, J.* Where the Court is satisfied beyond reasonable doubt of the guilt of the accused, the fact that the evidence is circumstantial and not direct, is not a factor which should *per se* affect the sentence.

Per *Kumaraswamy Sastri, J.*—A consideration of the species of evidence on which the guilt of an accused is found should not of itself determine the nature of the evidence.

Circumstantial evidence like any other must, in every case, be tested and weighed and prevail or not by its own inherent proving force.

Per *Ayling* and *Kumaraswamy Sastri, JJ.*—Age of the accused is a factor which ought to be taken into consideration in determining the sentence to be imposed. **M.** MUNIANDI *v.* EMPEROR, 1 L. W. 1007; 16 M. L. T. 535; (1915) M. W. N. 34; 16 CR. L. J. 28 **332**

——— ——— **s. 302**—*Murder by grandmother of her grandchild—No justification—Sentence, appropriate Circumstantial evidence, whether alone sufficient to pass death sentence—Lenity to woman—Rule of practice—Sex of accused, whether determining factor in passing death sentence—Principle to exercise discretion misconceived — Revision — High Court, power of interference.*

Where an old woman of 50 years of age, who had long hated her daughter-in-law and resented her intrusion and had worked herself up to a frenzy of hatred against her, taking advantage of her absence from the house, entered it and murdered her five years' old grandchild with horrible cruelty, and nothing was alleged by her or suggested on her behalf which could, if established, have afforded any sort of legal or moral justification, the mere fact that the case rests on circumstantial and not direct evidence should not affect the passing of death sentence.

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Per *Ayling, J.*—Comparative lenity to women is a commonly accepted rule of practice though, needless to say, not of law, but in dealing with an atrocious crime like this the mere sex of the criminal should not bar the imposition of a sentence which would be considered appropriate in the case of a man.

Per *Seshagiri Aiyar, J* (*dissenting*)—Where a conviction is based purely upon circumstantial evidence, it is an element to be taken into consideration in determining the nature of the sentence. Where, in addition to it, there are the facts that the prisoner is a woman 50 years old and a period of four months has elapsed from the date of her conviction, no case is made out for altering the sentence of transportation for life into one of death.

Per *Oldfield, J.*—Where the principle on which a Sessions Judge exercises his discretion is misconceived, a High Court can interfere in revision with that exercise of discretion. **M.** RASAMMAL, *In re*, 16 CR. L. J. 20 **324**

——— ——— **ss. 302, 325**—*Murder—Hanging up unconscious body believing it to be dead—Death due to hanging—Intention—Offence—Grievous hurt.*

The accused assaulted his wife, who became unconscious and was thought to be dead. Then in order to create an appearance that she had committed suicide, he took up her unconscious body and hung it up by a rope, thinking it to be a dead body, but the medical evidence showed that most probably she had died of hanging:

Held, that there could be no intention to kill the woman when he thought that she was already dead and that, therefore, the offence committed was not of murder under section 302 but only an offence under section 325, Indian Penal Code. **C** EMPEROR *v.* DALU SARDAR, 18 C. W. N. 1279; 15 CR. L. J. 709 **157**

——— ——— **s. 304A**—*Death by negligence—Boat, over-crowded, sinking of—Sinking due to strong wind and rough water and resulting in loss of life—Unseaworthy condition of boat not proved—Lessees of ferry not responsible—Accident.*

Where owing to strong wind and rough water a ferry-boat overturns or sinks resulting in loss of life, the lessees of the ferry cannot be convicted of an offence under section 304A, Indian Penal Code, unless it is shown that the boat, although overcrowded, was in an unseaworthy condition at the time of the occurrence. **O.** RAGHU *v.* EMPEROR, 1 O. L. J. 711; 16 CR. L. J. 72 **664**

——— ——— **s. 323** **1005**

——— ——— **s. 325** **157**

——— ——— **s. 332** **319**

——— ——— **s. 349** **168**

——— ——— **s. 353** **634**

——— ——— **ss. 379, 442, 457, 511**—*Trespass in cattle enclosure—'Building,' meaning of—Attempt to commit theft.*

The mere surrounding of an open space of ground by a wall or a fence of any kind cannot be deemed to convert the open space into a "building" within the meaning of section 442, Indian Penal Code, and a person entering such an enclosure with intent to commit theft of cattle cannot be convicted under section 457 of the Code. But he is guilty of an offence under sections 379/511, as the attempt to commit theft may be said to have begun when he entered the enclosure. **P.** KOHMI *v.* EMPEROR, 24 P. R. 1914 CR.; 16 CR. L. J. 1 **305**

——— ——— **s. 401**—*Habitual gang of thieves Facts necessary to be proved in order to sustain conviction—Evidence of bad character—"Agoo", position of—Evidence Act (I of 1872), s. 49—"Usages of any body of men", whether cover* Panchayat's *inferences or conclusions Relevant fact—Evidence as to admission and confession, whether admissible.*

In order to sustain a conviction on a charge under section 401, Indian Penal Code, it is necessary to prove

(1) that there existed a gang of persons;
(2) that those persons were associated for the purpose of committing theft or robbery;
(3) that theft or robbery was to be committed habitually; and
(4) that the accused was a member of such gang.

But it is not necessary that each individual member of the gang should be proved to have habitually committed theft in company with the other members. Once it is established that a gang, however small in number, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in one or more cases of theft come within the purview of section 401.

The fact that an accused person is of bad character or is reputed to be a thief or a habitual thief is no evidence against him for the purposes of a charge under section 401, Indian Penal Code.

The *agoo* (the receiver of stolen property in the interests of theives who form a gang is a principal member of the gang and is within the purview of section 401.

The words "usages of any body of men", in section 49 of the Evidence Act, do not cover the inferences or conclusions which village *panchayats* are wont to draw on the basis of their experience from the behaviour of alleged thieves under certain circumstances: and the opinion formed by the members of a *panchayat* as to the guilt of suspects when the latter decline to prove their innocence in the manner laid down by the *panchayat* is not a relevant fact. Evidence as to admissions and promises made by alleged thieves before a *panchayat* is admissible without there being proof of the actual words used by the suspects before the *panchayat*. **P.** BEJA *v.* EMPEROR, 13 P. R. 1914 CR.; 16 CR. L. J. 33 **625**

——— ——— **ss. 405, 409** *Criminal breach of trust—Misappropriation of sale-proceeds—Intention at time of sale—Auctioneer not carrying out terms of contract, liability of.*

Section 405, Indian Penal Code, does not cover misappropriation of the sale-proceeds of property entrusted to a person.

A person cannot be said to have disposed of the sale-proceeds of property entrusted to him in violation of his contract dishonestly, unless it is shown that he had the intention of dishonestly appropriating the sale-proceeds at the time of the sale.

Penal Code--concld.

An auctioneer cannot be said to be liable for criminal breach of trust if he does not punctually carry out every term in the agreement.

A person charged with criminal breach of trust of property entrusted to him cannot be convicted of embezzling the amount obtained by dealing with the property. **C.** BALTHASAR *v.* EMPEROR, 41 C. 844; 15 CR. L. J. 683; 19 C. W. N. 422 **131**

——— ——— **s. 409** **131**

——— ——— **s. 415** **641**

——— ——— **ss. 426, 447**—*Mischief Trespass—Trespasser's entry, whether gives him judicial possession—Removal of obstruction, whether offence—Pathway—Obstruction.*

A mere trespasser cannot obtain what is known n law as possession by the act of entry, or by the continuance of that act, so long as the act is disputed and resisted.

Therefore, if a person takes possession of the site of a public road and builds upon it to the obstruction o the public, it is no offence for a member of the public to pull down that obstruction and exercise his right of way. **M.** DHARMALINGA MUDALI, *In re*, 1 L. W. 911; 15 CR. L. J. 723 **171**

——— ——— **s. 428** **641**

——— ——— **s. 442** **305**

——— ——— **s. 447** **171, 173**

——— ——— **ss. 448, 511**—*Attempt to commit criminal trespass—Criminal Procedure Code (Act V of 1898), s. 227—Charge, amendment of*

Entry on a verandah may not amount to house-trespass, but such entry coupled with an attempt to push open the door, does amount to an attempt to commit the offence. Those who accompany the accused but remain looking on without entering on the complainant's property are not guilty of criminal trespass even if they abuse.

When a Magistrate amends the charge, he should not write over the original charge but should leave it on the file for reference, if necessary, and should write the new charge separately and correctly date it. **L. B.** NGA PAN HLAING *v.* EMPEROR, 16 CR. L. J. 2 **306**

——— ——— **s. 457** **305**

——— ——— **s. 464** **323**

——— ——— **s. 465**—*Signing telegram in another's name—No intent to injure—Forgery—Denial of fact by accused—Defence inconsistent with denial.*

The mere signing a telegram in another's name, where it is not shown to have been done with intent to injure him and where it does not actually injure him, does not constitute the offence of forgery, even though the signature may have been made without the authority of such person.

An accused is not bound by any statement denying any fact against him if he desires subsequently to take a further defence inconsistent with the denial. **C.** KALI PRASAD BANERJEE *v.* EMPEROR, 16 CR. L. J. 76 **668**

——— ——— **s. 477A** **323**

——— ——— **s. 492, Expl. 4** **460**

——— ——— **s. 511** **305, 306**

Pensions Act (XXIII of 1871), s. 4—*Suit for partition of* inam—*Necessity of certificate—Hindu Law—Joint undivided family*—Desai inam—*Devolution of* inam *on managing member—Right of other members to share* Inam—*Grant of land and not merely of land-revenue Jurisdiction of Civil Courts.*

The pre-requisite of filing a certificate under section 4 of the Pensions Act has no application where the suit in the Civil Court is for partition of the *inam* among the members of the family to which the grant was made, nor does that section apply where the grant is not merely of land-revenue but of land also.

Where on the date of the grant there was no *kudiyaram* interest in the land, the presumption is that the grant is not merely of land-revenue but of land also.

Where a *Desai Inam* devolves on the managing member of a joint undivided Hindu family for the time being, the presumption is that the devolution is for the benefit of all the members of the family and not for that of the manager alone. The other members of the family are, therefore, entitled to shares in the *inam*. **M** NANJUNDIAH *v.* VENKATA SUBBAYA, 1 L. W. 670; 16 M. L. T. 239; 27 M. L. J. 618 **87**

——— ——— ——— **ss. 11, 12** **743**

Personal Law. *See* CUSTOM.

Petition-writer, position of—Case, conduct of, entrusted to petition-writer—Litigation, experience in, effect of—Legal consequences of acts—Transaction, true import of—Undue influence **26**

Plaint, amendment of. *See* AMENDMENT OF PLAINT **383**

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Plea—Denial of fact by accused—Defence inconsistent with denial **668**

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Police Constable in possession of money contrary to order, conviction of—Defence, consideration of—Plea of guilty—Admission—Government order, proof of—Practice **151**

Possession—*Evidence—Possession of one part, whether possession of other part.*

Where in a suit for possession of land by the Secretary of State for India it is proved that the plot in dispute is a part of the Nazul lands which are in possession of the Government, it is not necessary to give further evidence of possession. **A.** INAYAT HUSSAIN *v.* SECRETARY OF STATE, 12 A. L. J. 894 **86**

Post mark—Genuinenesss—Presumption—Evidence of date and place of stamping—Date of letter—Date of posting—Date of tender of postal article to addressee—Date of delivery—Evidence—Time of trains—Matter of public notoriety—Court, notice by—Letter refused—Proof of refusal—Indorsement by postal peon, value and proof of—Presumption of fact—Evidence Act (I of 1872), ss. 16, 23, 33, 114. **562**

Post Office Act (VI of 1898), s. 52—*Misappropriation of Postal money order—Evidence, value of—Mere suspicion whether sufficient evidence—Oral or documentary evidence to prove statements made in departmental inquiry, whether admissible.*

Where the only evidence against the accused, charged with misappropriating a Telegraphic money order, is that the postal account contained entries of delivery on dates different from those on which the actual deliveries were made, that merely creates a suspicion and is not sufficient to prove misappropriation.

Oral or documentary evidence as to the statements made by a Postman in the course of a departmental inquiry are not admissible in evidence in his absence. **M.** KUPPALI PRAKASAROW, *In re*, 16 CR. L. J. 3 **307**

Power-of-Attorney, *construction of—Practice of Chetties—Two Chetties signing joint promissory-notes—Liability—Burden of proof—Evidence Act (I of 1872), ss.* 102, 103.

Powers-of-attorney are to be construed strictly, that is to say, where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

When two Chetty firms sign joint and several promissory-notes, they are both jointly interested in the moneys borrowed.

If one of the joint executants desires to escape liability, the burden of proof lies on him to prove that the payee had notice and knowledge that he signed merely as a surety for the other.

Twomey, J.—A power to sign accommodation notes may well be inferred from a power to sign promissory-notes jointly with others. **L. B.** BANK OF RANGOON, LTD., *v.* SOMASUNDARAM CHETTY **253**

Power of Receiver in partition suit to acknowledge debt—Acknowledgment, effect of—Joint family trade—Promissory note executed on behalf of firm by one member, if other members can be sued. **343**

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——— Trial piecemeal—Decision whether legal **954**

———, *Witness improving on his former statement—Evidence—Colouring matter of blood on clothes and nail parings of accused—Murder.*

It is very unsafe to rely upon a witness who materially improves on his former statement.

In the absence of reasonable proof of guilt, the presence of colouring matter of blood on certain articles of clothing of a person accused of murder or of mammalian blood on his nail parings is not of much consequence and can be explained in various ways. **P.** NADIR *v.* EMPEROR, 43 P. W. R. 1914 CR.; 16 Cr. L. J. 75 **667**

Pre-emption. *See* PUNJAB PRE-EMPTION ACT

———, *Appeal—Amount increased—No time fixed for payment of additional amount—Payment within reasonable time, validity of.*

In a pre-emption decree the plaintiff was ordered to pay a certain sum of money within a limited time. In appeal this amount was increased, but no time was fixed for the payment of this additional amount. The pre-emptor, however, paid it in a month and one day after the decree:

Held, that the payment was within reasonable time and the pre-emptor was entitled to execute his decree. **A** GUPTAR TEWARI *v.* DEBI SARAN TEWARI 12 A. L. J. 842; 36 A. 514 **65**

———, Co-sharer—Vendee, whether complete stranger **55**

———, *Custom—A share of a* mahal *confiscated by Government—Custom already prevailing in the* mahal, *whether affected by confiscation—*"Karibi wa khandani," *whether a widow related through a female is.*

The confiscation of a share in a *mahal* by the Government does not affect the custom of pre-emption which was in existence prior to the confiscation, and the grantee of the confiscated share has a right of pre-emption as against a stranger.

Where there is a preferential claim of pre-emption on the ground of the pre-emptor being both "*karibi wa khandani*" with the vendor, a Hindu widow whose relationship with the vendor is through a female and who is 12 degrees removed from the vendor, is not *karibi wa khandani* and has no preferential right. **A.** DURGA PRASAD PANDE v. FATEH BAHADUR SINGH, 12 A. L. J. 725; 36 A. 451 **494**

Pre-emption—concld.

——— ——— ———, Declaratory suit—Succession—Mortgage of ancestral land—Sale of equity of redemption, whether sale for purposes of pre-emption—Widow of donor still alive—*Riwaj-i-am*—Sale of ancestral house—Ancestral and acquired property **852**

——— ——— ———, right of—Sharer in *mahal* being related to vendor, preferential right of, over sharer not so related **517**

——— ——— ———, *suit for—Alternative relief, whether can be claimed—Suit based on Muhammadan Law—Custom proved—Suit, whether to be decreed.*

A pre-emptor ought to be allowed to base his case in the alternative, on the Muhammadan Law or custom. Therefore, a suit for pre-emption based on Muhammadan Law can be decreed without an amendment, if it is proved that a custom of pre-emption prevails and the plaintiff has brought himself within it. A. ABDUL HAMID v. MASEETULLAH, 12 A. L. J. 966; 36 A. 573 **70**

Prescription. *See* ADVERSE POSSESSION; EASEMENT.

Presidency Towns Insolvency Act (III of 1909), ss. 18, 53—*Execution sale—Subsequent insolvency of debtor, if affects purchaser's right—Official Assignee, right of, to set aside sale and stop confirmation.*

According to the provisions of the Civil Procedure Code, an auction-purchaser's title dates from the date of the sale, provided the sale is confirmed by the Court. Until confirmation, however, he has an inchoate right which he is entitled to have recognised and perfected. An order of adjudication passed against the judgment-debtor does not affect such right, as the Official Assignee only takes the estate subject to the rights of third persons affecting the same and cannot claim to have the sale cancelled on the ground of any equity possessed by the general body of creditors at the time of the order of adjudication. M. OFFICIAL ASSIGNEE OF MADRAS v. PONNUSAWMY MUDALI, 1 L. W. 1028 **421**

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Presumption. *See* HINDU LAW.

——— ——— ———Addition to holding by encroachment—Possession for more than 12 years prior to commencement of Act—*Ryots*—Ejectment **588**

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——— ——— ———*Implied engagement—Anicut irrigation, construction of, by Government—Right of owner of land whose supply is cut off to receive free supply—Cause of action—Government, liability of.*

Where on the introduction of the anicut system of irrigation into a certain district, the Government allowed free irrigation from the anicuts to all lands which, owing to the construction of several anicut channels and other works connected therewith, were found to have lost, wholly or partially, their pre-existing sources of supply, the owners of such lands, who did not enter into litigation with the Government for interfering with the old sources of supply and who took the water supplied by the Government from the Government anicuts, must be taken to have accepted the offer of Government in satisfaction of their claims against Government and where the Government supplied water for 37 years, a natural and irresistible presumption arises that there was an implied engagement between the parties for the free supply of water and if the Government interferes with such supply the owners of such lands have a good cause of action against the Government.

Where since a Settlement a land-holder has improved his *zemindari* and brought a large extent of land under wet cultivation by improving his irrigation sources and where the Government by their new anicut system cut off sources of irrigation supply to those large extents of land, it cannot be said that the Government did not undertake liability to supply water free to all those lands whose then existing irrigation sources were interfered with by the Government's constructions but only to those lands which were irrigated at the Settlement. M. ZEMINDAR OF KAPILESWARAPURAM v. SECRETARY OF STATE, 37 M. 355 *Note* **590**

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Principal and agent—Agent contracting in his own name—Suit, right of—Agent and sub-agent—Privity of contract between principal and sub-agent—*Dubashes*, position of—Sub-agent—Security money with agent Principal adopting agent's acts, rights and liabilities of—Equity 822

——————— *One limited Company acting as managing agent for another, whether can make profits in supplying goods.*

The plaintiff Company were managing agents of the defendant Company and supplied to the latter, at reasonable retail prices, goods which they themselves had bought wholesale at lower prices:

Held, that the plaintiff Company were not entitled to make any profit on the goods supplied to their principal, the defendant Company. **L. B.** TWINZAS OIL CO. v. MOWER & CO. 478

——————— *Goods purchased on credit—Contract by agent to pay reasonable rate of interest – Principal, whether bound.*

An agreement by an agent to pay a reasonable rate of interest for goods purchased on credit is binding on his principal. **M.** EDAYAGIRI GOPALARATNAM *v.* CHOKALINGAM SETTI 365

——————— *Money spent by agent for principal—Right of agent to compensation Limitation Act (IX of 1908), Sch. I, Art. 83.*

The right of an agent to be recouped by his principal in respect of losses sustained by the agent in his agency is a direct consequence of the agency contract, and a suit to enforce the right is governed by Article 83 of the Limitation Act. **P** MANGHI RAM v. RAM SARAN DAS MAMAN CHAND, 35 P. W. R. 1915 415

——————— Suit to recover money—Limitation—Moveable property—Money, whether moveable property—Agency, termination of—Limitation Act (IX of 1908), Sch I, Arts. 89, 115—Agent's contract to account, suit on—Article applicable 760

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Probate and Administration Act (V of 1881)—*Will, whether can be proved in proceedings other than probate—Will not proved under the Act, effect of Succession Act (X of 1865) s. 187—Deceased, representation of.*

A Will may be proved in a proceeding other than a probate proceeding, although no Probate of it has been taken under the Probate and Administration Act V of 1881.

But unless a Probate or Letters of Administration are taken under the Act, a Will cannot prove that anybody named therein has title to the estate of the testator.

Therefore, so long as the Probate of a Will is not taken, the legal heir represents the estate of the deceased and can maintain a suit for the benefit of the estate. **C.** BASUNTA KUMAR CHUCKERBUTTY *v.* GOPAL CHUNDER DAS, 18 C. W. N. 1136 21

——————— **s. 4** 472

——————— **ss. 23, 30 and 41**—*Letters of Administration, limited grant of, when not allowed.*

In granting Letters to administer the estate of a deceased person, a limited grant of Letters should not be awarded to the attorney of an absent sharer, if a sharer who is entitled to as much as the absent sharer is within the Province and is willing to administer the estate **L. B.** ESOOF EBRAHIM MOOLLA v. ESOOF SULAIMAN ABOO 743

——————— **s. 24, 25** 980

——————— **s. 30, 41** 743

——————— **s. 78**—*Administration bond Surety's liability, suit to enforce—Limitation —Limitation (Act IX of 1908), Sch. I, Art. 68.*

A suit to enforce the liability of a surety under an administration bond is barred under Article 68 of the Limitation Act, 1908, if not brought within three years of the breach of a condition contained in the bond. **L. B.** AHMED MOOLA DAWOOD v. FATIMA BEE BEE. 505

——————— **s. 90** 792

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——————— Reformatory Schools Act (VIII of 1897), s. 9 (1) (2)—Magistrate not empowered under s. 8 of Act—Case to be submitted to District Magistrate and not to his immediate Appellate Magistrate 336

Process-fee. *filing of—Service of order, proof of—Attachment of immoveable property—Alienation, private, of immoveable property ordered to be attached—Civil Procedure Code (Act XIV of 1882), s. 274—Civil Procedure Code (Act V of 1908), O. XXI, r. 54—Evidence Act (I of 1872), s. 114—Presumption—Judicial acts, regularity of, to be presumed—Proceedings, presumption in respect of.*

The filing of process-fee for the issue of an order of attachment of an immoveable property is not sufficient proof of service of that order.

A private alienation of an immoveable property effected after the passing of an order for its attachment not actually carried into effect, cannot be treated as invalid, unless proof is offered that all the preliminaries required by section 274, Civil Procedure Code (1882), *i.e.*, Order XXI, rule 54, Civil Procedure Code (1908), have been complied with.

Section 114 of the Evidence Act authorises presumptions to be raised as to the regularity of judicial acts, but a presumption can be made in regard to the proceedings that may follow it. **O.** LALJI v. GANGA PRASAD, 1 O. L. J. 549 **204**

Promissory note *executed by* karnavan *but not signed as* karnavan—*Liability of* tarwad *property.*

Where a suit is based upon a promissory note executed by the deceased *karnavan*, who did not sign himself as *karnavan*, no decree can be given against the *tarwad* property. **M.** GOVINDAN NAIR v. NANU MENON, (1914) M. W. N. 782; 27 M. L. J. 595 **750**

——————, *suit on—Head of* mutt *executing promissory note, whether personally liable.*

The head of a *mutt* is personally liable on promissory notes executed by him, unless he has contracted himself out of such liability. **M.** KASIVASI SOMASUNDARA THAMBIRAN v. VENKATANARAYANA PILLAI **356**

Provincial Insolvency Act (III of 1907), ss. 11 (d), 15—*Application to be declared insolvent—Bogus debt given in schedule of liabilities, effect of.*

Where an applicant is in fact insolvent, his application should not be dismissed merely because he mentions some bogus debts in the schedule of liabilities given with the application.

If he has been guilty of any act of bad faith in drawing up the schedule, he can be suitably dealt with at a later stage by the District Judge under the provisions of the Insolvency Act. **A.** MUNNI LAL v. BHAGWAN DAS **24**

——————— ss. 12 (1), (3), 46 (3)—*Creditor's petition—Notice to other creditors, if necessary—Order refusing to add creditor as party—Adjudication—Appealability.*

There is nothing in section 12 (3) of the Provincial Insolvency Act, III of 1907, to warrant the contention that in the case of a petition filed by a creditor to adjudge his debtor an insolvent, notice to other creditors is not necessary under section 12 (1) of the said Act.

Under section 46 (3) of the Provincial Insolvency Act an appeal lies to the High Court at the instance of a creditor against an order of adjudication passed on the petition of another creditor if the Court declined to add the former as a party. **M.** MUTHUKARUPPAN CHETTIAR v. MUTHURAMAN CHETTIAR, 1 L. W. 912; (1914) M. W. N. 899 **282**

Provincial Insolvency Act—concld.

——————— s. 15 **24**

——————— s. 16—Receiver, position of **836**

——————— s. 18—*Insolvent's property in possession of third person—Receiver—Power of Court to put Receiver in possession of such property.*

Section 18 of the Provincial Insolvency Act empowers the Court, where it appoints a Receiver, to remove any person, in whose possession or custody any property of the insolvent is, from the possession or custody thereof, provided the insolvent has a right to remove him. **A.** BANSIDHAR v. KHAROGJIT, 12 A. L. J. 1273; 37 A. 65 **926**

——————— s. 36—*Jurisdiction of District Judge to refer matter to subordinate Court.*

An inquiry under section 36 of the Provincial Insolvency Act cannot be delegated to a subordinate Court. The District Judge must himself decide whether or not action should be taken to annul a transfer under the section. **A.** JAGANNATH v. LACHMAN DAS, 12 A. L. J. 889; 36 A. 549 **32**

——————— s. 46 (3) **282**

Provincial Small Cause Court—*Compensation for attachment before judgment, order of—Appeal.*

A Small Cause Court has power to award compensation when it issues an *interim* attachment and dismisses it after the other side is heard and such an order cannot be questioned in appeal. **M.** KARUMURU VENKATESWAMI v. LANKA TRIPURIAH **359**

Public charities. *See* CIVIL PROCEDURE CODE, s. 92.

Public policy—Agreement to pay money for procuring adoption, validity of **779**

Public way, *right of Metalled or unmetalled parts of public road, whether public road.*

All the ground forming part of a road, whether metalled or not, over which the public have the right of way is the public road. **A.** MUNICIPAL BOARD, AGRA v. SUDARSHAN DAS SHASTRI, 12 A. L. J. 1137; 37 A. 9 **206**

Punjab Land Revenue Act (XVII of 1887), s. 54—Pre-emption of entries **969**

Punjab Pre-emption Act (II of 1905), s. 12 (c), "economy" *Subdivision*—Patti *created for fiscal purposes—Proprietor of* patti, *pre-emption, right of—Pre-emptor, obligations of—Extension of time to pay pre-emption money, when allowed by Appellate Court—Law of pre-emption, nature and basis of—Villages of recent growth, whether can be subject of pre-emption.*

A pre-emptor is given a very special and peculiar right which overrides the ordinary rights of contract and if he asks the Court to give effect to that right, he must be careful to see that he complies, compatibly with his honest pleas, with the decree which the Court grants him.

Therefore, an Appellate Court will not as of right grant to a pre-emptor an extension of time within which to pay any further sum which that Court finds to be justly payable by him, if in point of fact he has paid no money into Court or has made no tender of a sum to the Court or if the sum he has paid or tendered is unreasonably small.

Punjab Pre-emption Act—concld.

A *patti* which is created merely for fiscal purposes and in no way represents homogeneity of area or descent of the proprietors, does not constitute a "sub-division" within the meaning and for the purposes of section 12 *(c)* "secondly" of the Punjab Pre-emption Act, 1905, and, therefore, a proprietor in such *patti* has no right of pre-emption.

The law of pre-emption as applicable to village communities was intended, primarily at all events, to protect the village against the intrusion of strangers, who might otherwise obtain a footing in it contrary to the wishes of the community who were bound to each other by the ties of descent and would resent the advent of an intruder.

Therefore, the principle can have no application when the village is of but recent foundation and is composed of individuals whose sole connection *inter se* is that each has been selected by Government as a person to whom a grant of land might fitly be made. **P.** WARYAM SINGH *v.* MAHTAB SINGH **423**

Punjab Tenancy Act (XVI of 1887), ss. 5, 111, 112—*Succession to occupancy rights—Right of collaterals—Claim based on agreement—Entry in Settlement Record, effect of—Agreement, how proved.*

In the absence of an express intention to the contrary, agreements recorded in a Settlement Record are not intended to take effect after the expiry of the period of the Settlement.

Where an occupancy tenant died without leaving any male lineal descendants or a widow, and his collaterals sued to succeed to the occupancy rights as against the landlords:

Held, (1) that there being no evidence to prove that the common ancestor of the last occupancy tenant and his collaterals ever occupied the land, the plaintiffs had no right of inheritance under section 59 of the Punjab Tenancy Act;

(2) that the plaintiffs' claim could not be allowed as they failed to establish an agreement referred to in section 111 of the Act.

A collateral of a deceased occupancy tenant who bases his claim to succeed to his tenancy upon an agreement, must prove it in one of the three following ways:

(1) He may produce a document which contains the terms agreed upon between the parties;

(2) he may put forward an entry made before the 18th November 1871 and attested by the proper officer in the record of a Regular Settlement sanctioned by the Local Government; or

(3) he may rely on an entry in a Record of Rights made after the above-mentioned date or on an entry in an annual record prepared under the provisions of the Punjab Land Revenue Act, 1887.

An entry which comes under (2) is by law deemed to be an agreement and nothing beyond its mere production is required, while the entry coming under (3) does not *proprio vigore* amount to an agreement and the party relying upon it has to prove that it embodies the terms of an agreement arrived at between the parties **P.** HIRA *v.* MUHAMADI, 2 P. W. R. 1915; 16 P. R. 1915; 64 P. L. R. 1915 **404**

—— —— —— **ss. 77, 100** **89**

—— —— —— **ss. 111, 112** **404**

Putni Regulation (VIII of 1819), s. 11—Putni Taluk, *purchaser of, rights of—Limitation Act (XV of 1877), Sch. II, Art. 121—Encumbrance, meaning of—Suit to annul encumbrance—Adverse possession, when encumbrance—"Court may presume possession to follow title," applicability of—Bengal Tenancy Act VIII of 1885), ss 159, 161, 167, 195 (c)—Encumbrance, suit to annul—Conditions to be fulfilled.*

A purchaser of a *putni taluk* at a sale held under Regulation VIII of 1819 takes the *taluk* in the state in which it was initially created, that is to say, the purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by act of the defaulting proprietor, his representatives or assignees, but also free of the interest acquired by an adverse possession which commenced after the creation of the *putni*.

Therefore, if a plaintiff relies upon Article 121 of Schedule II of the Limitation Act, 877, he has to establish that the encumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the *putni*.

The doctrine "that the Court may presume possession to follow title", however valuable in deciding questions of limitation in cases of conflicting evidence as to possession on both sides, can have no application in a case where the plaintiff has to establish possession at a particular point of time

Where in an ejectment suit by the purchaser of a *putni taluk* the purchaser does not establish that the possession of the defendants commenced after the creation of the *putni* or that the proprietor of the estate was in possession at the time when the *putni* was granted, the interest of the defendants cannot be said to be an incumbrance within the meaning of Article 121 of the Limitation Act, 1877, or within the meaning of section 11, clause (1), of Regulation VIII of 1819 and the purchaser is not entitled to a decree of ejectment

Under the Bengal Tenancy Act, 1885, also the word *incumbrance* in sections 159, 161 (*a*) includes a statutory title acquired by a trespasser in adverse possession of the land of the defaulting tenure, provided such act of possession commenced after the tenure had been created.

The restriction mentioned in section 195 (*c*) of the Bengal Tenancy Act does not touch the question of the applicability of section 167 to the lands in suit. **C.** KALIKANANDA MUKHERJEE *v.* BIPRO DAS PAL CHOUDHURY, 19 C. W. N. 18; 21 C. L. J. 265 **436**

Putni tenure—*Rent, whether first charge—Sale in execution of decree for arrears of rent—Rights of purchaser—Priority between landlord and mortgagee—Bengal Putni Talukdars Regulation (VIII of 1819).*

The rent payable by the *putnidar* to the *zemindar* for which a decree has already been obtained, is a first charge upon the tenure and takes precedence over all other charges even though they be prior in point of time.

A sale under such a decree passes the tenure to the purchaser who acquires it with liberty to annul all encumbrances

Where property has been sold in execution of a decree for arrears of rent, the mortgagee has a charge upon the surplus sale-proceeds, notwithstanding the fact that the mortgage-debt has been transformed into

Putni tenure—contd.

a judgment-debt as the security subsists till the mortgage-decree has been satisfied.

Where a sale of a *putni* tenure takes place under the Putni Regulation and the sale proceeds are deposited with the Collector, the landlord is entitled in the first place to appropriate a sufficient portion of the sale-proceeds before the mortgagee can proceed to realise his dues.

A tenure which has been lawfully sold for its own arrears cannot be again put to sale for the arrears due on account of a previous period.

Obiter dictum. Section 65 of the Bengal Tenancy Act does not contradict section 17 of the Putni Regulation. **C.** BASANT KUMAR BOSE *v.* KHULNA LOAN COMPANY, 20 C. L. J. 1 **197**

Receiver. appointment of—Mortgage-decree—Personal decree, absence of **986**

Records of Court lost. Court's power to reconstruct lost records **244**

Redemption. *See* MORTGAGE.

——————— decree passed by implication—Preliminary decree—Foreclosure—Redemption decree must be drawn up **101**

——————— , partial—Suit to redeem one item of mortgaged properties, maintainability of **194**

——————— , *right of—Equity of redemption sold in Court auction—Purchaser not getting symbolical delivery, effect of—Equity of redemption purchased by mortgagee, effect of—Adverse possession of interest in land—Hindu Law—Alienation by widow—Consent of next reversioner to alienation given in course of suit, effect of.*

In 1873 the equity of redemption in an usufructuarily mortgaged property, which was in the possession of the mortgagee, was sold in execution of a money-decree against the mortgagor, but the auction-purchaser did not get symbolical delivery of the incorporeal right purchased by him. In 1893 the mortgagee purchased the equity of redemption from the heir of the auction-purchaser. In 1909 the plaintiff purchased the equity of redemption from the heir of the heir of the mortgagor and sued for redemption:

Held, that, by purchasing the equity of redemption from the auction-purchaser, the mortgagee became the full owner of the property and that the plaintiff had no right to claim redemption.

Held, also, that the fact that the auction-purchaser of the equity of redemption did not get symbolical delivery of the incorporeal right purchased by him, did not vest back that right in the mortgagor-judgment-debtor.

There can be no adverse possession of any interest in land by a person who is not deriving any benefit whatever during the period of the alleged adverse possession.

The consent of the next reversioner to a Hindu widow's alienation if given in the course of a suit, and not at the time of the alienation, is not sufficient to pass full title to the alienee. **M.** LAKSHMINARAYANA AIYAR *v.* ULAGAMMAL, 28 M. L. J. 246 **528**

Reformatory Schools Act (VIII of 1897), s. 9 (1) (2)—*Magistrate not empowered under s. 8 of Act—Procedure—Case to be submitted to District Magistrate and not to his immediate Appellate Magistrate.*

A second class Magistrate, not empowered to act under section 8 of the Reformatory Schools Act (VIII of 1897), should after convicting the accused, submit the case to the District Magistrate for passing sentence under section 9 (2) of the Act, and not to the joint Magistrate to whom the second class Magistrate may be immediately subordinate. **M.** KANAKUYYA *v.* EMPEROR, 16 CR. L. J. 32 **356**

Registration—*Compromise deed—Arrangements about certain estate.*

A deed of compromise which gives effect to some arrangement arrived at between parties about a certain estate is compulsorily registrable. **P.** INDAR SINGH *v.* KARTAR SINGH **423**

Registration Act (III of 1877), s. 17—*Compromise petition filed in mutation case—Stamp—Registration.*

A petition presented to a Revenue Court in a mutation case and stating that the parties had compromised their dispute and praying that mutation may be sanctioned in accordance with the compromise, does not require to be stamped or registered as a transfer of interest in immoveable property. **A.** JAGRANI MISRANI *v.* BISHESHAR DUBE, 12 A. L. J. 1316 **791**

——————— **ss. 28, 32, 49, 60**—*Registration by Sub-Registrar within whose jurisdiction property not situate—Fictitious property mentioned in deed—Fraud.*

The object of registration is the prevention of fraud and to make public all transfers of property.

Therefore, a document is not registered in accordance with the Act if no part of the property comprised in the deed is situate within the jurisdiction of the Registrar who registers the deed. **A.** JAGANNATH *v.* RAM NATH, 12 A. L. J. 913 **52**

——————— **ss. 32, 49, 60** **52**

Registration Act (XVI of 1908), s. 17—*Compromise petition—Reciting release of co-parcener's right in family property, admissibility of without registration.*

A compromise petition evidencing either an actually effected release of a co-parcener's right in a family property or merely an agreement to give a release, is admissible in evidence without registration. **M.** SELLAPPA KOUNDAN *v.* GURUMOORTI, 27 M. L. J. 386 **790**

——————— **s. 17**—*Grant of maintenance to Hindu widow—Writing not necessary—Oral evidence.*

Under the Hindu Law, no transaction need be in writing, therefore a grant of immoveable property to a Hindu widow for maintenance, is perfectly valid if proved by oral evidence. **N.** JIWANLAL *v.* CHUDAMAN, 10 N. L. R. 111 **235**

——————— **s. 17 (c)**—*Receipt extinguishing mortgage, whether requires registration—Evidence, admissibility in.*

A receipt which evidences not merely a payment of money but also extinguishes the mortgage in

Registration Act—(1908)—concld.

virtue of a fresh agreement entered into on the date of its execution, requires registration under section 17 of the Registration Act and is inadmissible in evidence without it. **M.** DUPAGUNTLA SUBBA RAO *v.* GOLLAPUDI ETHIRAJULU, (1915) M. W. N. 33 **360**

Regulation XI of 1825, s. 4, cls. 1, 4 — *Small and shallow river-beds, right in—Accreted land, lease of, whether recognized Lease, whether in good faith*

Under section 4, clause (4), of Regulation XI of 1825, the beds of small and shallow rivers are recognised as the private property of *zemindars* within whose estate they lie, subject when dried up, to the proviso stated in the first clause of the section as regards the assessment of revenue.

When, therefore, such a river dries up or recedes leaving behind dried up land, the neighbouring subordinate *Talukdar* cannot claim it either as appertaining to his *taluk* or as an accretion to it within the first clause of the section, but it remains the *khas patit* of the *zemindar* to whose estate the river belonged.

Where a lease of such river-bed is granted by a subordinate *Talukdar* when it is still under water, the lessee cannot claim to hold it as a *raiyat* as against the proprietor when the bed dries up.

The land which is the *khas patit* of the *zemindar* cannot be *raiyati* land, and the lessee cannot acquire any *raiyati* right in it by demise from a Subordinate *Talukdar* and he cannot be said to be a lessee in good faith of the land so demised to him. **C.** RAMJAN ALI *v.* MAHARAM ALI KHONDKAR **406**

——— **s. 4 (1)**—*Accretion to rent-free tenure—Title of holder of parent tenure—Duty to pay rent—Claim for mesne profits—Tenant holding land* bona fide *under* de facto *proprietor*—De facto *proprietor not real owner, effect of.*

A tenant who enters upon a land and holds it *bona fide* under a *de facto* proprietor is entitled to be treated as a *raiyat*, although the *de facto* proprietor subsequently turns out to be not the real owner.

Where the land in dispute formed an accretion to a rent-free tenure:

Held, (1), in a suit for declaration of title to it and for recovery of possession thereof with mesne profits, that the plaintiff was entitled to possession, but the fact that he held the parent tenure rent-free did not entitle him to hold the accreted land rent-free and that he could hold it only on payment of rent to the *putnidar*;

(2) that as the plaintiff was not entitld to hold the land rent-free and as he had not only never paid rent to the *patnidar* but had never even offered to do so, he could not get a decree for mesne profits;

(3) that the plaintiff could not claim to eject a *bona fide* tenant put in by the superior holder. **C.** RAJENDRA NATH ROY *v.* NANDA LAL, 19 C. L. J. 595; 18 C. W. N. 1206 **977**

Rehn. *See* MORTGAGE.

Religious Endowments Act (XX of 1863), s. 18—*Sanction to institute suit—Sanction, object of—Construction—Suit by one while sanction given to two.*

Sanctions for instituting suits against trustees of religious establishments should be construed strictly

Religious Endowments Act—concld.

without enlarging their scope, the object of requiring sanction being to protect managers from vexatious suits.

Where sanction is given to two persons, one of them alone cannot sue without getting the sanction amended, the sanction being a condition precedent to the exercise of the right of suit. **M.** VENKATESHA MALLIA *v.* BAMMAMPALLI RAMAYYA HEGADE, 27 M. L. J. 241 **202**

Religious office, transfer of—Land attached to office transferred, whether right to office also transferred—Injunction, whether allowable **542**

——— **trust** *Trustee, power of, to alienate corpus of trust fund for repairs Manager of joint Hindu family and trustee, powers of, if similar.*

There is no difference between the rights of the alienee from the manager of a joint Hindu family and one from the trustee of a religious trust. Though ordinarily a trustee of a temple should not alienate the *corpus* of the trust fund by way of mortgage or sale, but should try his best to raise the sum required for the necessary purposes of the temple, such as repairs, by public subscriptions or by curtailment of other expenditure, yet an alienation made by the trustee for such a purpose is perfectly valid, if the alienee advances the money after making *bona fide* inquiries and satisfying himself as to the necessity for raising the funds required by the alienation in question. **M.** KUTTAYAKATH VIRA VARMA VALIA RAJAH AVERGAL *v.* ERINHAL KARUVANTA VALAPPIL AYISOUMMA, 1 L. W. 981; 16 M. L. T. 503; (1914) M. W. N. 909 **239**

Rent, payment of—Joint tanants—Co-sharer right of, to collect his share of rent separately **237**

———, suit for determination and recovery of, maintainability of **242**

——— Tree *pattas*—*Vari* payable for trees, if rent **60**

Representative-in-interest — Purchaser of equity of redemption **111**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, s. 1.

——— *Decision in previous execution proceeding between same parties, whether bars suit on same subject-matter—Civil Procedure Code (Act XIV of 1882), s. 244—Widow in possession of her husband's house, when trespasser—Maintenance, right to claim, when allowed.*

The executors of a deceased proprietor sued his widow and some other persons for recovery of various parts of his estate. The parties came to an amicable settlement and a decree was passed in terms of the written compromise. In execution proceedings, the widow objected to the attachment of the house she was residing in, but the objection was overruled and the execution allowed to proceed, the Chief Court on appeal holding that she had no right to live on in the house. On a suit by the widow for declaration that she was entitled to live during her life-time in the house in suit and for maintenance allowance:

Res judicata—concld.

Held, (1) that the decision in the previous execution proceedings between the same parties made this question *res judicata*;

(2) that inasmuch as the widow must be regarded as a trespasser in possession of property to which she had no right, she was not entitled to claim maintenance unless and until she had given possession of the house and accounted for the profits up to the date of possession. **P.** BHAGWAN KAUR *v.* HARNAM KAUR, 17 P. W. R. 915; 69 P. L. R. 915 **430**

——— ——— *Estoppel — Decision as well as grounds of decision bar subsequent suit—Civil Procedure Code (Act V of 1908) s. 11—Boundary Marks Act XXVIII of 1860), ss. 24, 25, order under, finality of.*

The plea of *res judicata* or estoppel is available, not only as regards the final conclusion of the Court or Officer, but also regarding all findings necessary for arriving at that conclusion whether they are given on formal issues raised in the case or are referable to the points which must have been the basis of the final determination.

A decision of the Boundary Settlement Officer that certain land did not form part of a *zemindari*, if not contested by filing a suit under section 25 of the Boundary Marks Act and also the grounds of that decision, *viz.*, that the lands never had formed part of the *mitta*, are *res judicata* between the parties in any subsequent suit for those lands **M.** MUTHAMMAL *v.* SECRETARY OF STATE, 27 M. L. J. 529; 16 M. L. T. 432 **817**

——— ———Execution—Application more than 12 years from date of decree—Civil Procedure Code (Act V of 1908), s. 48—Decree directing execution of conveyance—Undisposed of execution petition considered as pending—Fresh execution application—Continuation of old application—Particular construction of decree **244**

——— ——— Future mesne profits—First suit for possession and future profits under old Code—Possession alone decreed after new Code—Second suit for mesne profits for same period, maintainability of—*Res judicata* pleaded in first Court as regards part of claim—Plea taken as to whole claim in appeal—Decree dismissing whole suit in appeal, if legal **622**

——— ——— Mortgage suit—*Ex parte* decree set aside—Suit on subsequent mortgage and decree against prior mortgagee—Proceedings in first suit re-opened—Subsequent mortgagee impleaded—Limitation Act (IX of 1908), s. 18—Priority not set up in subsequent suit—Civil Procedure Code (Act V of 1908), s. 11, Expl. IV **860**

——— ——— Personal interest in suit between members of same family **16**

——— ——— plea of, not raised, whether can be raised in appeal—All pleas of estoppel, whether barred, if not raised in written statement—Mortgage suit—Subsequent mortgagee made party must set up even his prior mortgage—Prior mortgagee not necessary party and not bound to appear and plead—Parties—Pleadings **673**

——— ——— Suit for ejectment—Revenue Court, whether competent to go into validity or invalidity of lease **731**

Resumption. *See* OUDH RENT ACT, s. 107 (B).

——— ———, right of—Grant—Service *Inam* **78**

Retrospective effect of Acts **543**

Re-union—Hindu Law—Evidence **43**

Reversioners. *See* HINDU LAW.

Review. *See* CIVIL PROCEDURE CODE, O. XLVII, r. 1.

——— ———Court, power of Successor of Judge who decides case, whether competent to grant review—Decision erroneous—Court, discretion of **366**

Revision. *See* CIVIL PROCEDURE CODE, 1908, s. 115.

——— ———Acquittal, when can be set aside—Transfer of case **170**

——— ———, competency of—Other remedies open **19**

——— ——— Contract—Agreement to compound offence, promissory note executed in consideration of, whether legal—Necessary condition—Revision—High Court's power of interference—Mere errors of procedure, effect of **181**

——— ———Execution of warrant by District Magistrate—High Court, power of, in revision **335**

——— ———High Court's power in—Questions of fact, when to be considered in revision. **169**

——— ——— High Court's power of interference **324**

——— ——— Interlocutory orders **954**

——— ——— Magistrate's power to reject surety—Sufficient ground—Defence witness, whether can stand surety **175**

——— ———Material irregularity **57**

——— ——— Power of High Court to set aside order under s. 562 and to pass sentence **635**

——— ———Power to investigate facts in revision—Distinction between appellate and revisional jurisdiction—Inherent power of Court **275**

——— ———Remedy by regular suit available—Practice **62**

——— ——— when other remedy open, time taken in, whether excluded to save limitation **219**

——— ———, who can entertain—Dekkhan Agriculturists Relief Act (XVII of 1879), ss. 3 (*w*), 9, 53—Suit falling under s. 3 (*w*) **606**

——— ———Withdrawal of suit with liberty to bring fresh suit, order of—High Court, whether can interfere—Charter Act (24 & 25 Vic., c. 104), s. 5—Material irregularity **203**

Revocation, power of, how affected by character of debt, secured or unsecured **223**

——— ——— **of Will,** when valid and operative **547**

Right of private defence of person. *See* PENAL CODE, s. 99.

Rioting. *See* PENAL CODE, s. 147.

Riparian owner, right of **800**

——— ———, rights of **974**

River-bed, small and shallow, rights in **406**

Ryot *petitioning Government to remit assessment in respect of land to be used by him for cattle-shed and farm-house — Remission granted—Land not excluded from* patta—Ryot's *interest in land not extinguished.*

The plaintiffs petitioned Government to allow them to use 45 cents of *their own land free of assessment* for the purposes of a cattle-shed and a farm-house in connection with their adjoining lands. This request was granted and in the next *patta* 45 cents of land was included, although the assessment was deducted from the total amount payable.

Held, that the plaintiffs did not give up their interest in the land and place it at the absolute disposal of Government. **M.** SECRETARY OF STATE v. MIKKELINENI CHINA **961**

Ryotwari villages, *irrigation in—Right of Government to distribute water—Dam keeping water from certain lands—Party effected, whether entitled to sue—Jurisdiction of Civil Court.*

Where Government in the exercise of its general power of distributing water for irrigation in *ryotwari* villages limits the supply of water to what is reasonably necessary, no one else has any right to interfere with it.

Where a dam has been erected penning back water from the plaintiff's land, the latter can sue in a Civil Court to protect his right. **M.** SIVASAILAM IYER v. RAMAKRISHNA AIYAR, (1914) M. W. N. 788 **18**

Sale—*Mortgage—Agreement of re-sale—Mortgage by conditional sale—Construction of document—Intention of parties.*

Where the defendant sold his property to the plaintiff for Rs. 300 and got on the same day a deed executed by the plaintiff to re-sell the property to him for the same amount and remained in possession on payment of Rs. 18 as rent and it was found that the real value of the land was something between Rs. 750 and Rs. 1,500 and that fair rent was Rs. 75 a year:

Held, that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale. **B.** MADHAVRAO v. SAHEBRAO, 16 Bom. L. R. 769; 39 B. 119 **751**

——or mortgage, test of **1**

——Sale-deed providing for vendee to return property and cancel sale if consideration money paid within certain period—Mortgage by conditional sale—Transfer of Property Act (IV of 1882), s. 58 (c)—Redemption **706**

Sale-deed, *setting aside of, suit for—Claim under litigation, sale of—Validity or invalidity of sale to be judged by circumstances attending it—Petition-writer, position of—Case, conduct of, entrusted to petition-writer—Litigation, experience in, effect of—Legal consequences of acts—Transaction, true import of—Undue influence.*

The validity or invalidity of the sale of a claim under litigation is not to be judged by the value of the property affected thereby after the claim is decreed, but by the circumstances as they stood when the sale was effected.

Sale-deed—concld.

Where a petition-writer, who was engaged as an expert in litigation to prosecute a case and was to get a share in the claim under litigation in case of success and who during the pendency of that case sold off his share, subsequently sued, after the claim was decreed, for setting aside the sale on the ground that it was brought about under undue influence:

Held, that the petition-writer could not be considered to be a person who did not understand the legal consequences of his acts or the true import of the transaction in which he had entered or to be in the position of a person upon whom undue influence could be exercised. **O.** VISHUNATH KUAR v. LADLI PRASAD, 1 O. L. J. 518 **26**

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, s. 195

Sandayika. *See* HINDU LAW.

Second Appeal. *See* APPEAL SECOND.

Security, apportionment of—Apportionment invalid—Security not extinguished **393**

Security for keeping peace. *See* CRIMINAL PROCEDURE CODE, s. 107.

Sentence—Death sentence—Age of accused, whether to be considered in imposition of death sentence **332**

Set-off—Monthly servant leaving without notice, whether entitled to wages—Master—Notice—Damages **270**

Settlement Record, mistake in, allegation as to—Court, duty of **536**

Shares, allotment of. *See* COMPANY.

Slander—*Invited guest turned away because he had taken meals at widow marriages—Excommunication—Outcasting—Defamation—Caste questions—Jurisdiction of Civil Courts—Penal Code (Act XLV of 1860), s. 499, Expl. 4.*

The defendant invited the plaintiff, a Brahman, to attend a *sradha* ceremony at his house, but on his arrival turned him away saying that, as he had taken meals at widow marriages, some other Brahmans refused to attend the *sradha* if he was present. The plaintiff sued the defendant for damages for slander:

Held, that the defendant had not slandered the plaintiff.

Sadasiva Aiyar, J.—Civil Courts may discuss and deal even with a caste question where the membership and character of a member have been injuriously affected.

Defamation as defined in section 499, Explanation (4), of the Indian Penal Code, is wide enough to include caste questions within it, even where those questions do not necessarily imply defect of character.

To tell a Hindu, who does not wish to be out of his caste, that he has been excommunicated or is out of caste is defamation.

To impute to a Brahman unfitness to officiate or be the guest at a *sradha* does not necessarily amount to defamation of his character in respect of his caste,

Slander—concld.

Unless the words used in respect of the caste of a Hindu are tantamount to saying "you have become an outcaste or you have been excommunicated from your caste," the words are not defamatory. **M.** VENGALA VENKAYYA *v.* THALLAM VENKATARAMIAH, 28 M. L. J. 58 **460**

Small Cause Courts Act (IX of 1877), Sch. II, Art. 8 **380**

Sonthal Parganas Settlement Regulation (III of 1872), ss 25, 25A—Patnidar *not a proprietor.*

A suit by a *patnidar* who is not a *zemindar*, for a declaration that the defendant *patnidars* had fraudulently caused certain land to be recorded as their *lakheraj* in the Record of Rights, is barred by sections 25 and 25 *A* of the Sonthal Parganas Settlement Regutation, 1872.

A *patnidar* is not a proprietor within the meaning of section 25*A*. **C.** DIGAMBAR DAS *v.* HARENDRA NARAYAN PANDEY, 20 C. L. J. 112 **992**

Specific performance—*Agreement to sell—Subsequent sale to third party—Notice.*

Where *A* and *B* agreed to sell a house to the plaintiff, receiving a certain sum as earnest money, and subsequently sold their respective shares in the house to *C*, who was proved to have notice of the agreement:

Held, that the plaintiff was entitled to a decree for possession and for registration of the sale-deed. **P.** CHARAGH DIN *v.* AHMAD DIN, 38 P. W. R. 1915 **497**

——— ——— of contract—Agreement to sell—Managing member of Hindu family—Necessity—Part performance **983**

——— ——— *Contract to sell land—Contract Act (IX of 1872), s. 55—Time not of essence of contract—Presumption, whether rebuttable—Default in payment—Offer by post to tender expenses—Abandonment—Earnest money, forfeiture of.*

The equitable presumption that time is not of the essence of a contract to sell landed property is rebuttable in certain circumstances, as when the sale is arranged in order to meet the expenses of a marriage taking place on a certain date.

Where the vendee undertakes to bear the expenses of the sale and registration, his failure to tender them sufficiently early is a strong piece of evidence of default on his part. A mere offer by postal letter to tender such expenses is not a legal tender.

A suit for specific performance of a contract to sell land instituted 20 months after the date of the contract during which time other circumstances have intervened, cannot be decreed on the ground of waiver.

Earnest money forfeited to the vendor under the terms of the contract cannot be recovered. **M.** MULPURI VEERAYYA *v.* SANAGAVARAPU SIVAYYA, 27 M. L. J. 482 **121**

Specific Relief Act (I of 1877), s. 15—*Specific performance of contract—Agreement to sell—Managing member of Hinda family—Necessity—Part performance.*

A person is entitled to specific performance of a contract by a member of a Hindu family to sell

Specific Relief Act—contd.

his share of the family property, but not to a decree for part performance. Conveyance of a portion is not such a part of the contract "as he can perform," in the terms of section 15 of the Specific Relief Act.

Where, therefore, a suit was brought for specific performance of a contract to sell entered into by the managing member of a Hindu family and the son was also made a party:

Held, that as there was no necessity to enter into the contract, it was not binding on the family and the suit could not be maintained. **M.** DUVVUR SUBBA *v.* KAKUTURU VENKATARAMI, 16 M. L. T. 370 **983**

——— ——— ——— **s. 31**—*Allegation of fraud or mutual mistake wanting—Suit, whether for rectification of contract—Dispossession, what amounts to—Limitation Act (IX of 1908), Sch I, Art 120.*

Where there is no allegation of fraud or mutual mistake of the parties nor any finding to that effect, the suit is not one for rectification of contract and cannot come under section 31 of the Specific Relief Act I of 1877

If a proprietor who has been collecting rent from his tenants, is prevented from doing so because a rival proprietor has successfully invoked the assistance of a Court of Justice, the injured proprietor is dispossessed from his property just as effectually as if he had been driven out by physical force.

Article 120, Schedule I, of the Limitation Act has no application in such a case, which is governed by the 12 years' rule of limitation. **C.** ASIAT-ULLAH *v.* SADAT-ULLAH **368**

——— ——— ——— **s. 39**—*Cancellation of bond, who can sue for—Hindu law*—Sudras—*Inheritance by illegitimate children.*

A suit under section 39 of the Specific Relief Act is maintainable only by a person against whom the instrument is void or voidable or to whom it may cause injury.

Under the Hindu Law the illegitimate children of the *Sudra* caste are heirs. **L. B.** VASA NARAYANASWAMY *v.* ANANTHAYE **272**

——— ——— ——— **s. 42** **619**

——— ——— ——— **s. 42** — *Declaration that valid personal contract subsists, whether title to legal character or right to property—Suit for declaration for right to subscribe to* Kuri *fund, whether maintainable.*

A declaration that a valid personal contract still subsists between the parties is not a right to declare a title to a legal character or a title to right to property, and no suit under section 42 of the Specific Relief Act lies for the declaration of such a relationship.

Therefore, a suit for a declaration that the plaintiff is entitled to subscribe to a *Kuri* fund in place of another subscriber, does not lie under section 42 of the Specific Relief Act **M.** RAMAKRISHNA PATTAR *v.* NARAYENA PATTER, 27 M. L. J. 634; (1914) M. W. N. 912 **883**

——— ——— ——— **s. 42,** *object of—Declaratory decree, when granted—Discretion—Civil Procedure Code (Act V of 1908), O. II, r. 2—Cause of action*

Specific Relief Act—concld.

for declaratory suits—Suits based on different titles, if separately maintainable.

It is a matter entirely within the discretion of the Court to grant or refuse declarations under section 42 of the Specific Relief Act.

The object of the section is merely to perpetuate and strengthen testimony regarding the title of the plaintiff so that adverse attacks on it may not weaken it.

Whenever evidence is being created which might ultimately result in disturbing the title of the plaintiff, he will have a cause of action to sue under section 42.

Where a suit with regard to certain property is based on a certain title, the plaintiff is not debarred by Order II, r. 2, from suing to recover some other property on some other ground. **M.** GANDLA PEDDA NAGANNA *v.* SIVANAPPA, 16 M. L. T. 310; 27 M. L. J. 520 **232**

Statement *made by party or his Pleader—Admissibility in evidence - Estoppel—*Wajib-ul-arz, *construction and value of—Proof of custom—Custom recorded in* Wajib-ul-arz *at variance with* Mitakshara *Law, weight of—Court, duty of.*

The statements regarding a certain point made in a previous case by a party or his Pleader are admissible in evidence to prove or disprove that point again arising in a subsequent case and can be relied upon by the Court in considering that point. But the party or the person claiming through him in the subsequ nt case is at liberty to prove that the admissions appearing in those statements were mistaken or untrue, and is not estopped or concluded by them unless some other person has been induced by them to alter his condition.

A *wajib-ul-arz* is properly admissible to prove a custom set out therein; and suits on the basis of custom may be decreed on entries in a *wajib-u -arz* alone. But where it appears that the entries connote the views of individuals as to the practice which they wish to see prevailing rather than the ascertained fact of a well-established custom, the *wajib-ul-arz* is of little value.

When a custom is startlingly at variance with the *Mitakshara* Law among Hindus following that law, a Court is entitled to look for substantial corroborations. **O.** SURAJ BAKHSH *v.* CHHAB KUAR, 1 O. L. J. 532 **98**

Step-in-aid of execution. *See* LIMITATION ACT, SCH. I, ART. 182.

Stridhanam. *See* HINDU LAW.

Subordinate Courts, right of **475**

Succession. *See* AGRA TENANCY ACT, s. 22; CUSTOM; HINDU LAW.

Succession Act (X of 1865), s. 4 **488**

——— ——— ——— ——— **s. 50** **547**

——— ——— ——— ——— **s. 170** **792**

——— ——— ——— ——— **s. 187** — Deceased, representation of **21**

——— ——— ——— ——— **ss. 268 to 273** **369**

Suit for administration of estate—Suit for accounts —Valuation for jurisdiction and Court-fees identical **342**

——— *to set aside decree passed against a person as minor on ground that he was not minor—Burden of proof.*

Where a decree passed against a person as a minor is sought to be declared null and void on the ground that he was not minor but major at the date of the suit, the burden of proof lies on him to establish his allegation. **N.** GOKAL SINGH *v.* KANHAYA LAL, 10 N. L. R. 137 **816**

Surety. *See* CRIMINAL PROCEDURE CODE, s. 109.

——, liability of—Bond for appearance in Court **665**

——, liability of—Bond to restore property attached before judgment—Dismissal of suit - Appeal **76**

Surrender. *See* ALIENATION; LANDLORD AND TENANT.

Tender, conditional, validity of **184**

Title—*Possession, suit for—Original grant not forthcoming Registered conveyance extending over fifty years produced, whether sufficient to prove title—Boundary, fixing of—Description in deeds to be followed.*

Where in a suit for possession the plaintiffs traced their title to a grant by Government which was not forthcoming, but proved a clear title to the lands for over fifty years by a succession of duly registered conveyances, mortgages, re-conveyance and other title deeds, and also proved that during that period they had leased portions of the land by registered leases:

Held, that as none of the documents produced by the plaintiffs were impugned, a clear title to the property was proved.

In fixing the boundary of a property the description which is to be found consistently in deeds pertaining to that property must be followed. **P. C.** JOHN KING AND CO., LTD. *v.* CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF HOWRAH, 18 C. W. N. 898; 27 M L. J. 20; 20 C. L. J. 407 **949**

——, test of—Revenue Records, entry in—Boundary dispute, proceeding in **341**

Transfer of case—Acquittal, when can be set aside in revision **170**

——— ——— ———Complaint dismissed by one Magistrate—Fresh complaint to another—Evidence oral and documentary in English—Magistrate not knowing English—Ground for transfer **665**

——— ——— ———Magistrate made Chairman of Municipal Board, whether still Magistrate and subordinate to District Magistrate—Jurisdiction **141**

——— ——— ———Power of District Magistrate to send case under section 107 to second class Magistrate **647**

——— ——— **of proceedings** under section 110, application for—Ground of transfer—Apprehension of not having fair and impartial trial **648**

Transfer of Property Act (IV of 1882), ss. 51, 63, 72—*Improvement—Mortgagor and mortgagee—Mortgage of* kacha *house—*Pacca *double-storied house built on* kacha *house falling down—Mortgagor, liability of.*

A *kacha* one-storied house was usufructuarily mortgaged for Rs. 400. The mortgagee built a *pacca* room in place of a *kacha* room that had fallen down and over the new room he built a second storey and put up a *pacca* staircase to communicate with the upper storey. The whole construction cost him about Rs. 300:

Held, that the mortgagee was entitled to recover from the mortgagor the cost of the new room on the ground floor, as its construction was covered by section 72 of the Transfer of Property Act.

Held, further that the mortgagee was not entitled to recover the cost of the upper storey and the staircase as they were built by him for his own convenience and comfort without any necessity and without the mortgagor's desire or consent. **A.** RUPAN SINGH *v.* CHAMPA LAL, 13 A. L. J. 14; 37 A. 81 **521**

——— ——— — — **s. 52** **353**

——— ——— ——— **s. 52**—Lis pendens—*Purchaser in simple money-decree between decree* nisi *and decree absolute, liability of*—Pendente lite.

The purchaser of a property in execution of a simple money decree between the date of passing a preliminary decree for sale under Order XXXIV, rlue 4, and a final decree under rule 5 of the Order in respect of the same property, is a purchaser *pendente lite* and is liable to the provisions of section 52 of the Transfer of Property Act, and his purchase cannot in any way affect the rights obtained by the decree-holder under the preliminary decree. **A** MAN SINGH *v.* AMANTAXA PRASAD **879**

——— ——— ——— **s. 53**—*Fraud against creditors, transfer of part of debtor's property, if constitutes—Mortgage-debt, discharge of.*

The mere fact that a mortgagee acted as the agent of the mortgagors in collecting their outstandings, does not show that the mortgage-debt is discharged.

A transfer by a debtor, for a genuine debt, of part only of his property is not voidable under section 53 of the Transfer of Property Act. **M.** PALANIAPPA CHETTI *v.* RAMA NATHAN CHETTI, 2 L. W. 64 **834**

——— ——— ——— **s. 58**—*Mortgage, elements of*—Adamanakadanpathiram, *whether mortgage—Limitation Act (IX of* 1908*), s.* 31.

It is not essential for a mortgage that there should be a formal transfer of interest or that a power of bringing the property to sale should be expressed.

A document which calls itself as an *adamanakadanpathiram* and gives a sufficiently accurate description of the mortgaged property and recites also the amount due thereunder, is a mortgage within the meaning of section 31 of the Limitation Act, 1908, and not merely a simple money bond. **M.** PONNURANGA MUDALIAR *v.* THANDAVARAYA MUDALIAR, 1 L. W. 1025; (1915) M. W. N. 21 **274**

——— ——— ——— **s. 58**—*Writer of document signing below attestor, whether attesting witness.*

The writer of a document, who signs after an admitted attestor, signs as an attestor, though he merely describes himself as the writer. **M.** AYYASAMI IYENGAR *v.* KYLASAM PILLAI **409**

Transfer of Property Act—contd.

——— ——— ——— ——— **s. 58 (a)**—*Mortgage—Document styled* Diggu Bhoghyam—*Construction—Transfer of interest in immoveable property.*

A document styled as Diggu Bhoghyam ran as follows:

Diggu Bhoghyam executed and delivered on 10th September 1863, corresponding to 27th Avani of Rudirodhgari year, in favour of Ranga Rayar Avergal *Zamindar* .....by Varadayyan and Anantayyan, sons of.....as follows: "A Cowle has been granted for the land in the Cusbah Kandeli, village named Nagari Divitkaran Punja, which was granted as Manyam to us by you, (Here follow details of the land) to Chinna Gownden, son of.....for Rs. 12-4-0 per annum. My father put that into your possession on 29th Chithrai of Kalayukthi year (1858) and executed a document. In that matter you have still to enjoy it from the current year Rudirodghari (1863) to Prabhava (1867-1868). Besides that, Rs. 55 have again been received this day on the security of the said land. This shall bear interest from to-day according to law. For the total of the principal and interest you shall enjoy the said land for 13 years from Vibhava (1868-1869) up to Vikaram (1880-1881) and put the land into our possession at the cultivation season in Chitrai month of Vishu. That is to say, Rs. 12-4-0 being the *thirva* on the aforesaid land should be collected from the aforesaid Chinna Gownden. Even though the said lands should lie waste owing to act of God or the State during the said years, you need not grant any remission to him. This is Diggu Bhoghyam executed of our own free-will":

Held, that the document is a mortgage, as there is a transfer of an interest in specific immoveable property within the meaning of section 58 of the Transfer of Property Act, and not merely an assignment of the income for a period. **M.** ANANTHA IYER *v.* RAMASWAMI IYER, 16 M. L. T. 444; (1914) M. W. N. 891 **71**

——— ——— ——— ——— **ss. 58 (b), 59, 100**—*Attestation—Simple mortgage—Charge—Distinction between the two—Deed of mortgage not completed for want of formalities, whether can be used to establish charge*—'Rehn,' *use of the word, whether sufficient guide to distinguish between mortgage and charge.*

The execution of a deed creating a charge can be duly proved by the witnesses who signed it upon the executant's personal acknowledgment of his signature thereon, but such a witnessing is not the attestation of a mortgage-deed within the meaning of section 59, Transfer of Property Act.

The distinction between a simple mortgage and a charge lies in the fact that the mortgage imports, while the charge does not import, an agreement, express or implied, governing the disposal of the property in some way on default being made in payment of the debt.

Where a person enters into a transaction involving a particular statutory obligation, the presumption is that he has impliedly agreed to submit to that obligation.

The statutory obligation of the debtor under a simple mortgage is exactly the same as it is under a charge, namely, an obligation, in default of payment, to have the security sold and the proceeds

Transfer of Property Act—contd.

applied in payment of the debt. The debtor in each case must be presumed to know of his liability as an element of the transaction he enters upon, whether it be a simple mortgage or a charge. But it is necessary to distinguish between an implied agreement to sell and a mere tacit acceptance of a contingent statutory liability to the sale of a security, inasmuch as a statutory obligation to have a security sold in a certain eventuality is not the same thing as a transfer of a right to sell that security on the happening of that eventuality. The form of realising the debt from the security, namely, by sale thereof, is necessarily the same, but where there is no transfer by agreement of the right to sell, that right does not come into existence at the time of the contract. In other words, in the case of a simple mortgage the right to sell the security on default of payment of the debt is created when the mortgage is effected, while in the case of a charge the statutory right and obligation to have the security sold arises only when default in payment of the debt is made and, not till then.

Where a document is in terms a deed of mortgage but has not been completed by proper attestation or other formality prescribed by law as indispensable for a valid mortgage, the instrument cannot be used to establish a charge. But where an instrument embodies the true contract between the parties, and is in terms an instrument which only creates a charge, then an erroneous belief of the parties that they have created a simple mortgage, and their conduct in calling it a mortgage and having it attested in that belief, would not affect the true nature and validity of the transaction. In such a case the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge.

As in vernacular the word '*rehn*' is used to denote every form of transaction in which immoveable property is bound as security for the payment of a debt, the name given to a document by the parties is not a sufficient guide as to whether the document creates a mortgage or a charge. **N.** KHEMCHAND *v.* MALLOO, 10 N. L. R. 81 **601**

——— ——— ——— ——— **s. 58 (c)** **706**

——— ——— ——— ——— **s. 59** **601**

——— ——— ——— ——— **s. 60** **184**

——— ——— ——— **ss. 60, 82**—*Partial redemption—Suit to redeem one item of mortgaged properties, maintainability of—Different items purchased by several persons at auction sale, effect of.*

Where several items of property are covered by a single mortgage, there cannot be a separate redemption of each of those items. Section 60 of the Transfer of Property Act cannot be read subject to section 82 and the fact that the several items were purchased piecemeal by different persons in Court auction cannot authorize a partial redemption by each of those purchasers. **M.** PANCHANADAM PILLAI *v.* SELLA PILLAI **194**

——— ——— ——— ——— **s. 63** **521**

——— ——— ——— ——— **ss. 63, 72 (b)**—*Improvement by mortgagee—Construction of well—Compensation.*

Transfer of Property Act—contd.

If a mortgagee in possession of agricultural land, without the express or implied consent of the mortgagor, constructs on the land a well the separate possession or enjoyment of which is not possible apart from the land and the construction of which is not necessary to preserve the property from destruction or even deterioration, the well must be delivered with the land to the mortgagor at redemption. **N.** RAJARAM *v.* VITHAL RAO, 10 N. L. R. 166 **712**

——— ——— ——— ——— **s. 72** **521**

——— ——— ——— ——— **s. 72 (b)** **712**

——— ——— ——— ——— **s. 82** **194**

——— ——— ——— ——— **s. 92** **184**

——— ——— ——— ——— **s. 100** **601**

——— ——— ——— ——— **s. 104** **177**

——— ——— ——— **s. 106**—*Landlord and tenant—Lease - Tenancy from year to year and for fixed period - Holding over - Determination of tenancy —Notice Breach of condition—Acceptance of rent—Waiver.*

Where a lease is forfeited for an act done in contravention of the terms of the lease, an acceptance of rent subsequent to forfeiture would amount to waiver.

Where a tenancy is from year to year and for a fixed term and the tenant holds over after the expiration of the term, the tenancy would still continue to retain the character of an yearly tenancy and would determine by a six months' notice terminating with the year of tenancy. **A.** CHATTAR SINGH *v.* NAND KISHORE, 12 A. L. J. 1139 **107**

——— ——— ——— **ss. 106, 107, 116**—*Lease—Yearly rent fixed—Period of tenancy not settled—Holding over—Nature of tenancy—Registration of lease—Presumption—"Agreement to the contrary," meaning of—Notice sent by post—Calculation of period of notice—Duty of service of notice excluded—Day of expiry taken into account—On what date notice should expire—Notice signed by ammukhtear, validity of—Post mark—Genuineness—Presumption—Evidence of date and place of stamping—Date of letter—Date of posting—Date of tender of postal article to addressee—Date of delivery —Evidence—Time of trains—Matter of public notoriety—Court, notice by—Letter refused—Proof of refusal—Endorsement by postal peon, value and proof of--Presumption of fact—Evidence Act (I of 1872), ss. 16, 32, 33, 114.*

Certain premises were rented by an unregistered lease. A yearly rental was fixed, but the period during which the tenancy was to continue was not settled. The tenant, however; continued in possession for several years and the landlord accepted rent from him:

Held, that the tenancy was for one year only and the legal effect of its being held over was that it was renewed from month to month and was, therefore, terminable by the lessor by 15 days' notice.

The presumption of a yearly taking does not always arise from the rent being payable yearly.

"An agreement to the contrary" within the meaning of section 116, Transfer of Property Act, means an agreement as to the terms of the holding over.

Transfer of Property Act—contd.

A tenancy for one year coupled with an express or implied agreement to renew it from year to year cannot be created except by a registered agreement.

In calculating the fifteen days' notice mentioned in section 106, Transfer of Property Act, the day on which the notice is served is excluded, but the day on which it expires is taken into account. The notice must expire with the end of a month of tenancy.

A notice under section 106, Transfer of Property Act, is valid if signed by the *am-mukhtear* of the landlord.

A post mark is presumed to be genuine and when taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears and that place or office mentioned therein was actually the place where it was affixed.

The date of a letter is not necessarily the date of its posting.

An article sent by post is presumed to be delivered to the addressee in due course of post, but to fix the date of its tender to the addressee the usual course of mail between the place of posting and the place of receipt must be ascertained from evidence inasmuch as a Court cannot take as matters of publi notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time and other facts involved in such an inquiry.

The date of delivery of an article sent by mail cannot necessarily be inferred from the post mark of the receiving office, more so in the case of registered articles which are delivered by the post office only on specified days and between specified working hours.

An endorsement on the cover of a letter by a postal peon that the cover was tendered to the addressee on a certain date and was refused, is at best a record of a statement by the peon and the events recited therein must be proved by calling him as a witness, unless, the statement becomes admissible under section 32 (2), or section 33 of the Evidence Act applies.

Such an endorsement is not admissible even as a statement made by a Public Officer in the discharge of his duty.

Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the Postal Authorities does not justify the presumption that it has been so returned because it has been refused by the addressee; for it may well be that it has been returned because the addressee has not been found; much less is there presumption that cover has been tendered to addressee on a particular date.

The presumption mentioned in section 114 of the Evidence Act is not a presumption of law but a presumption of fact.

Therefore, where the addressee pledges his oath that a certain cover was never tendered to him, the presumption of regularity of official business cannot be treated as conclusive against him. **C.** GOBINDA CHANDRA SHAH *v.* DWARKA NATH PATITA; 20 C. L. J. 455; 19 C. W. N. 489 **962**

Transfer of Property Act—concld.

——— ——— ——— ——— **s. 107** **962**

——————— **s. 108 (f)** — *Lease—Occupiers of houses in* abadi qassaban *in* Mohalla Atala, *village* Atarsuiya, Allahabad—*Transfer of house, right of.*

The rights of an occupier of a house in *abadi qassaban*, in *Mohalla* Atala, village Atarsuiya, in Allahabad are those of a lessee holding under a building lease, and as such are transferable. **A.** ABDUL HAQ *v.* DATTI LAL, 13 A. L. J. 168 **446**

——— ——— ——— ——— **s. 116** **962**

——— ——— ——— ——— ——— **ss. 123, 129** **466**

Trespass—Criminal trespass—*Bona fide* assertion of grazing right—Unlawful assembly **173**

——— ——— Trespasser's entry, whether gives him judicial possession - Removal of obstruction, whether offence—Pathway—Obstruction **171**

Trespasser—Mortgagee entitled to possession on mortgagor's failure to pay instalment - Trespasser, possession of, whether adverse to mortgagee **255**

Trust. *See* RELIGIOUS TRUST.

——— *Suit by trustee to eject tenant—Co-trustees, party defendants — Suit filed without previous consultation, maintainability of.*

Where a trustee of a temple sued to eject a tenant of the temple whom his co-trustees had granted a renewal of lease without consulting him sometime before suit and impleaded the co-trustees as defendants after giving them notice calling upon them to join him in the plaint:

Held, that the suit was maintainable and the fact that the plaintiff had not held a consultation with his co-trustees before suing would not vitiate it. **M.** CHERUKAT MADATHIL EDAKRAMANCHERI *v.* MANGATHAYA DAMODARAM NAMBUDRI, 16 M. L. T. 250; (1914) M. W. N. 834 **207**

——— **property**—*Breach of trust—Person entitled to become trustee* in futuro, *suit by, for possession, whether maintainable.*

A person entitled to the office of a trustee only *in futuro*, has no subsisting interest and cannot sue for possession of trust properties *in præsenti.*

Where a breach of trust is alleged against the trustees in office, the proper remedy is a suit for their removal from office and appointment of a Receiver pending appointment of new trustees. **M.** ETTISHERI EDATHIL *v.* POTHERA KALLOOR, 2 L. W. 61 **946**

Trusts Act (II of 1882), s. 90—*Co-owner renewal of debt by, in his sole name—Unfair advantage*—Cestui que trust—*Declaratory suit maintainability of.*

Where one of the two co-owners of a debt obtains a document in his own name in derogation of the right of the other, the latter has a right to have it declared that the former holds the document for the latter's benefit also under section 90 of the Trusts Act, 1882. **M.** ALAVALA BALAYYA *v.* ALAVALA GURUVAYYA, 1 L. W. 874 **55**

Undue influence—Gift by old bady to her children - Persumption of domination or confidential relationship 39

——— Transaction — Petition writer entrusted with conduct of litigation—Legal consequences of his act 26

U. P. Court of Wards Act (III of 1899), s. 48—*Notice to sue—Amendment of plaint—No change in cause of action, whether fresh notice required.*

In a suit against a Ward of a Court an amendment of the plaint should not be allowed if the effect of the amendment is to introdue a new "cause of action" which was not stated in the notice provided by section 48 to be given to the Collector but where it is sufficiently stated the amendment should be allowed and a fresh notice under the section is not necessary.

The object of section 48 of the Court of Wards Act is to give the Collector time to consider the nature of claim against the ward in order that the manager might investigate the matter and, if necessary, meet the claim without incurring needless cost. **A.** BALDEO PRASAD *v.* COLLECTOR OF PILIBHIT, 12 A. L. J. 11 9; 37 A. 3 91

U. P. Land Revenue Act (I Iof 1901), ss. 34. 35. 40 880

——— ——— **ss. 110, 111, 233 (k)**—*Co-sharer not recorded as such, whether bound by partition proceedings - Prohibition under s. 233 (k), applicability of.*

In a partition proceeding before a Revenue Court it is not necessary for a person who is not a recorded co-sharer to come forward to assert his right and to claim proprietary interest in the plots, inasmuch as it is only a recorded co-sharer to whom notice is given and who alone is competent to object to the partition.

Therefore, a co-sharer who is not a recorded co-sharer is not precluded under section 233 (*k*) of the U. P. Land Revenue Act, III of 1901, from setting up his title in a Civil Court.

The prohibition under section 233 (*k*) of the U. P. Land Revenue Act, III of 1901, refers to the case of persons who were parties to the partition proceedings, or who should have been made parties thereto, and whose claims could have been heard under sections 111 and 112 of that Act. **A.** SHAMBHU *v.* CHETRAM, 12 A. L J. 017 119

——— ——— ——— **s. 111** 119

——— ——— ——— **s. 118**—*Partition—Site of building of one co-sharer allotted to another—Owner of building failing to express his intention to retain building on payment of ground-rent, effect of—Right to keep house after partition—Right to materials of house.*

Where in a partition proceeding before a Revenue Court a site of a building occupied by a co-sharer is allotted to the share of the other co-sharer, it is incumbent upon the co-sharer in possession of the building to invite the attention of the Revenue Authorities at the time of the partition to the existence of the building and to ask for an order fixing a ground-rent under the provisions of section 118 of the Land Revenue Act; and if he fails to do so, the other co-owner is entitled to possession in accordance with the partition decree and only an opportunity to remove the materials of the building can be allowed to him. **A.** BHURE LAL *v.* JAGAN NATH 933

——— ——— ——— **s. 233 (k)** 119

U. P. Municipalities Act (I of 1900), ss. 2, 91—*Powers of Municipal Board to close drain.*

Section 2 of the U. P. Municipalities Act cannot be read in such a way as to prevent the Municipal Board from exercising for all time the powers conferred by section 91 of the Act in respect of drains which are a nuisance or injurious to health.

Therefore, even where a person has obtained a decree against his neighbour declaring his right to pass water along a drain, the Municipal Board is entitled to close the drain if it is injurious to public health. **A.** CHAULI *v* MUNICIPAL BOARD OF MUZAFFARNAGAR, 12 A. L. J. 1 05 781

——— ——— **ss. 87, 88, 147**—*Notice under s. 88—Prosecution under s. 87—Conviction whether legal—Daily fine, whether legal under s. 88 - Evidence—Report of Municipal Overseer, admissibility of—Municipal Board neglecting to pass order within time despite receipt of written notice and written reminder, effect of.*

Where a notice is issued by a Board under section 88 but the prosecution and conviction are under section 87, the order of conviction cannot stand.

A daily fine cannot be imposed for an offence under section 88.

The report of a Municipal Overseer as to when the construction of a *chajja* took place, is not admissible in evidence and no finding can be based on such a report.

Under section 87 of the Municipalities Act the applicant gave notice to the Board, on September 30th, 1912, of his intention to erect a building. The Municipal Board took no notice of it. On 28th November 19 2 the applicant by written communication called the attention of the Board to its omission. But the reminder had no effect on the Board:

Held, that under section 87, clause (3), the Board must be deemed to have sanctioned the proposed building. **A.** RAM NATH *v.* MUNICIPAL BOARD OF MUTRA, 12 A. L. J. 740; 16 Cr. L. J. 78 670

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——— ———, *showing* muafi *to be resumable, effect of*—Muafi-khairati, *interpretation of.*

An entry in a *Wajib-ul-arz* showing a *muafi* to by resumable is no proof of the fact that the *muafi* is resumable, where the entry is not the record of a custom or practice ascertained after due inquiry

Wajib-ul-arz—concld.

but merely the statement of a landlord in his own favour as that of an interested party.

The word *muafi-khairati* does not in itself imply that the *muafi* has an effect only during the pleasure of the grantor. **U. P. B. R.** NISARUL RAHMAN *v.* TIKAM DAS, 1. O. L. J. 680 **860**

Wakf property—*Charge, validity of—Sanction of* Cazee—Ex post facto *approval, whether valid—Deed named as* tamleek *and* tawliatnama, *whether contemplates absolute endowment of entire property.*

A charge created for the purpose of saving a *wakf* property with the sanction of the *Cazee* is binding on the *wakf* property, but in case the sanction is not obtained at the time of creating the charge, an *ex post facto* approval is equally effective and the Court in which the matter comes in for consideration may validate the charge by holding that the required necessity existed.

A deed named as a *tamleek* as well as a *tawliatnama* does not contemplate an absolute endowment of the entire property. **C.** LATIFUNNISSA BIBI *v.* MAJIDUNNISSA BIBI **358**

Waste Land Rules, 1876——Izaradar—*Mortgage by occupancy-tenant—Expiry of* izardar's *term—Subsequent mortgage in favour of third party—Priority.*

In order to secure the premium of a permanent lease, defendant No. 1 executed in favour of the plaintiff, a registered mortgage-deed of his right in a field, and an *izaradar* on the village becoming *khalsa* on the expiry of the mortgagee-*izaradar's* term, the defendant-mortgagor was recorded as the occupant of a survey number. Subsequently he mortgaged his right to defendant No. 2:

Held, that the mortgagor's title as a permanent tenant under the plaintiff did not come to an end on the village becoming *khalsa* and that as he did not acquire a new, independent title unconnected with his title under the plaintiff, the plaintiff's mortgage was enforceable as against the subsequent mortgagee. **N.** JAMNA DAS *v.* PAIKU, 10 N. L. R. 170 **715**

Water rights—*Riparian owner, rights of.*

A riparain proprietor may take from a flowing stream as much water as he really requires for ordinary purposes such as for drinking, washing and so on even though he may seriously diminish the quantity available for the proprietogs below him but for purposes of irrigation he can only take a reasonable amount and what is a reasonable amount must be decided according to the particular circumstances of each case.

Where it was found that the defendants-appellants took the whole of the water that reached their land for irrigating purposes and thus completely cut off the water from the plaintiff-respondent's land:

Held, that they were not entitled to take the whole of the water unless they had acquired such a right by prescription. **U. B.** NGA PI *v.* NGA KYAN THA, 7 B. L. T 282 **974**

Widow. *See* HINDU LAW.

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——— Attestation of—Succession Act (X of 1865), s. 50—Execution of Will—Executant's signature on document, place for, no law as to—Signature for purpose of execution—Re-execution of Will—Will, execution of, includes signature of executant and attestation of witnesses—Adoption itself does not revoke previous Will—Document, construction of—"Janashin wa qaim-muqam," interpretation of—Testamentary character of document—Bequest of *talukdari* estate—Revocation of previous Will—Estate received under Will, divesting of—Burden of proof, nature of, in case where document set up as having effect of setting aside previous Will—Suspicion in mind of Court to be removed—Execution, both mechanical and intelligent or conscious, to be proved **547**

——— *Hindu Law—Portion of letter disposing of property after writer's death, whether Will.*

A portion of a letter relating to dispositions of property after the writer's death operates as a Will, notwithstanding the fact that the remainder of the letter effects an immediate settlement and contemplates the execution of a more formal document. **M.** SOMANCHI VENKATASUBBARAYUDU *v.* SOMANCHI PULLAMMA **363**

——— *Hindu Wills Act (XXI of 1870),* **s. 2**—*Probate and Administration Act (V of 1881) ss. 24, 25—Terms of Will—Probate Court only competent to decide whether Will imperfectly or inaccurately drawn up—Landlord and tenant—Suit to recover rent—Tenant setting up right of third party already on record.*

In cases to which the Hindu Wills Act applies, the terms of a Will can be proved only by a reference to the Probate or Letters of Administration, as the case may be.

Sections 24 and 25 of the Probate and Administration Act lay down the rule for cases in which the original may have been lost.

No Court other than the Court of Probate is competent to hold that the Letters of Administration had been imperfectly or inaccurately drawn up, or on an investigation of the proceedings of the Probate Court to hold that the Letters of Administration have the same effect as if a copy of the terms of the Will had been annexed thereto.

Where it is conceded that either *A* or *B* is the landlord of *C* and *A* institutes a suit to recover rent from *C* to which *B* is joined as a party, if it is agreed between *A* and *B* that *A* is entitled to the rent, it is not open to *C* to invite the Court to determine whether *A* or *B*'s entitled to recover rent from him. **C.** SUKMARI GUPTA *v.* BHARAT MANDAL, 20 C. L. J. 148 **980**

——— *, nuncupative, proof of—Hindu widow—Property acquired by, with her own money—Will, inclusion in, of property in husband's estate.*

The person who sets up a nuncupative Will is bound to allege as well as to prove with precision the words of the deceased on which he relies with every circumstance of time and place.

Where a certain property which originally formed part of a widow's husband's estate but was sold in execution of a decree and re-purchased by her with her own money, was disposed of by her in her Will:

Will—concld.

Held, that the widow did not intend it to form part of her husband's estate. M. KUMARASWAMIA PILLAI *v.* VAIRAVANATHA PILLAI 14

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Workman's Breach of Contract Act (XIII of 1859)—*Contract to be performed in foreign territory, whether can be enforced under the Act.*

A contract, the performance of which is to take place in a foreign territory, cannot be enforced under the Workman's Breach of Contract Act (XIII of 1859) M. *In re* SINNA KARUPPAN, 16 M. L. T. 303; 16 CR. L. J. 61 653

—— —— —— —— **s. 2**—*Order of imprisonment, when to be passed—Appeal from order under s. 2, whether lies.*

As an order passed by a Magistrate under section 2 of the Workmen's Breach of Contract Act does not come under the provisions of section 408 Criminal Procedure Code, no appeal lies to a Session Judge from such an order.

An order of imprisonment cannot be passed under section 2 of the Workmen's Breach of Contract Act unless there is a non-compliance with the order of re-payment or carrying out the contract. C. ANUKUL CHANDRA ROY *v.* KAMARALI SARDAR, 18 C. W. N. 1271; 15 CR. L. J. 697 145

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INDIAN CASES.

1915.

VOLUME XXVI.

MADRAS HIGH COURT.

CIVIL APPEAL No. 152 OF 1911.

August 19, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Hannay.

SINGARAM CHETTIAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KALYANASUNDARAM PILLAI—PLAINTIFF—RESPONDENT.

Mortgage or sale, test of—Equity of redemption, surrender of, by mortgagor's widow—Transfer of property by mortgagee to third party—Suit for redemption—Locus standi *of mortgagor's reversioner—Limitation Act (IX of* 1908*), Sch. I, Arts.* 134, 141.

The test to determine whether a particular transaction is a sale or a mortgage, is the intention of the parties.

A widow cannot by relinquishing her widow's estate to the reversioner affect the validity of alienations made by her before such relinquishment.

Where a mortgagee, in whose favour the equity of redemption has been surrendered, sells it to another person, this latter cannot be said to have "purchased mortgaged property" within the meaning of Article 134, Schedule I, of the Limitation Act; and a suit for redemption is governed by Article 141 and not by Article 134.

In order to make Article 134 applicable it is necessary that the purchaser must act in the *bona fide* belief that he is purchasing an absolute estate and not merely a mortgage interest.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 23 of 1910.

FACTS.—The suit was for redemption of an alleged mortgage by conditional sale of the year 1876. The properties in suit originally belonged to one Nallavinayagam Pillai and his elder brother. The latter executed a mortgage by conditional sale of these properties in favour of one Saminada Chetty, in 1860, for Rs. 7,000. A counter-agreement was executed by Saminada Chetty in favour of the mortgagor undertaking to re-convey the properties to the latter. Later on, the elder brother of the said Nallavinayagam paid off Rs. 3,000 to the mortgagee and redeemed his half share in the properties and the half share belonging to Nallavinayagam Pillai remained under mortgage for the balance of Rs. 4,000 to be paid by Nallavinayagam aforesaid. In consideration of the said outstanding sum of Rs. 4,000, Nallavinayagam executed Exhibit A in 1876 in favour of the same Saminada Chetty purporting to be an out and out sale of the properties mentioned therein. By a document of the same date, Exhibit B, Saminda Pillai undertook to re-convey the properties to Nallavinayagam on payment of the Rs. 10,000 on or before 30th June 1886. It further provided that in case Rs. 5,000 was paid between 1880 and 1884, half the properties were to be released at once and that if the Rs. 10,000 secured by Exhibit A were not paid by the date fixed (*i.e.*) 30th June 1886, the agreement was to be void. Nallavinayagam died leaving two widows him surviving. Saminada Chetti, the mortgagee, went on making further advances to the widows on the security of the same property. In 1886 the senior widow brought a suit against Saminada Chetti for redemption of the mortgage, alleging that she had tendered the mortgage amount which the mortgagee refused to receive. The mortgagee denied tender but relied on a release by the widows of their right under Exhibit B. In this he was supported by the junior widow. The nature of the transaction evidenced by Exhibits A and B was put in issue in that suit and the Subordinate Judge, who tried it as a preliminary issue, gave a finding that it amounted to an outright sale and not a mortgage. On this the

parties compromised the case, whereby the senior widow executed a release-deed, Exhibit II, dated 27th February 1887, surrendering in favour of the mortgagee her interest in the equity of redemption for a consideration of Rs. 1,100 then paid to her. This compromise was recorded by the Court and the suit was struck off the file. In 1891 Saminda Chetti conveyed his interest in the suit properties by a deed of absolute sale, Exhibit III, to one K. Ramalinga Chetty, the father of the 1st defendant and the grandfather of the 2nd defendant. The plaintiff based his title to sue upon a surrender by Exhibits C and D by the surviving widow of Nallavinayagam of her life-interest in favour of his deceased adoptive father, the then nearest reversioner and himself. The junior widow is still alive. The defendants contended *inter alia* that the transaction evidenced by Exhibits A and B amounted to an out and out sale and not a mortgage by conditional sale, that consequently there was no right of redemption, that the suit was barred by limitation and that, in any event, it was premature, as one of the widows of Nallavinayagam was still alive and had not legally divested herself of her life-estate so as to let in the reversioner. A further plea was also raised as to non-joinder of certain parties interested in the suit properties under a Will executed by Nallavinayagam. The Subordinate Judge found all the points in favour of the plaintiff and decreed the suit. The defendants then appealed to the High Court.

Messrs. *T. Rangachariar* and *S. Muthia Mudaliar*, for the Appellants:—The transactions of 1876 amounted to an out and out sale and not a mortgage by conditional sale. Exhibit B only evidenced an agreement for re-purchase. There were several circumstances in the case which bore out that view. The vendee paid Rs. 10,000 for the sale while the same property had previously been mortgaged to him for only Rs. 4,000; in the agreement there was a recital to the effect that the vendee had purchased the property absolutely; the object of the transaction was to clear off the debt previously existing on the property. It was not quite proper to attribute to the parties the intention of keeping the debts alive, while at the same time there was no provision in either deed to enable the alleged mortgagee to sue for the mortgage-money. The transaction was entered into at a time when the decision in *Sri Rajah Lakshmi Cheliah Garu* v. *Krishna Bhupati Devu* (1) was prevalent and even under circumstances much more favourable to the vendor that decision held that the transaction was only a sale with an agreement to re-convey. Under the deed of agreement, the vendor was to pay the sum of Rs. 10,000 only, the price paid by the vendee, and not any additional sum as in *Balkishen Das* v. *W. F. Legge* (2). The transaction was before the Transfer of Property Act. The price paid was a fair price for the property at the time of the sale. The agreement provided that in default of payment within the time fixed the *agreement was to become* void and not that the sale was to become absolute or some such provision showing that the parties did not intend the sale to be absolute.

The following cases were referred to on this point:—

Bhagwan Sahai v. *Bhagwan Din* (3), *Sri Rajah Lakshmi Cheliah Garu* v. *Krishna Bhupati Devu* (1), *Ayyavayyar* v. *Rahimansa* (4), *Venkata Krishna Rao* v. *Venkatachalam* (5), *Abdulbhai* v. *Kashi* (6), *Kinuram Mandal* v. *Nitye Chander Sirdar* (7) and *Situl Purshad* v. *Luchmi Purshad* (8).

The following cases were distinguished:—*Balkishen Das* v. *W. F. Legge* (2), *Ghulam Nabi Khan* v. *Niaz-un-nissa* (9), *Jhanda Singh* v. *Wahid-ud-din* (10) and *Palaniappan* v. *Subbaraya Gounden* (11).

The doctrine of surrender by a widow in favour of the reversioner ought not to be extended. There was no direct authority in support of the view that surrender could be to a reversioner and a stranger.

(1) 7 M. H. C. R. 6.
(2) 22 A. 149 (P. C.); 4 C. W. N. 153; 27 I. A. 58; 2 Bom. L. R. 523.
(3) 12 A. 387 (P.C.); 17 I. A. 98; 5 Sar. P. C. J. 557.
(4) 14 M. 170.
(5) 7 M. L. J. 299.
(6) 11 B. 462.
(7) 6 C. L. J. 208; 11 C. W. N. 400.
(8) 10 C. 30 (P. C.); 10 I. A. 129; 13 C. L. R. 382; 7 Ind. Jur. 349; 5 Sar. P. C. J. 470.
(9) 9 Ind. Cas. 140; 8 A. L. J. 119; 33 A. 337.
(10) 9 Ind. Cas. 1013; 8 A. L. J. 389; 33 A. 585.
(11) 22 Ind. Cas. 4; 14 M. L. T. 579; (1914) M. W. N. 222; 1 L. W. 80.

Behari Lal v. *Madho Lal Ahir Gayawal* (12), *Kolandaya Sholagan* v. *Vedamuthu Sholagan* (13), *Adipuranam Pillai* v. *Gopalsami Mudaly* (14), *Beni Madho Singh* v. *Jagat Singh* (15), *Marudamuthu Nadan* v. *Srinivasa Pillai* (16), *Bhawani Kuwar* v. *Mathura Prasad Singh* (17), *Raja Dei* v. *Umed Singh* (18), *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (19), *Kaniz Fatima* v. *Wali-ullah* (20), *Palla Kanakamma* v. *Challa Ramasami* (21) were referred to.

Suit was barred under Article 134 or 144, Limitation Act. Article 134 was applicable, because mortgagee purported to sell as absolute owner and the vendee purchased in 1891 as absolute owner. Twelve years having elapsed from date of purchase, suit was barred. Sub-Judge was wrong in thinking that *bona fides* were necessary in a case to which Article 134 was applicable. All that Article 134 required was that the mortgagee must sell as absolute owner and the purchaser must purchase as absolute owner.

If Article 134 was inapplicable, Article 144 would apply. From 1891, the date of purchase, the defendant's ancestor and defendant had enjoyed the property as absolute owners, and, therefore, the suit was barred by limitation. Article 134 was clearly applicable. *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (22), per Mookerji, J. There had been a valid relinquishment by the widows as per Exhibit C. The suit was also bad for the non-joinder of the trustees under the Will of Nallavinayagam, Exhibit K. In any event, the equity of redemption having vested in the defendants during the life-time of the surviving widow, the suit was premature. The surrender relied upon by the plaintiff was invalid as having been effected in favour of the nearest reversioner and a stranger.

Messrs. *K. Srinivasa Iyengar* and *G. S. Ramachandra Iyer*, for the Respondent :—The lower Courts were right in holding that Exhibits A and B amounted to a mortgage by conditional sale. The circumstances of the case clearly showed that such was the intention of the parties. Article 134, Limitation Act, had no application to the case, which was governed by Article 140 or 141. The transferee, in addition to being a mortgagee, had also the equity of redemption in him, which at any rate disentitled the mortgagor to sue to recover possession at least during the life-time of the widow. *Munna Lal* v. *Munnu Lal* (23). In principle there was no distinction between a sale by a widow and the transfer of an interest less than full ownership. Further it was evident that the transferee under Exhibit III did not take believing that the transferor had an absolute title.

The decisions beginning with *Radhanath Doss* v. *Gisborne* (24) had uniformly held that such a belief was essential to make the Article applicable. *Vide* also *Ambalavana Desigar Pandara Sannidhi* v. *Bappu Row Jagadap* (25), *Muthu* v. *Kambalinga* (26), *Vythilingam Pillai* v. *Kuthiravattah Nair* (27), *Veerabadra Tevan* v. *Veerappa Tevan*, (28), *Pandu* v. *Vithu* (29), *Bhagwan Sahai* v. *Bhagwan Din* (30) and *Ram Charn Tewary* v. *Protap Chandra Dutt Jha* (31). The observations of Mookerji, J., in the *Ram Churn Tewary* v. *Protap Chandra Dutt Jha* (31) could not be followed as being opposed to the long current of decisions. Exhibit C was perfectly valid as a relinquishment of the widow's interest in favour of plaintiff. There was no point at all in non-joinder as the trustees under the Will, Exhibit K, did not derive any interest in the suit properties.

Mr. *T. Rangachariar* in reply :—Article 134 was the only Article applicable. *Bona fides* on the part of the transferee were not

(12) 19 C. 236 (P. C.); 19 I. A. 30.
(13) 19 M. 337; 6 M. L. J. 140.
(14) 31 M. 354; 3 M. L. T. 281; 18 M. L. J. 259.
(15) 16 Ind. Cas. 337; 10 A. L. J. 33.
(16) 21 M. 128; 8 M. L. J. 69.
(17) 16 Ind. Cas. 210; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 944; 14 Bom. L. R. 1046; 16 C. L. J. 606; 40 C. 89 at p. 98 (P. C.).
(18) 13 Ind. Cas. 632; 9 A. L. J. 158; 34 A. 207.
(19) 30 A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 17 M. L. J. 605; 35 I. A. 1.
(20) 30 A. 30; A. W. N. (1907) 272; 4 A. L. J. 689.
(21) 23 Ind. Cas. 98; 1 L. W. 237.
(22) 2 C. L. J. 546.
(23) 23 Ind. Cas. 559; 36 A. 327; 12 A. L. J. 457.
(24) 14 M. I. A. 1; 15 W. R. (P. C.) 24; 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 Eng. Rep. 687.
(25) 9 M. L J. 93.
(26) 12 M. 316.
(27) 29 M. 501; 16 M. L. J. 358; 1 M. L. T. 290.
(28) 15 Ind. Cas. 609.
(29) 19 B. 140.
(30) 9 A. 97; A. W. N. (1886) 303.
(31) 2 C. L. J. 448.

necessary. The mortgagee purported to transfer the absolute estate and the vendee professed to purchase only the absolute estate. Absence of *bona fides* on the part of the vendee could not be inferred from the mere fact that the documents which had been handed over to the vendee, upon a proper construction, disclosed the want of an absolute title in the vendor. Neither could it be said that the transferree had notice of the infirmity in the title of the transferor. The cases cited by the other side were not against this view. See also *Gopal Narain* v. *Trimbak Sadashiv*(32), *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (33).

The case in *Munna Lal* v. *Munnu Lal* (23) was no authority for the view that Article 134 was inapplicable if the mortgagee had some other title.

Again, it was not correct to say that Article 134 was inapplicable to the case because the widows could not have sued at the time by reason of their arrangements with the mortgagee, and the reversioner because a widow was then alive. Where the widow precluded herself from suing, the presumptive reversioner could sue. Trevelyan's Hindu Law, 445; *Majumdar Hiralal Ichhalal* v. *Desai Narsilal Chatarbhujdas* (34).

JUDGMENT.—This is a suit to redeem an alleged mortgage by conditional sale created in 1876 by Exhibits A and B, and is brought by the plaintiff, claiming as next reversioner to the original mortgagor by reason of the surrender made by the mortgagor's surviving widow in favour of the then next reversioner, now deceased, and the plaintiff, his adopted son. The first and second defendants are the son and grandson of one K. Ramalinga Chetty, who in 1891 obtained a deed of absolute sale, Exhibit III, of the properties in question from the alleged mortgagee under Exhibit A. The defendants' case is that the transaction in Exhibits A and B was not one of conditional mortgage but of absolute sale, and that there is no right to redeem. They also contended that the suit was barred and that the plaintiff had no right to sue because he was not the adopted son of the next reversioner and because one of the mortgagor's widows is still alive and had not divested herself of her estate so as to let in the reversioner. Finally, they contended that even if the plaintiff was entitled to sue, the suit was bad for non-joinder of certain parties interested under the Will of the original mortgagor. The Subordinate Judge found all the issues in the plaintiff's favour and decreed his claim.

The first question to be decided in this appeal is, whether the transaction of 1876 was a mortgage or a sale, and on this point we entertain no doubt that the Subordinate Judge was right in his finding that Exhibits A and B were intended to create a mortgage by conditional sale. The test in such cases is admittedly the intention of the parties and everything in this case points to their intention having been to create a mortgage rather than a sale. The deeds were in renewal of a previous mortgage of the year 1860 for Rs. 7,000 executed in favour of the same mortgagee by the elder brother of Nallavinayagam Pillai, the executant of Exhibit A. As recited in Exhibit A, that elder brother had paid off Rs. 3,000 and got back half the property leaving the remaining half in the enjoyment of the creditor. The Rs. 4,000 remaining due and a further advance of Rs. 6,000 to Nallavinayagam constituted the consideration for Exhibit A. On the same day that Exhibit A was executed Saminatha Chetty, the mortgagee, executed a counter-agreement to re-convey on payment of this Rs. 10,000 on or before 30th June 1886. Exhibit B probably follows the terms of the similar agreement executed by the mortgagee in 1860, which was one of the title-deeds handed over to the plaintiff's grandfather in 1891 with Exhibit III but has not been produced by him. It provides that, if half of the Rs. 10,000 be paid between 1880 and 1884, half the land is to be given back at once and the other half on payment of another Rs. 5,000 in 1885, or payment may be made of the Rs. 10,000 before the 30th June 1886 and the properties reconveyed. If payment is not so made the agreement is to be void. The provision entitling Nallavinayagam to get back half the property on paying half of the Rs. 10,000 mentioned in Exhibit A tends to show that the Rs. 10,000 paid under Exhibit A was

(32) 1 B. 267.

(33) 10 Ind. Cas. 683; 9 M. L. T. 448 (P. C.); 15 C. W. N. 417; 8 A. L. J. 528; 13 Bom. L. R. 421; 38 C. 526; 14 C. L. J. 238; (1911) 2 M. W. N. 231; 88 I.A. 76; 21 M. L. J. 1145.

(34) 17 Ind. Cas. 909; 17 C. W. N. 573; 13 M. L. T. 415; (1913) M. W. N. 428; 11 A. L. J. 432; 17 C. L. J. 474; 15 Bom. L. R. 483; 25 M. L. J. 101; 40 I. A. 68; 37 B. 326 (P. C.).

a loan on mortgage and not the purchase price, and the subsequent conduct of the other party to Exhibit A in making further advances to the widows of the mortgagor tends the same way. In transactions of this kind the presumption is in favour of a mortgage being intended rather than a sale and we agree with the conclusion of the Subordinate Judge on this point.

Before dealing with the other contentions raised in the appeal, it is necessary to refer to what happened after the death of the mortgagor and before the date of the conveyance of 1891, Exhibit III, under which the defendants claim. As already mentioned, the mortgagee under Exhibits A and B made further advances to the widows of the mortgagor, and when in 1886 the senior widow sued him to redeem the properties alleging that she had tendered the amount due before the time limited for payment in Exhibit B, he pleaded that no such tender had been made and that in consideration of further advances the widows had released their right of redemption under Exhibit B. The junior widow in her written statement supported that contention. Issues were framed on those contentions and subsequently an additional issue was framed as to whether Exhibits A and B consituted a mortgage. This was tried as a preliminary issue and the Subordinate Judge found that it was not a mortgage. Before the other issues were tried the case was settled and the senior widow executed a deed of release, Exhibit II, dated 27th February 1887, surrendering all her rights of redemption in the suit lands in consideration of a further payment of Rs. 1,100, the junior widow having already disclaimed all claim to redeem in her written statement. On this a petition was put in, recording the settlement and the suit was ordered to be struck off the file on the 3rd March 1887. It has not been seriously contended before us that these proceedings could operate as *res judicata* against the reversioner, but the defendants rely on them in support of their contention that the suit is barred or at least premature. As regards the latter contention, assuming the transaction to have been originally one of mortgage, the effect of those proceedings was that the mortgagee acquired the equity of redemption from the widows of the mortgagor, an alienation binding on them and on their life-estates though not necessarily binding on the next reversioner.

The junior widow is still alive and the plaintiff's claim as reversioner is based on two relinquishment-deeds, Exhibits C and D, executed by her.

In this state of things, the defendants contend that the effect of the proceedings in the suit above mentioned was to vest the equity of redemption of the mortgaged properties in the mortgagee at any rate for the life-time of the widows or the survivor of them. This contention is raised in paragraph 6 of the defendants' written statement and is covered by the issues, but is not dealt with by the Subordinate Judge, whether from oversight or because it was not strongly pressed before him. It appears to afford a conclusive answer to the present suit, as it seems clear that a widow cannot, by relinquishing her widow's estate to the reversioner, affect the validity of alienations made by her before such relinquishment which, though not binding on the reversioner, were binding on her for life. The result is that, during the life-time of the surviving widow, the equity of redemption remains vested in the defendants as assignees of the mortgagee and that the present suit is premature.

In the view we take of the case, it is unnecessary and undesirable to express a final opinion as to the question of limitation which was elaborately argued before us. Mr. K. Srinivasa Aiyangar has contended that this was not a case of a transfer from a mortgagee within Article 134 of the Limitation Act at all, because admittedly at the date of the transfer the transferor, in addition to his mortgage interest, had acquired something more, *viz.*, the equity of redemption in the suit properties at any rate during the life-time of the widows of the mortgagor, so as to disentitle the mortgagor to sue for possession, and he has cited *Munna Lal* v. *Munnu Lal* (23) in support of this proposition. He has also contended that the Article applicable is not Article 134 but Article 141, and seeing that on the facts found the transferor of the defendants acquired the equity of redemption in the suit properties from the widows of the mortgagor, there would seem to be strong grounds for holding that Article 141 is applicable to this as to other alienations by the widow of the last male

owner. Had the widows purported to sell the suit properties outright to the defendants' transferor, this would undoubtedly have been the Article applicable, and it is difficult to see why it should be inapplicable because they have transferred something less, *viz.*, the equity of redemption. Lastly, he argued that, assuming Article 134 to apply, the recitals in Exhibit III show that the transferee under that document did not take with that belief in the transferor's absolute title to transfer, which a long catena of decisions beginning with *Radhanath Doss* v. *Gisborne & Co.* (24) has held to be necessary to render the Article applicable. In our opinion, these decisions cannot now be questioned and we are, therefore, unable to follow the ruling of Mookerjee, J., in *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (22) which appears to be at variance with them. Turning now to Exhibit III, it contains a curious recital of the transferee's belief in the transferor's absolute title to convey, which rather suggests an acquaintance with the decisions already referred to. The recitals and the documents handed over as title-deeds both show that the transferor did not rely for his absolute title solely on Exhibit A, but also on the release and disclaimer he had obtained from the widows. In these circumstances it seems open to question whether he really believed in his absolute title to transfer.

As regards the other contentions raised by the appellants, it is sufficient to say that we are not satisfied that Exhibit C did not relinquish to the plaintiff the surviving widow's interest in the suit properties, as that is bad as a relinquishment because made in favour of the next reversioner for the time being and his son, the present plaintiff. Nor are we satisfied that the trustees under the Will of the last male owner, Exhibit K, took any interest in the suit properties which made it incumbent on the plaintiff to join them. So far as the present case is concerned, it is sufficient to say that the plaintiff has not shown that he is entitled to redeem during the life-time of the surviving widow of the last owner.

The appeal must be allowed and the decree of the lower Court reversed with costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL APPLICATION No. 16 OF 1914.

October 24, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Sir P. C. Banerji, KT., Judge.

KULSUM-UN-NISA BIBI—APPLICANT

versus

Chaube BASDEO AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110—Privy Council Appeal from decision of High Court in second appeal, application for - Decision directly involving claim to property of value of Rs. 10,000.

A suit relating to 2 *bighas* 12 *biswas* of land valued at only Rs. 1,000 came up in second appeal to the High Court and was disposed of. The history of the land in dispute was the same as that of another 300 *bighas* of land in the same *mahal*:

Held, that the mere fact that the history of the property in dispute was the same as that of the other land in the *mahal* valued at more than Rs. 10,000 did not involve a claim in question within the meaning of section 110, so as give the applicant a right of appeal to His Majesty in Council.

Application for Privy Council Appeal in Second Appeal No. 1456 of 1913.

Nawab *Abdul Majid*, for the Applicant.

Mr. *P. L. Banerji*, for the Opposite Party.

ORDER.—This is an application for leave to appeal to His Majesty in Council. The suit only related to 2 *bighas* 12 *biswas* of land and was valued at only Rs. 1,000. This Court in second appeal reversed the decree of the lower Appellate Court and restored the decree of the Court of first instance. The case *prima facie* does not fulfil the conditions of section 110 of the Code of Civil Procedure. It is, however, contended on behalf of the applicant that the decree of this Court directly involves a claim or question to or respecting property of the value of Rs. 10,000. The history of the land in dispute, no doubt, is the same as that of another 300 *bighas* or three *dants* in the same *mahal*. The question in the suit was the status of the mortgagors of the plaintiff. If they were merely tenants, they would have had no right to mortgage their holdings and they could not have been prevented from surrendering their tenancies to the *zemindars*. It is contended that the owners or occupiers of the remainder of the other land may now set up that they are not tenants, as the result of the decision of this Court

the present suit, and that, therefore, some question relating to the rest of the land which exceeds in value Rs. 10,000, is involved in the decree of this Court.

We cannot agree with this contention. The case of *Sri Kishan Lal* v. *Kashmiro* (1) has been cited. There the question in suit related to the validity of an arbitration award. The High Court, reversing the decision of the Court below, had held that the award was not binding on *Musammat* Kashmiro. The judgment proceeds: "If the decree of this Court becomes final, the question of the validity of the award will also become final as regards property other than the property in dispute in the present suit. It is, therefore, clear that the decree of this Court does involve a question relating to property of the value exceeding Rs. 10,000." It is clear the case was decided on its own facts. The mere fact that the history of the property is the same does not involve a claim or question within the meaning of section 110, as to give the applicant a right of appeal to His Majesty in respect of the two *bighas* odd. It is not alleged that the plaintiffs in the present suit are interested in any portion of the property save the 2 *bighas* and 12 *biswas* which were the subject-matter of the suit.

We accordingly reject the application with costs.

Application rejected

(1) 21 Ind. Cas. 617; 35 A. 445; 11 A. L. J. 654.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1554 OF 1912.

August 18, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

GOPALA MOOPPANAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Dharmakarta SUBRAMANIA IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu law—Temple, right of worship in—Place of worship—*Sudra, *right of, to enter—Burden of proof.*

Per *Sadasiva Aiyar, J.*—Temples are intended for the worship of people belonging to all the four castes professing the Hindu religion without exception. It lies, therefore, upon a person who wishes to restrict a *Sudra* or one who has a higher caste status than *Sudra* from proceeding beyond the *Dwajasthamba* into the next hall to establish by proof of a recognised usage of that particular temple that the individuals belonging to that community or class are not entitled to go beyond the *Dwajasthamba.*

Per *Tyabji, J.*—Whether a particular class of people are entitled to enter into a temple or not, depends upon the terms of the dedication. In the absence of any written trust-deed dedication is a reflex of the general religious notions prevailing amongst members of the community for whose benefit the temple is dedicated.

Sankaralinga Nadan v. *Rajeswara Dorai*, 31 M. 236; 12 C. W. N. 946; 4 M. L. T. 101 (P. C.); 8 C. L. J. 230; 10 Bom. L. R. 781, *Venkatachellapati* v. *Subbarayadu*, 13 M. 293, *Dewan of Travancore* v. *Vakjiraji*, 14 Trav. L. R. 56, followed.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 103 of 1911, preferred against that of the Additional District Munsif of Tinnevelly, in Original Suit No. 116 of 1909.

FACTS.—The suit was by the plaintiffs, members of the Elaivaniyar community, for establishing their right to go so far as the Sabhapathy Sannadhi and as far as the front of the Palliarai in the Amman Sannadhi in the Sri Ramalingaswami Temple at Panakudi in the Tinnevelly District for purposes of worship, and for a permanent injunction restraining the defendants, who belonged to the communities of Brahmins, Vellalars and Mudaliars, from interfering with the exercise of such right by the plaintiffs and their castemen. The defendants contended that the plaintiffs and their castemen were not entitled to the rights claimed as they belonged to a very inferior caste and the usage of the temple had been to exclude them therefrom. Both the lower Courts dismissed the suit, the lower Appellate Court holding that the burden of proving the existence of the right in question lay upon the plaintiffs and that the evidence adduced by them did not establish the right set up by them. The plaintiffs, thereupon, appealed to the High Court.

Mr. *T. R. Ramachandra Iyer*, for the Appellants:—The lower Appellate Court erred in law in throwing the burden of proof on the plaintiffs. They, at any rate, cannot be lower in status than a *Sudra* and *prima facie* will be entitled to the right claimed. The defendants ought to establish by affirmative evidence that the

plaintiffs were not entitled to the right of access claimed by them and in the absence of such evidence the plaintiffs were entitled to a decree. *Sankaralinga Nadan* v. *Rajeswara Dorai* (1) and *Venkatachellapati* v. *Subbarayadu* (2).

Mr. *T. Rangachariar*, for the Respondents:—The usage of the temple had always been to exclude the plaintiffs' caste and such usage ought to be respected, even though unreasonable. *Sankaralinga Nadan* v. *Rajeswara Dorai* (1).

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants in this second appeal. They brought the suit out of which this second appeal has arisen as representatives of the Elaivaniyar community in the village of Panakudi. The defendants represent the Brahmins, Mudaliars and Pillais in that village. The plaintiffs pray for the following main reliefs:—

"(*a*) A declaration as against the defendants and their communities, Brahmins, Vellalas and Mudaliars, of the right of the plaintiffs and of their castemen residing at Panakudi to go so far as the Sabhapathy Sannadhi and as far as the front of the Palliarai in the Amman Sannadhi in the said Panakudi Sri Ramalingaswami Temple and worship the Swamis and Amman and to receive Prasatham etc., after performing Abishekam, Archanai, Neivediam, etc., during the Mandagapati occasions and on ordinary occasions;" and

"(*b*) a permanent injunction restraining the defendants and their community from causing any obstruction to the plaintiffs and their castemen in their performing the above acts, claiming the said right by virtue of such declaration."

The principal compartments of an ordinary Siva temple are, (1) the Garbhagraham where the principal fixed image is established and which is the holiest part of the temple; (2) the next outer hall called the Ardhamantapam (Half Hall) and (3) a further outer hall which is called the Mahamantapam or Big Hall. As the principal image usually faces east, these three rooms or halls lie usually east of one another. In the Siva temples the big outer Nanthi, the flag-staff and the Balipitam lie still further to the east. The two outer Mantapams (the Ardhamantapam and the Mahamantapam) are, under a more elaborate classification, sub-divided into fractional portions. The Arthamantapam is divided into (*a*) Antharala, (*b*) Mukha Mantapa, (*c*) Dwara Mantapa, (*d*) Snapana Mantapa and (*e*) Virisha Mantapa. The Mahamantapa is sub-divided into (*a*) Bahir Mantapam and (*b*) Nritha Mantapam. In the smaller temples (like the one in dispute) the only practicable distinction is between the Garbhagraham and the portion east of its gate up to the flag-staff, so far as access of caste Hindus is concerned. The technical names "Ardhamantapa", "Mahamantapa", etc., do not at all appear in the evidence in the suit and though slight mention appears of a Thorana light and Thoranakkal, the learned District Judge is unable to come to any definite conclusion as to what is meant by these words. It appears from the evidence of the defence 9th witness that "all those who can enter the temple" (that is west of the flag-staff) "can go as far as the Sabhapathi Sannadhi", that is, up to the gate of the Garbhagraham and that no sub-division is made of the space into Ardhamantapa, Mahamantapa, Nrithamantapa, etc., as regards the rights of access. The plaintiffs' prayers are substantially for a declaration that they are entitled to stand for purposes of worship in what I shall call the outer Mantapam (that is, the hall between the flag-staff and the Garbhagraham) and for an injunction against their being ejected therefrom. It is the case of both parties that so far as the Garbhagraham is concerned, it is only the Brahmins *who belong to the temple-priest sect* that could stand inside it for the purpose of worship. Ordinary Brahmins, Pillais and Mudaliars are entitled to worship from the outer Mantapam.

The plaintiffs allege in their plaint that they belong to a caste which "according to immemorial custom and according to Hindu Shastras" (see 4th paragraph of the plaint) were entitled to worship standing in the outer Mantapam and that in November 1907 some Pillais and Mudaliars began to obstruct the members of the plaintiffs' community from standing in that Mantapam on the ground that the plaintiffs' community

(1) 31 M. 236; 12 C. W. N. 946 (P. C.); 4 M. L. T. 101; 8 C. L. J. 230; 10 Bom. L. R. 781.
(2) 13 M. 293.

have no right to go westward of the Dwajasthambam or the flag-staff.

The lower Appellate Court's conclusion might be shortly stated thus using mostly its own language:—"The plaintiffs have adduced a considerable body of evidence proving that their caste people are entitled to go beyond the flag-staff and into the Ardhamantapam" in the famous temples of Thiruchendur, Sankaranainarkoil, Kourtallam and Srivaikuntam and also in Tenkasi, Melaivasal, Tinnevelly, Velliyoor, Kadayam and Tharuvai. "Some of the witnesses on plaintiffs' side are of particularly good credit and the majority are of good position and means of knowledge". Plaintiffs' 8th and 11th witnesses are the trustees of the Thiruchendur Temple, the 8th is a respectable Vellala, member of the District and Taluq Boards and the 11th is also a Taluq Board Member. The plaintiffs' 9th witness is the Village Munsif of Sankaranainarkoil and Bhattar of the temple there and he pays a *beriz* of Rs. 750. The plaintiffs' 15th witness is the manager of the Tinnevelly Temple. The plaintiffs' 16th witness is a Brahmin Bank Agent. "The majority of the plaintiffs' witnesses are of good position and knowledge. It is not likely that they would derogate from the dignity of the places which they hold sacred by admitting the right of entry of persons whose presence would otherwise constitute a pollution unless that right really existed." "The oral evidence on the plaintiffs' side is superior to that on the defendants' side. It certainly proves that in a number of temples of repute their caste is not excluded from the inner precincts of the temple. Hence there is nothing preposterous in the plaintiffs' claim. As their claim is shown to be conceded in a number of temples, some of them situated in the most important Districts, and as there is no corresponding evidence on the defendants' side that it is refused in the temples of equal importance, there is some reason for viewing the plaintiffs' claim favourably in the present case."

(2) But though some presumption is raised from this strong evidence on the plaintiffs' side, "it is not enough to transfer the burden of proof" from the shoulders of plaintiffs, that is the burden of proving that their castemen have got a right to go beyond the flag-staff in this particular temple. The evidence on the plaintiffs' side as to this particular temple is "not so strong as to base an affirmative conclusion on it in plaintiffs' favour even when it is assisted by such slight probabilities as may arise from the evidence regarding other temples."

"(3) It is unnecessary to consider the defendants' evidence in detail because the plaintiffs' evidence is insufficient to transfer the burden of proof." It is immaterial that the defendants' witnesses who speak regarding the plaint temple are not entitled to much credit.

It is clear to me on a careful perusal of the District Judge's judgment that in his opinion, apart from the question of the burden of proof being on the defendants or if the burden of proof was sufficiently shifted on to the defendants to prove *the exclusion of the plaintiffs* from the outer Mantapam, his conclusion would have been that the evidence on the defendants' side was wholly insufficient to establish such an exclusion. In short, the learned District Judge's judgment is entirely based upon the view that a Hindu belonging to a particular caste who wishes to go into the portions of the temple between the flag-staff and the Garbhagraham, should establish by positive evidence that there is a custom in that temple which *does not* exclude him from any of those places.

It seems to me, with due respect, that this will in many cases be tantamount to throwing an impossible burden upon a caste Hindu who wishes to worship in a temple. There are so many castes and sub-castes in India and the word 'caste' is so very loosely used, the word not being confined to designate the four principal castes only. The Mudaliars, Pillais, Karakatars, etc., though they are all supposed to belong to the Sudra caste, are usually considered and spoken of as separate 'castes'. So also, among the Brahmins themselves, there are hunderds of subdivisions throughout India. That a Hindu pilgrim belonging to one of the four Hindu main castes should be liable to be excluded, at the will of a trustee or even worshippers then present at the

temple, from going beyond the flag-staff (up to which even persons belonging to other religions are allowed to go) and that he should be obliged to prove by positive evidence that there is no *negative* custom to exclude his caste people, seems to me to throw a distinctly unreasonable burden upon the Hindu pilgrim or worshipper.

The origin of image worship in temples is stated in authoritative Puranas to have been in the Threthayugam and subsequent ages. In the first or Krithayugam, God was worshipped by mankind (which consisted of only one caste) as immanent in the heart of everything and worship consisted solely in service to one's fellow-creatures. As the spirit of universal brotherhood decayed in the second age and notions of inferiority and superiority among men were indulged in, the inferior man was asked to worship God's higher manifestations in the superior man. Then disputes naturally arose about relative superiority and inferiority and the sages considered it expedient to introduce image worship in order to prevent quarrels about superiorities and in order that all men (who had now become divided into four distinct castes) without unseemly squabbles about their relative excellencies might worship God in a common image (see the 40th *Sloka* in the 7th *Skandha*, 14th Chapter, of Sreemath Bhagavatham). Though image worship was thus recomended and laid open to all castes, it was clearly recognised *as not the highest form of worship* (see succeeding *Slokas*). The appropriate mode of worship for the Brahmins was held to be through the media of the fire and the sun and the highest form of worship for all castes was always recognised as that which prevailed in the first age. It is clear from the above that temples were intended for the worship of people belonging to all the four castes without exception. Even outcastes were not wholly left out of the benefits of temple worship, their mode of worship being, however, made subject to severe restrictions as they could not pass beyond the Dwajasthambam (and sometimes not beyond the temple outer gate) and they could not have a sight of the images other than the procession images brought out at the times of festivals. The Agamas and the Thantharas which regulated the worship in the temples laid down rules as regards what caused pollution to a temple and as regards the ceremonies for removing pollution when caused. There are, it is well-known, Thanthries in Malabar who are specialists in these matters of pollution. As the temple priests have got the special Saivite initiation or *Dheeksha* which entitles them to touch the innermost image and as the touch of the persons who have got no such initiation, even though they be Brahmins, was supposed to pollute the image, even Brahmins other than the temple-priest Brahmins were in many temples not allowed to go into the Garbhagraham. In one of the Agamas it is said (as freely translated) thus :—"Saivite Brahmin priests are entitled to worship in the Anthrala portion. Brahmins learned in the Vedas are entitled to worship in the Arthamantapa, other Brahmins in the front Mantapa, Kings and Vaisyas in the Dwaramantapa, initiated Sudras in the Bahir Mantapa" and so on.

There is no Mantapam or hall for worship east of Dwajasthambam and it is plain from the Thanthras and Agamas that the Sudras and all castes above Sudras (including the Anuloma, mixed progeny of the four castes) are entitled to stand and worship at appropriate spots west of the Dwajasthambam. I am, therefore, reasonably clear that it lies upon a person who wishes to restrict a Sudra or one who has a higher caste status than a Sudra from proceeding beyond the Dwajasthambam into the next hall, to establish by proof of a recognised usage of that particular temple that the individuals belonging to that community or class are not entitled to go beyond the Dwajasthamba. Speaking for myself if I were not bound by authority I should like to hold that a custom which prohibits one who belongs to a community which is not lower than a Sudra caste from going beyond the Dwajasthambam is an unreasonable custom and ought not to be recognised. But as even such unreasonable customs, provided they are not grossly immoral, have been held to override the law and *Shastras* if fully established by evidence, I think I am bound to follow such rulings.

As was said in the judgment of the Court of first instance in the Kamudi case,

Sankaralinga Nadan v. *Rajeswara Dorai* (1), a Court of law cannot reject a custom because it is not in accordance with the principles of equity or individual notions of right and wrong. Courts of law have recognised and enforced customs of this character although they may be repugnant to generally received notions of what is just and proper. It is not for this Court to examine whether the doctrines or usages obtaining in a particular temple are defensible from a logical or equitable standpoint in the light of modern enlightenment and civilization, but to ascertain correctly, so far as the materials placed at its disposal permit, what the custom and usage is as observed and practised by the community for whose use and benefit the temple which is the subject of the litigation is dedicated, and to be guided by them. There are certain castes whose touch causes pollution not only to Brahmins but also to Sudras. They are usually spoken of as Heenajathiyars. Of course, even among Sudras those who consider themselves more respectable will try to avoid the touch of the less respectable classes, though there is no ceremonial pollution caused by such touch. For instance D. W. No. 1 says in this case " I am a Sudra caste Vellala, I *do not touch the lower class of* Vellalas." This is not because their touch passes in a religious pollution to the higher class, but simply out of the exaggeration and aberration of caste sentiments, the exaggeration being due to *class* sentiment having come in recent times to reinforce *caste* sentiment. So D. W. No. 1 says: "I will not touch a Maravar or Edayan," though he admits that Marvars, Edayans, Asaries, and Kammalas, Pillais, Mudaliars and Pillais of inferior castes all stand in the next compartment to the Brahmins' compartment mixed up together. See page 21, lines 20 and 21 of the printed book. D. W. No. 14 adds: "Koravars, Reddies and Nayakas are entitled to enter the temple," which means entering the outer hall. The plaintiffs' community, though of the Sudra caste, was a rather poor and uninfluential community till a few years ago while the Pillais and Mudaliars have been influential classes all along.

Now, coming to the caste status of the plaintiffs who are Elaivaniyars, it is first to be remarked that the Tamil word 'Vaniyan' is derived from the Sanskrit "Vanija". Vanija (Baniya in the northern Vernacular) merely means a Vysiya who has trade as his occupation. The term 'Vaniya' in Tamil when used by itself has come to mean a trader in oils. A trader in oil, especially when he crushes seeds to obtain the oil is considered to follow a sinful occupation. Vaniyans who press oil are also called Sekkans, "Sekku" being the oil-pressing machine. In the Census Report, 1901, Mr. Francis, I. C. S. says at page 182 that "for some obscure reason, Mannu classed oil pressing as a base occupation." The reason is, however, clear enough. In Chapter 4, *Sloka* 85, Manu says that an oil press (which destroys the lives of innumerable vegetable seeds) is not better than a slaughter-house and that is the reason why the caste of the Sekkan or Thila-Vaniyan (shortly called Vaniyan) is considered an impure caste. But the plaintiffs in this case are Elaivaniyans, that is those who trade in leaves, especially betel leaves, and one ought not to be misled by the use of the word 'Vaniyan' as part of the other caste-designation.

In Thurston's Castes and Tribes, Vol. VI, page 360, Elaivaniyars are described under the more high-sounding title of Senaikudayan. They are also called Kodikkal Pillaimars or Pillaimars who cultivate the betel-vine. In the Madras Census Report of 1901 at page 177 it is remarked: "In 1891 following the Tanjore District Manual they were wrongly classed with Vaniyars oil-mongers, but they are superior to these in social position and are even said to rank above Nattukottaichetties." This latter observation may not be accurate, but there can be no doubt that Elaivaniyars have no connection whatever with the oil mongers or Vaniyars. Traders must, according to the true spirit of the Hindu *Shastras*, be classed as Vysias. Owing, however, to the repression of Kshatriyas and Vysiyas by the Brahmins in the mediæval ages, most of the Kshatriyas and Vysiyas have descended to the position of Sudras. But there can be no doubt that Elaivaniyars are at least Sudras and do not belong to the communities which are lower than Sudras who are called Heenajathiyars (like Pallars, Chucklers and Paraiahs).

The castes below the Sudra are most of the

Prathilomas and those who are classed as Anthiyajas and outcastes or *Patithas*. The *prima facie* right of the Brahmin to enter the temple was negatived in the case in *Venkatachellapati* v. *Subbarayadu* (2), because the plaintiff there, it was proved by the defence evidence, had, in the eyes of the community frequenting the temples, become *patitha* and outcaste by marrying a widow. Though there are 28 Sivagamas, the Kamikagama is the Agama most quoted in these matters and the substance of the other Agamas has been digested in 18 *Pathathies*, of which Sakalagamasara, Varunapathathi and Nirvacharapathathi are those most frequently referred to. In the Nirvacharapathathi it is said that Sivathwijas should worship in the Garbhagraham, Brahmins from the antechamber of Sabha Mantapam, Kshtriyas, Vysiyas and Sudras from the Mahamantapam, the dancer and musician from the Nritha Mantapam east of the Mahamantapam, and that castes yet lower in scale should content themselves with the sight of the Gopuram. Taking it then as indisputable that the plaintiffs belong to the Sudra caste, they are *prima facie* entitled to worship from the Mahamantapam, one of the halls west of the Bull near Dwajasthambam and east of the Garbhagraham.

In *Venkatachallapati* v. *Subbrayadu* (2) the learned Judges quote without dissent the following observations of the Court of first instance in that case: "The temple is, of course, intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. *Sudras and Baniyas can go into the hall of the temple.* Brahmins can go into the holy of the holies." The learned District Judge in the present case admits that in *Venkatachellapati* v. *Subbarayadu* (2) the burden of proof that a Brahmin was excluded from worshipping in the inner precincts of the temple, was imposed on the defendants who were for exclusion, because the plaintiff who was a Brahmin would ordinarily be entitled to access into the inner precincts of the temple. On the same reasoning if a Sudra would ordinarily be entitled to access into the hall beyond the Dwajasthamba, it is for those who wish to exclude a particular community, which isnot below the Sudra community, from such access to establish the custom to exclude that particular community though they form a sub-division of the Sudras. In the well-known Kamudi case, *Sankaralinga Nadan* v. *Rajeswara Dorai* (1), the Shanars were excluded from access into the temple because overwhelming evidence, proving that they belong to a caste whose touch was pollution (to Sudras), whose occupation of toddy-drawing was of a sinful kind and who were, therefore, lower than Sudras in status, was adduced by those who wanted *to exclude them and who unhesitatingly took upon themselves the burden of proving such right of exclusion.* No doubt the person who wished to exclude was the plaintiff in that case, while here the plaintiffs sue for a declaration that they are entitled to be included; but I think that it would be a wholly unsatisfactory state of things that the status and rights of a community to take part in public temple worship should depend on whether a member of that community appears as a plaintiff or as a defendant. The contention of the defendants in this case is based, *not* on the allegation that the plaintiffs belong to a caste which is below the Sudra caste or whose occupation is of a sinful character, but only on the ground that whatever may be the practice in other temples, in this particular temple the usage is to exclude the plaintiffs from the temple proper. Such a plea not being proved and the plaintiffs as Sudras being *prima facie* entitled to worship from the Mahamantapam, their suit ought to have been decreed.

In *Venkatachellapati* v. *Subbarayadu* (2) Mr. Justice Muttusawmi Iyer says that "the right claimed by the plaintiff to enter into certain portions of the temple was a right which he was at liberty to assert *as a citizen and a Brahmin*". This shows that each of the principal castes can rely upon its *prima facie* right to enter a temple. In the famous Ambalapuzha temple case, *Dewan of Travancore* v. *Vakjiraji* (3), the late Mr. N. K. Ramachandra Rao of the Travancore High Court (then the District Judge of Alleppy), a very orthodox and learned Brahmin Judge, decided that a Bhattia merchant was entitled to worship from the hall of that famous temple (though he was a foreigner to Malabar)

(3) 4 Travancore Law Reports 56.

because he belonged to one of the higher castes. I am clearly of opinion that it is unreasonable to call upon a person belonging to any of the thousands of sub-castes existing in India to prove affirmatively that his sub-caste has by prescription acquired a right to get into a particular temple among the tens of thousands of Hindu temples dotted over India and if he could not do so, to shut him out of worship in that temple

It seems to me that provided he proves that he has the status of one of the main castes (or it may be, an intermediate Anuloma status between two of the main castes), it would be for those who wish to exclude him from the usual position in the temple assigned to a man of his caste status by the Agamas to prove that, by the special custom of that temple, even a person of that caste status is excluded.

Reversing, therefore, the judgments of the lower Courts I would give a judgment in favour of the plaintiffs, granting the reliefs claimed in prayers (*a*) and (*b*) of the plaint subject to a declaration that Brahmins, Pillais and Mudaliars are entitled to take precedence over the plaintiffs by standing in front of persons belonging to the plaintiffs' caste in the covered portions of the temple between the Dwajasthambam and Gharbhagraham where it is intended that worshipper shall stand and that the defendants Nos. 1, 2 and 4 to 9 (the defendants Nos. 1 and 2 in their individual capacity and not as trustees) shall be personally liable for the plaintiffs' costs throughout and the defendants shall bear their own costs.

Reliefs now granted to the plaintiffs shall not operate so as to derogate from the exercise by Brahmins, Pillais and Mudaliars of the right of precedence.

TYABJI, J.—The question involved in this appeal would primarily be dependent upon the terms of the original dedication of the temple. As there is no written trust-deed or its equivalent, the Court is left to deduce from the materials before it what the terms of the dedication must have been.

Under these circumstances it seems to me that the proper course is to presume that the dedication was a reflex of the general religious notions prevailing amongst members of the community for whose benefit the temple was dedicated. It is reasonable to assume that the dedication would follow the current of the prevailing religious views : if something at variance with the general notions was intended, those different intentions would in the ordinary course be clearly expressed.

The religious books cited by my learned brother are entirely in favour of the plaintiffs. This part of my learned brother's judgment I desire respectfully to adopt and follow. The learned District Judge should, therefore, have addressed himself to the question whether the defendants had proved that they had, by the original dedication or by what took the place of dedication, been given a right to exclude the plaintiffs from the portions of the temple which the plaintiffs claim to enter. The course he actually adopted was to start on the basis that the burden of proving that the plaintiffs had a right to enter the temple was initially on the plaintiffs. This may be conceded as part of the general rule that the plaintiffs must prove their case, but the failure to notice the considerations mentioned by my learned brother is very material. There was considerable evidence on the plaintiffs' part to prove the existence of what is referred to by the District Judge as a 'general rule permitting the access of their caste to temples.' Evidence to this effect was given with reference to the Thiruchendur, Tinnevelly and seven or eight other temples. It is carefully, I may say elaborately, considered by the District Judge. His conclusion is that the plaintiffs' evidence is "superior" to that of defendants on this question. Then the District Judge deals with what he considers to be the second part of the plaintiffs' case. He says: "Plaintiffs' direct evidence as to their right to enter the temple is given by 13 persons besides the first plaintiff; nine belonging to Panakudi and the others more or less connected with the village." His view of the plaintiffs' evidence on this part of their case is not legally in their favour. In his opinion it is "insufficient to transfer the burden of proof." He considers it, therefore, unnecessary to deal with the evidence of the defendants in detail. He does say, however, that "the defendants' witnesses who speak

regarding the plaint temple are of much the same quality as regards credit and independence;" and he refers to the admissions of the defendants that the inferior Vellalas can enter the temple, that the Elaivaniyans are not excluded from communion with other castes in various social connections, that (according to the 13th witness for the defendants) sons of Dasis can enter the temple and that the third defendant in his written statement refers to the plaintiffs' right to go as far as the Thoranakkal. His final conclusion is thus expressed : "there is nothing in all that which justifies acceptance of the plaintiffs' witnesses' evidence in spite of their lack of credit and independence."

I feel the difficulty of appearing to interfere with a finding of fact in second appeal —a finding arrived at after so careful a consideration of the evidence. But the precision with which the learned Judge has intimated his views as regards the evidence of each of the parties on each point enables us to give effect to his views of the evidence on the basis of the more accurate understanding of the law which my learned brother's research has made possible.

Taking the evidence as appreciated by the learned District Judge, the facts found by him may be stated to be that the general practice in regard to the 9 or 10 temples above referred to is in favour of the plaintiffs; that with reference to the particular temple now in question the witnesses of both sides "failed from a lack of credit and indepenence;" that it is not proved by the plaintiffs that they have been allowed in the past to enter this temple as a matter of right ; nor is it proved by the defendants that the privilege of excluding the plaintiffs from entering the temple has been asserted by the defendants and admitted in the past by the plaintiffs.

The result is not doubtful. The defendants have fallen far short of establishing to the satisfaction of the District Judge that the usage long prevailing, uniform and clear leads to the conclusion that the religious trusts declared in connection with this temple gave to the defendants and their predecessors-in-title the right to exclude the plaintiffs from it, notwithstanding that the general religious sentiment would be opposed to such exclusion.

On the District Judge's view of the evidence, therefore, the plaintiffs should have been given a decree in terms of prayers (*a*) and (*b*) of the plaint, subject to the declaration of the right of the Brahmins, Pillais and Mudaliars to which my learned brother refers in his judgment. I agree, therefore, in the order proposed by my learned brother.

Appeal allowed;
Decree reversed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 42 OF 1911.
September 7, 1914.
Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.
KUMARASWAMIA PILLAI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
VAIRAVANATHA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, nuncupative, proof of – Hindu widow – Property acquired by, with her own money – Will, inclusion in, of property in husband's estate.

The person who sets up a nuncupative Will is bound to allege as well as to prove with precision the words of the deceased on which he relies with every circumstance of time and place.

Where a certain property which originally formed part of a widow's husband's estate but was sold in execution of a decree and re-purchased by her with her own money, was disposed of by her in her Will:

Held, that the widow did not intend it to form part of her husband's estate.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 28 of 1907.

Mr. *M. D. Devadoss*, for the Appellants.

Mr. *T. Rangachariar*, (with him Messrs. *P. R. Narayanasawmi Aiyar*, *M. B. Doraisami Aiyangar* and *E. S. Chidambaram Pillai*), for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the Subordinate Judge of Tinnevelly in a suit brought by the plaintiffs as reversioners to recover the properties of the last male-owner, Virabahu Pillai, on the

death of the last surviving widow. The first defendant relies on a nuncupative Will in his favour, which he says was made by the last male-owner three weeks before his death at the end of 1883 or in the beginning of 1884. His case is that the deceased then constituted him his "*abhimana puthran*" or son by affection and bequeathed his property to him at once, charging him with the maintenance of his widows and with the performance of certain charities. It is, no doubt, true that in several documents from 1885 onwards, the first defendant described himself as the "*abhimana puthran*" of the deceased; but on the other hand the *pattas* for the suit properties were transferred to the names of the widows and the widows continued in possession and enjoyment of the suit properties until their death and also conducted the charities. The first mention of this nuncupative Will in express terms is to be found in the Will, Exhibit I, executed by the junior widow in the year 1902. That recital, of course, is not evidence of the execution of the Will. In order to prove the execution of the Will the first defendant has to rely on the oral evidence of himself and from other witnesses given in the year 1910 about 26 years after the event. The Judge has accepted that evidence and found the nuncupative Will proved. The law is rightly very strict as to the proof it requires of nuncupative Wills where such Wills are allowed at all. We have been referred to the decision of their Lordships of the Privy Council in *Baboo Beer Pertab Sahee* v. *Maharajah Rajendeer Pertab Sahee* (1) where their Lordships say:—"But if any party is bound to strictness of pleading, it is he who sets up a nuncupative Will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place." Now when the evidence of these five witnesses is carefully examined, they are found not to agree as to the substance of the bequest. The 10th witness for the defence and the first defendant himself as his 11th witness both swear that the disposition in favour of the first defendant was to take effect at once upon the death of the testator, on the other hand the 12th, 13th and 16th witnesses for the defence all say that the disposition was to take effect after the death of both the widows. Our attention has been called to the fact that the 10th witness at page 142 in cross-examination says that the Will was to take effect after the death of the widows; in examination-in-chief he had said that it was to take effect immediately. That only shows what uncertainty there is, even in this witness's evidence as to what the testator's dispositions were. Under these circumstances we feel constrained to say that the alleged nuncupative Will has not been proved with the precision which the law requires. We are also impressed by the fact to which Mr. Devadoss for the appellants has called our attention, that there seems to be no good reason why this testator should have relied upon such an old-fashioned and unsatisfactory manner of giving effect to his intentions. The evidence is that he was able to write and also that there was a Sub-Registrar's office quite close to his house. He was not, according to the evidence which we accept, in any danger at the time of the disposition and would have had ample time before his death to execute a written Will in the ordinary way. Having regard to these facts and the uncertainty of the defence evidence as to the contents of the alleged Will, we feel bound to say that the Will has not been proved and cannot be given effect to. That being so, the appeal must be allowed to this extent.

Various other points were taken before us by the appellants. One point was that certain property had originally belonged to the estate and had been sold in execution of a decree and was afterwards re-purchased by the widow with her own money and had been incorporated by her in her husband's estate. That is, we think, sufficiently disproved by the fact that she in her Will, Exhibit I, purported to dispose of it. That is a clear indication that she did not intend it to form part of her husband's estate.

Another point taken was as to a pair of ear-rings which are alleged to have been worn by the deceased at the time of his death. We have examined the evidence to prove that these ear-rings came into the possession of the first defendant, and we find it is not satisfactory and it is denied by the first defendant. We are unable to say that the

(1) 12 M.I.A. 1 at p. 28; 9 W. R. (P.C.) 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 398; 20 Eng. Rep. 241.

Subordinate Judge was wrong in this respect.

The result is that, in so far as the property affected by the nuncupative Will is concerned, the appeal must be allowed and the decree of the Subordinate Judge must be varied accordingly. Each party will pay and receive proportionate costs throughout. The defendants Nos. 3 and 4 are entitled to their costs of the appeal.

The memorandum of objections is dismissed with costs.

Appeal allowed in part ;
Memo. of objections dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 57 OF 1914.
August 19, 1911.
Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.
GOTTEPATI SUBBANNA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
GOTTEPATI NARASAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Guardian knowingly setting up false plea —Gross negligence—Res judicata—*Personal interest in suits between members of same family.*

A minor is not bound by a decree passed against him, if he shows that his guardian was guilty of gross negligence in the conduct of the suit.

A guardian setting up a plea of adoption, false to his knowledge even if it be to benefit the minor, in a suit to recover possession of property, when he could have set up a Will which gave him a moiety of the property, is guilty of gross negligence.

In a suit to which no strangers are parties, each member of the family must ordinarily be considered to be litigating for his own benefit and not for the benefit of the estate.

Asghar Raza Khan v. *Mahomed Mehdi Hossein Khan*, 30 C. 556 (P. C.); 7 C. W. N. 482; 30 I. A. 71, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 36 of 1909 on the file of the District Court of Kistna.

Mr. *P. Narayana Murthy*, for the Appellants.

Mr. *S. Srinivasa Aiyangar* (with him Mr. *V. Ramadoss*), for the Respondents.

JUDGMENT.

SANKARAN NAIR, J.—This is an appeal by the plaintiffs from the decree of the Subordinate Judge of Masulipatam declaring that an alienation of the properties in suit in favour of the 2nd defendant by the 1st defendant, the widow of the last male-owner, is not binding on them and defendants Nos. 3 and 4 who are expectant reversioners. Bapanna, the last male-owner died, in the year 1881. In 1882 his widow, the 1st defendant, sued to recover possession of the properties from the 2nd defendant who was then a minor. His father as his guardian contended in that suit that his son, the 2nd defendant, was adopted by the deceased. The Court found that there was no such adoption and decreed possession of the properties to the widow, the plaintiff in that suit. In execution of the decree, she obtained possession and in 1897 she executed the registered deed of gift which the plaintiffs now seek to set aside.

The Subordinate Judge has held that the deed of gift is valid because the 1st defendant was entitled to a moiety of the properties in suit under a Will executed by her husband a few days before his death, by which he left a moiety of his properties to the 1st defendant and the other moiety to the 2nd defendant who is his brother's son.

The first contention raised in appeal is that the 2nd defendant is barred by the proceedings in that suit from relying on this Will. The Sub-Judge is of opinion that there was no bar as 2nd defendant's guardian was guilty of gross negligence in defending that suit. The facts necessary for the decision of that question are these :—In that suit the widow alleged that her husband executed a Will on the 8th May 1881, but a few days after the execution of the Will he revoked it. The defence set up by the 2nd defendant's father in the Court of first instance was that the 2nd defendant had been adopted by the 1st defendant, that he was not aware of the execution of the Will and that even if the Will was genuine, it was not valid against the 2nd defendant. The Munsif found that the adoption set up by the 2nd defendant's guardian was not proved. He also added that it was unnecessary to take any notice of the Will as the evidence showed in his opinion that it was executed at a time when the testator was "distressingly ill" *and as both parties deny the Will.* He accordingly decided in favour of the 1st defendant.

In appeal the Judge held that the adoption was not proved. And as to the Will, he

observed: "It is remarkable with what caution both parties approach Exhibit A. The defendants deny its authenticity. But as a *pis aller* elect, if the adoption is disallowed, to profit by its provisions to the extent of getting half the properties of the deceased for the minor 2nd defendant." He then considered the evidence in the case and found that the Will was genuine and that it was revoked. The Sub-Judge is of opinion that the plea of adoption set up for the 2nd defendant in the former suit was false to the knowledge of his guardian and it was gross negligence on his part not to have relied on the Will. I am of opinion that the Sub-Judge is right. There is no doubt from the evidence that the guardian, who was the father of the minor, must have known that the alleged adoption was false. Without his knowledge no such adoption could have taken place. The Will was inconsistent with the adoption and he precluded himself from giving evidence about the genuineness of the Will by setting up the false plea of adoption, which he did no doubt to obtain the entire properties of the testator for his son who under the Will would have obtained only half. The case before us then is that of a guardian who deliberately sets up a false plea for adoption and fails to set up the claim of the minor under a Will of which also he must have been aware. There is no doubt, therefore, that he was grossly negligent in the conduct of the suit. A minor is not bound by a decree passed against him if he shows that his guardian is guilty of gross negligence. I am of opinion, therefore, that the plea of *res judicata* cannot be upheld.

It is then urged that the widow was in possession of the property from 1883 to 1897, not as full owner claiming under the Will, but only setting up a widow's claim to the property. It is denied that the widow got possession in 1883 and it is alleged that she took possession only in 1887. This contention was not raised in the lower Court and as further evidence will have to be taken if the plea is now allowed to be urged, we are not prepared to entertain it at this stage.

It was also contended that the widow having disclaimed her rights under the Will, it is not open to her now to claim the property as it became vested in the heir-at-law. This plea also was not raised in the lower Court and as further evidence has to be taken, we cannot allow the appellant to raise it in appeal.

The next question is whether the Will is genuine. It was produced with the plaint in the suit in 1882. It was proved in that case. It is also proved to be attested by the father of the 4th and 5th plaintiffs who was a witness in that suit. The *karnam* of the village, who is an attesting witness, has been examined in this suit and he proves that the testator executed it of his own free will.

There is no evidence of the revocation of the Will. It is true no doubt in the suit in 1881 it was found that the Will was revoked. The evidence on which reliance was placed in that suit was of the father of the plaintiffs Nos. 4 and 5. That evidence is not of much weight as he was an attesting witness and was trying to get rid of the Will. There is the oral evidence of the defendants' witnesses Nos. 3 and 4, which the Sub-Judge has believed to show that the Will is not revoked. We, therefore, disallow this contention.

For these reasons we confirm the decree of the lower Court and dismiss the appeal with costs.

SPENCER, J.—While agreeing with the view taken by my learned brother that the 2nd defendant's father, while acting as his next friend in Original Suit No. 972 of 1882, was guilty of gross laches in basing his son's defence upon a false plea of adoption, which he must necessarily have known to be not true, instead of relying upon the Will which has now been found to be genuine, I am further inclined to agree with the Subordinate Judge that no case of *res judicata* can arise in this suit by reason of the previous litigation. My grounds are these. The widow was the plaintiff in the former suit and seeing that she and the 2nd defendant in this suit were then in competition for the right to succeed as heirs to the deceased Bapanna, the widow's cause of action appears to have been a personal one. But assuming for the sake of argument that she represented the estate of the deceased, it appears that the reversioners, who are the plaintiffs in this suit, are neither claiming under her in the present litigation nor were represented by her in the former litigation. For the widow, being still alive and appearing as first defendant in this suit, must be treated as the representative of the estate in this suit, if the estate is represented at

all. As it stands to reason that an estate cannot be represented in one and the same suit by two representatives, each with interests adverse to the other, it follows that while she lives, the reversioners do not represent the estate when she does, and, therefore, they are not bound by any decision obtained for or against her acting in her capacity as representative of the estate. Moreover in a suit to which no strangers are parties, each member of the family must ordinarily be considered to be litigating for his own benefit and not for the benefit of the estate. Vide *Ashgar Raza Khan* v. *Mahamad Mehdi Hossein Khan* (1).

On the other points arising in the appeal, I adopt the view taken in my learned brother's judgment and I agree that the appeal should be dismissed with costs.

Appeal dismissed.

(1) 30 C. 556 (P. C.); 7 C. W. N. 482; 30 I. A. 71.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 575 OF 1913.

September 22, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

SIVASAILAM IYER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMAKRISHNA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Ryotwari *villages, irrigation in—Right of Government to distribute water—Dam keeping water from certain lands—Party effected, whether entitled to sue—Jurisdiction of Civil Court.*

Where Government in the exercise of its general power of distributing water for irrigation in *ryotwari* villages limits the supply of water to what is reasonably necessary, no one else has any right to interfere with it.

Where a dam has been erected penning back water from the plaintiff's land, the latter can sue in a Civil Court to protect his right.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 391 of 1911, preferred against that of the Subordinate Judge of Tinnevelly, in Original Suit No. 31 of 1907.

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *S. Muthiah Mudaliar* and *C. A. Seshagiri Sastri*), for the Appellants.

Messrs. *T. R. Ramachandra Aiyar* and *A. Swaminatha Aiyar*, for the Respondents.

Dr. *S. Swaminadhan*, for the Government.

JUDGMENT.—The main contention put forward on behalf of appellants is this. Under the arrangement effected by Mr. Arundel in 1876, they are entitled absolutely to all the water that is diverted down their Vagaikulam channel by the Alkoli anicut. Even if Government in the exercise of its general power of distributing water for irrigation in *ryotwari* villages could limit this supply to what is reasonbly necessary, no one else has any right to interfere with it. Government has not appealed against the decree of the Subordinate Judge which gave appellants the declaration and injunction sued for. The other defendants, who are the *ryots* of Papankulam, can only oppose the suit on the basis of private rights of their own in the water passing down the Vagaikulam channel. No such private rights have been found by either of the lower Courts.

This argument has been forcibly put forward by Mr. K. Srinivasa Aiyangar, but after careful consideration we feel unable to accept it. It seems to us that the District Judge has rightly held the foundation of the appellants' case (*i.e.*, their absolute right to all the water entering the Vagaikulam channel) to be unsound. It is clear that Mr. Arundels' Settlement evidenced by Exhibit D series merely dealt with the distribution of water between the various branches of the Ramanadi for the prevention of disputes among the *ryots* immediately cultivating thereunder. The disposal of the surplus waters after providing for the irrigation of these lands was not considered—nor the interest of any villages except the five mentioned in Exhibit D1. It is impossible to say that this arrangement gave or recognised any larger rights of the Alwarkurichi villagers in the Vagaikulam waters than they were previously enjoying, except in so far as it secured that not more than 70 per cent. of the Ramanadi waters should be deducted for the other branches before the balance was allowed to enter their channel. Now, it is not contended that the necessary level of the Udayar *parai* dam then stood at a different level from what it does now: and we think we

must take the District Judge to find that it was not customary then or at any subsequent time up to 1906 for appellants or their fellow-villagers to raise turf-dams on the top of it.

The rights of appellants' party after Mr. Arundel's Settlement in the Ramanadi waters, therefore, appear to be simply these:—

(*a*). The normal right of every *ryot* holding *nanja* land to a supply of water reasonably sufficient for its irrigation.

(*b*). As a safeguard for this, the right (secured by masonry sluices) that no more than 70 per cent. of the Ramanadi waters should be deducted for the other and higher branches.

These rights do not appear to carry with them the right to erect the turf-dam which forms the subject of the present litigation: for it is found as a fact by the District Judge that without it appellants can get a sufficient supply. Appellants must, therefore, be held to have failed to establish the facts which would entitle them to the declaration and injunction sued for. It is argued, however, that Government in consequence of its failure to appeal against the decree of the Subordinate Judge must be held to have retired from the contest: and that in these circumstances the other defendants can only defend the suit by establishing their own private rights. We do not think this makes any difference in the view that we have taken above. The suit cause of action is given in the plaint as the order of the Shermadevi Sub-Collector, dated 5th July 1906, forbidding the erection of the turf-*bund* and that of the Collector of Tinnevelly, dated 30th January 1907, confirming the same. These orders were passed on petitions from the Papankulam *ryots* (respondents) representing the prejudice caused to them by the *bund* and were passed for respondents' protection in the exercise of Government's general right of distributing the water-supply for irrigation purposes. No direct interests of Government were involved and there is no reason why Government should appeal from the decree of the first Court. Even in second appeal the Government Pleader represents that he has nothing to urge and is willing to abide by the decision of the Court. This, however, should not prejudice the other respondents or in any way relieve appellants of the necessity of establishing the right which they seek to enforce and declare. We have already held that they have not done so.

We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1039 OF 1912.

September 30, 1914.

Present:—Mr. Justice Hannay.

SUBBIAH PILLAI *alias* SUBRAMANIA PILLAI—PETITIONER

versus

KAILASAM PILLAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Other remedies open—Revision, if competent.

There will be no revision where there is a remedy by suit.

Ittiachan v. *Velappan*, 8 M. 484 (F. B.) and *Subbu Reddiar* v. *Kumaraswamy Reddiar*, 21 Ind. Cas. 461; (1913) M. W. N. 856, followed.

Karuppayee v. *Chinnammal*, 25 Ind. Cas. 191; 16 M. L. T., 101; 1 L. W. 537 and *Sri Krishna Doss* v. *Chandook Chand*, 4 Ind. Cas. 509; 32 M. 334; 5 M. L. T. 125; 19 M. L. J. 307, not followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Srivaikuntam, in Civil Miscellaneous Petition No. 467 of 1912, in Original Suit No. 380 of 1909.

FACTS.—The petitioner put in a petition under Order XXI, rule 100, Civil Procedure Code, to the District Munsif of Srivaikuntam and the same was dismissed under Order XXI, rule 101. Instead of filing a suit under Order XXI, rule 103, he applied to the High Court to revise the order of the District Munsif.

Messrs. *C. V. Anantakrishna Iyer* and *A. Swaminatha Iyer*, for the Respondent, raised the preliminary objections that the revision petition did not lie as there was a remedy by suit open to the petitioner, and that there was no question of jurisdiction involved and relied upon. *Ittiachan* v. *Velappan* (1) and *Subbu Reddiar* v. *Kumarswamy Reddiar* (2).

Mr. *K. S. Ganapati Iyer*, for the Petitioner:—The fact that a remedy by suit is open to the petitioner, is no bar to the exercise

(1) 8 M. 484 (F. B.).
(2) 21 Ind. Cas. 461; (1913) M. W. N. 856.

of the revisional powers of the High Court. *Karuppayee* v. *Chinnammal* (3) and *Sri Krishna Doss* v. *Chandook Chand* (4). The lower Court acted illegally and without jurisdiction in entertaining a second petition for delivery after the time limited by law and after a prior petition had been dismissed as time-barred. The case in *Muthia* v. *Appasami* (5) relied upon by the lower Court is inapplicable to the facts of the case, as that case was one between a decree-holder and a judgment-debtor and not between a decree-holder and a third party. *Kesri Narain* v. *Abul Hasan* (6).

JUDGMENT.—The preliminary objections are taken that there can be no revision in this case as the petitioner has a remedy by suit, and secondly that no question of jurisdiction is involved. It seems to me that both these objections must be upheld.

The petitioner's application to the lower Court was one under Order XXI, rule 100, of the Civil Procedure Code and his petition was dismissed under Order XXI, rule 101. His remedy in these circumstances was to sue to establish the right he claimed under the provisions of Order XXI, rule 103. The cases *Ittiachan* v. *Vellappan* (1) and *Subbu Reddiar* v. *Kumaraswamy Reddiar* (2) are clear authorities for the contention that in these circumstances no petition for revision lies. The cases cited for the petitioner, *viz.*, *Karuppayee* v. *Chinnammal* (3) and *Sri Krishna Doss* v. *Chandook Chand* (4), seem to me not to be in point. In the former, Oldfield, J., following the practice of the Court, revised an order setting aside an *ex parte* decree, although the petitioner could have advanced the considerations he relied on by appeal. In the latter, Miller, J., (while emphasising the rule that when a party has a remedy elsewhere than in the High Court, the High Court should not, except in special cases, interfere in revision) in the special facts of the case before him interfered in revision although the petitioner had a remedy by suit, on the ground that non-interference would only lead to multiplication of proceedings by a suit to which there could be no defence. Neither of these cases, therefore, afford any answer to the first preliminary objection.

As regards the second objection, the contention of the petitioner is that the lower Court acted illegally and without jurisdiction in entertaining an application for delivery "after the time limited by law and after a similar application had been dismissed as time-barred (Ground No. 4)." There is no evidence that a previous application for delivery was dismissed as time-barred or that the second application was out of time. The petitioner relies upon Exhibit A, a deposition by the decree-holder in a criminal case, in which he says that after delivery was obstructed on the first petition, he put in a petition subsequently and it was dismissed as time-barred. Assuming that Exhibit A is admissible to prove these facts, there is nothing to show what was the nature of the subsequent petition or how it was time-barred and nothing is to be gained by speculating on those points. From the B Diary it appears that the District Munsif called for the old execution petition to be produced, but petitioner did not see fit to comply with that order. On the facts placed before him the District Munsif was justified in following the decision in *Muthia* v. *Appasami* (5) and in entertaining the second petition for delivery. That case is sought to be distinguished on the ground that it was a case between a decree-holder and judgment-debtor, whereas the present is one between a decree-holder and a third party [see *Kesri Narain* v. *Abul Hasan* (6)], but it seems to me that the same principle governs both cases. There is nothing whatever to show whether the petition referred to in Exhibit A was one under Order XXI, rule 97, Civil Procedure Code, or that any order was passed against the decree-holder under Order XXI, rule 99. From grounds Nos. 4 and 6 of this petition it would appear that the petition referred to in Exhibit A was a petition for delivery and not an application under Order XXI, rule 97.

In these circumstances I uphold the second objection also, that no question of jurisdiction is involved which would justify interference under section 115, Civil Procedure Code.

(3) 25 Ind. Cas. 191; 16 M. L. T. 101; 1 L. W. 537.
(4) 4 Ind. Cas. 509; 32 M. 334; 5 M. L. T. 125; 19 M. L. J. 307.
(5) 13 M. 504.
(6) 26 A. 365; A. W. N.

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The petition is dismissed with costs.

Petition dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 9 OF 1914.

August 1, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji KT.

BALDEO—PLAINTIFF—APPELLANT

versus

ULFAT RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Ex-proprietary tenancy—Adverse possession.

A person cannot acquire the "status" of an ex-proprietary tenant by adverse possession, though he can obtain by adverse possession an absolute title to the property.

Letters Patent Appeal from the judgment of Mr. Justice Piggott, reported in 22 Indian Cases 269.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *G. L. Agarwala*, for the Respondents.

JUDGMENT.—We are not prepared to endorse as a matter of law that the defendants became under the circumstances ex-proprietary tenants by reason of being in possession of the property. We are inclined to think that the defendants acquired an absolute title to the property. They have admittedly been in possession ever since the year 1891 and such possession has been without any title. This *prima facie* would give the defendants an absolute title by adverse possession, and it would be upon the persons who were entitled to possession to explain and show that the possession of the defendants was not adverse. The learned Judge of this Court says: "My own opinion is that the appellant in the present case must be held to have acquired the status of an ex-proprietary tenant by adverse possession for twelve years and more". We do not think that a person can acquire the "status" of an ex-proprietary tenant by adverse possession. True it is that a leasehold or an ex-proprietary interest can be acquired by adverse possession as against the person who is the lessee or the ex-proprietary tenant. But we do not think that where there never has been a lessee or ex-proprietary tenant that it is possible to become such by adverse possession. The respondents have filed no objection to the decision and have not claimed to be proprietors and, therefore, we cannot interfere with the decree of this Court. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2401 OF 1912.

June 11, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice N. R. Chatterjea.

BASUNTA KUMAR CHUCKERBUTTY—PLAINTIFF—APPELLANT

versus

GOPAL CHUNDER DAS—DEFENDANT—RESPONDENT.

Probate and Administration Act (V of 1881)—Will, whether can be proved in proceedings other than probate—Will not proved under the Act, effect of—Succession Act (X of 1865), s. 187—Deceased, representation of.

A Will may be proved in a proceeding other than a probate proceeding, although no Probate of it has been taken under the Probate and Administration Act V of 1881.

Surbomungola Dabee v. *Mohendronath Nath*, 4 C. 508, followed.

But unless a Probate or Letters of Administration are taken under the Act, a Will cannot prove that anybody named therein has title to the estate of the testator.

Therefore, so long as the Probate of a Will is not taken, the legal heir represents the estate of the deceased and can maintain a suit for the benefit of the estate.

Prosunno Chunder Bhuttacharjee v. *Kristo Chytanno Pal*, 4 C. 342; 3 C. L. R. 154, *Chuni Lal Bose* v. *Osmond Beeby*, 30 C. 1044, referred to.

Appeal against the decree of the Subordinate Judge of Faridpur, dated the 23rd May 1912, affirming that of the Munsif, Goalundo, dated the 15th September 1911.

Babu *Surendra Kumar Bose* (for Babu *Preo Sankar Majumdar*), for the Appellant.

Babu *Kishori Lal Sarkar*, for the Respondent.

JUDGMENT.—The father of the plaintiff purchased a holding in execution of a decree and had notices under section 167 of the Bengal Tenancy Act issued on the defendants who are under-*raiyats*. On the death of his father the plaintiff brought this suit for ejectment. The plea of the defendants was, amongst others, that the deceased father of the plaintiff had left a Will under which the plaintiff was only a part-owner of the property in suit and could not as such eject them. The plaintiff in his deposition admits that he has heard of the execution of a Will by his

father. The defendant produced the Will, and the plaintiff objected to its being proved. The Court of first instance allowed the Will to be proved and dismissed the suit of the plaintiff as incompetent.

It has been contended before us that the Courts below are wrong in allowing the Will to be proved and should have proceeded to try the suit, notwithstanding the Will which could be proved only in a proper proceeding under the Probate Act.

It is contended that so long as Probate is not taken, the estate of the testator must be represented by the heir-at-law. In the case of *Prosunno Chunder Bhuttacharjee* v *Kristo Chytanno Pal* (1), Mr. Justice Markby said: "I think that until some other claimant comes forward, the party who takes possession of the estate of a deceased Hindu must, in the present state of the law, be treated for some purposes as his representative, and a judgment obtained against such a representative is not a mere nullity." The reason given was that otherwise the remedy of the creditor against the estate might be barred by an intentional delay in taking out Probate. In the case of *Surbomungola Dabee* v. *Mohendronath Nath* (2), Mr. Justice White allowed a Will to be proved. Although no Probate had been granted of the same, the heiress was allowed to prove it for the purpose of construing it and showing that it was void. This latter case is authority for upholding the proof of the execution of the Will. That, however, is not sufficient for passing title under the Will. Section 187 of the Succession Act applies to the Wills of Hindus and no title under the Will can be established in any Court of Justice unless a Probate or Letters of Administration with the Will annexed has been granted by a competent Court. The Will, therefore, uncovered as it is by a Probate or Letters of Administration, cannot prove that anybody named therein has title to the estate of the testator. The plea of non-joinder must, therefore, fail. The question, however, still remains to be decided—does the plaintiff represent his deceased father so as to be competent to maintain the suit? The case of *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (1) is authority for holding that he might, if he is in possession of his father's estate, represent him for the purpose of being sued by a creditor. In the case of *Chuni Lal Bose* v. *Osmond Beeby* (3) the residuary legatee as well as the heir *ab intestato* were substituted as the representatives of a deceased judgment-debtor, and it was held that the representation was complete. Mr. Justice Markby, in the case of *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytanno Pal* (1), says: "The executor does not represent the deceased, by virtue of the Will until he has obtained Probate. Who then represents the deceased who has left a Will after his death, until Probate has been obtained? Surely some one must do so, or the law would not have provided that the Statute of Limitation should run between the death and the grant of Probate and it undoubtedly does." If this be the reason why the party in possession should represent the deceased until the Will is proved so far as a claimant against the estate is concerned, there is no reason why the heir in possession should not represent the estate for the benefit of the estate against persons liable to the estate. Just as the decree against the party in possession may be available to the creditor for working out his remedy against the executor when he obtains Probate, the decree obtained by the party so in possession may enure to the benefit of the claimants under the Will when they can rely on the same as their deed of title. The heir-at-law may claim adversely to the Will, he may impeach the validity of the Will, notwithstanding that execution is proved: he may have various defences available to him against any claimant under the Will.

In any case if he can prove that he has come into possession of the general estate of his father, he can as the legal heir maintain a suit for the benefit of the estate, so long as any other claimant does not establish his right to the same under the Will.

The learned Munsif in this case was satisfied with the mere proof of the execution of the Will. The Will, although in Court, was not even put to the plaintiff

(1) 4 C. 342; 3 C. L. R. 154.
(2) 4 C. 508.
(3) 30 C. 1044.

when he was examined.

We think that the judgments of the Courts below should be set aside, and the case sent back to the first Court for decision on the merits after allowing the parties opportunity for adducing such evidence as may be relevant. The plaintiff is entitled to the costs of this and the lower Appellate Court. The costs in the first Court will abide the result.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1416 OF 1913.

November 6, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

HIMAT SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HULAS SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Succession—Occupancy-holding—Death of absolute owner of holding prior to passing of Tenancy Act, but of his widow after it—Right of collaterals to succeed.

S died prior to the passing of the Agra Tenancy Act (II of 1901) leaving a widow *K*. *K* succeeded to the occupancy-holding left by *S*. *K* died after the passing of the Act:

Held, that the plaintiffs, who were the nephews of *S* and were not in joint cultivation with him, could not succeed to the holding after the widow's death.

Second appeal from the decision of the Subordinate Judge of Budaun.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—Sanwant Singh died before the passing of the Tenancy Act of 1901 leaving a widow Kamla Koer. The widow died a short time ago. According to the plaintiffs they got possession of the occupancy-holding and were dispossessed by the defendants. This is a suit for recovery of possession of the occupancy-holding. Very difficult questions have been propounded under section 22 of the Tenancy Act. In the present case it is sufficient to say that, under no possible construction of that section, are the plaintiffs entitled to this holding. They are nephews of Sanwant Singh. It has been found that they were not joint in

cultivation with Sanwant Singh and are not collateral relations of Kamla Koer. In any view the decree of the Courts below is wrong. We allow this appeal, set aside the decree of the Courts below and dismiss the plaintiffs' suit with costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2255 OF 1912.

May 14, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

PROMODE RANJAN GHOSH—DEFENDANT—APPELLANT

versus

ASWINI KUMAR NAG—PLAINTIFF—RESPONDENT.

Nim-howla tenure—*No covenant against involuntary alienation of tenants or for re-entry—Purchaser of tenure at execution sale, right of—Landlord, whether entitled to sue original tenant—Decree, whether binding on purchaser.*

Where a *nim-howla tenure* was expressly made non-transferable to any one except the landlord but where there was no covenant against involuntary alienation or for re-entry, a purchaser at an execution sale of the right, title and interest of the tenants in the tenure acquires a good title by his purchase, and it is not open to the landlord to sue the original tenants with a view to obtain a decree whereby he could proceed against the tenure in the hands of the purchaser.

Appeal against the decree of the Subordinate Judge, Khulna, dated the 3rd May 1912, confirming that of the Munsif, Bagirhat, dated the 21st July 1911.

Babus *Jogendra Chandra Ghosh*, *Anilendra Nath Ray Chowdhury* and *Smritish Chandra Ghosh*, for the Appellant.

JUDGMENT.—This is an appeal on behalf of the landlord-defendant in a suit for declaration that the plaintiff is not bound by a decree for rent obtained by the landlord against the tenants-defendants. The plaintiff is the purchaser, at an execution sale of the right, title and interest of the tenants-defendants in a *nim-howla* tenure which lay originally in the District of Backergunge, but is now included in the District of Khulna. Notwithstanding the purchase by the plaintiff, which was duly notified

to the landlord, the latter brought a suit for rent against the tenants-defendants and obtained a decree. The plaintiff asks for a declaration that this decree is not binding on him and that the tenure in his hands is not liable to be sold in execution of this decree. The question consequently arises whether the plaintiff has acquired a valid title to the tenure by his purchase at the execution sale. The determination of this question depends upon the terms of the *nimhowla* lease of the 20th February 1878, which provides as follows:—"Let it be known that if you find it necessary to transfer the *nimhowla* tenure, you will transfer it to me for proper price. You will not be at liberty to transfer it to any person other than myself. If you transfer it to any other person, such transfers will be invalid."

On behalf of the landlord-defendant it has been argued that the tenure was expressly made non-transferable except in one event, namely, a transfer by the tenants to the landlord, and that consequently the plaintiff has not acquired a valid title by his purchase. There are two obvious answers to this contention. In the first place, there was no covenant against involuntary alienation as there was in the case of *Vyankatraya* v. *Shivrambhat* (1), where there was a covenant that the tenant would not let the land of the tenancy be sold or attached and sold in satisfaction of judgment-debts. It follows consequently that the plaintiff has acquired a valid title by his purchase. This view is supported by a long series of decisions, amongst which may be mentioned *Tamaya* v. *Timapa* (2); *Nil Madhab Sikdar* v. *Narattam Sikdar* (3); *Golak Nath Roy Chowdhry* v. *Mathura Nath Roy Chowdhry* (4); *Parameshri* v. *Vittappa* (5). In the first of these cases, it was pointed out that where land had been sold against the will of the lessee by the act of a Court, the lessee could not be said to have voluntarily transferred his interest and thereby committed breach of a covenant not to assign.

In the second place, it is clear that as there was no covenant for re-entry, the plaintiff has acquired a valid title. In support of this proposition reference may be made to the case of *Basarat Ali Khan* v. *Manirullah* (6) in which it was pointed out, on the authority of the decision of Blackburn, J., in *Williams* v. *Earle* (6), that where no right of re-entry is reserved, though there is a covenant binding on the tenant not to assign, the assignment is nevertheless operative. If the assignment in the case before us be thus deemed operative, it necessarily follows that title passed to the plaintiff, and it was consequently not open to the defendant to sue the original tenants with a view to obtain a decree whereby he could proceed against the tenure in the hands of the plaintiff.

The result is that the decree made by the Subordinate Judge is confirmed and this appeal is dismissed.

Appeal dismissed.

(1) 7 B. 256.
(2) 7 B. 262.
(3) 17 C. 826.
(4) 20 C. 273.
(5) 26 M. 157; 12 M. L. J. 189.

(6) 2 Ind. Cas. 416; 10 C. L. J. 49; 36 C. 745.
(7) (1868) 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 61 OF 1914.

November 5, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MUNNI LAL—APPELLANT

versus

BHAGWAN DAS—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 11(d), 15—Application to be declared insolvent—Bogus debt given in schedule of liabilities, effect of.

Where an applicant is in fact insolvent, his application should not be dismissed merely because he mentions some bogus debts in the schedule of liabilities given with the application.

If he has been guilty of any act of bad faith in drawing up the schedule, he can be suitably dealt with at a later stage by the District Judge under the provisions of the Insolvency Act.

First appeal from a decision of the District Judge of Benares, dated March 19th, 1914.

Mr. *Harnandan Prasad*, for the Appellant.

Dr. *S. N. Sen*, for the Respondent.

ORDER.—This is an appeal by one Munni Lal whose application to be adjudicated insolvent has been dismissed by the learned District Judge of Benares. The insolvency application showed assets amounting to a little over Rs. 800 and liabilities exceeding Rs. 1,800. The principal debt stated was one due to the respondent, Bhagwan Das, which the applicant stated

at Rs. 1,300 From the evidence on the record it would appear that the amount due to Bhagwan Das now exceeds the sum of Rs. 1,500. The application has been dismissed by the District Judge upon a finding that the other smaller debts shown in the schedule of liabilities were bogus debts put in for the purpose of swelling the amount of applicant's nominal liabilities. Seeing that upon the uncontroverted facts of the case the applicant was hopelessly insolvent in respect of the debt due to Bhagwan Das alone, the above does not seem to be a satisfactory reason for dismissing his application. If he has been guilty of any act of bad faith in drawing up the schedule of liabilities, he can be suitably dealt with at a later stage by the District Judge under the provisions of the Insolvency Act. We allow this appeal, set aside the order of the Court below and direct the District Judge to re-admit the application and to dispose of it in accordance with law. The appellant will have his costs of this appeal.

Order set aside.

ALLAHABAD HIGH COURT.

APPLICATION IN SECOND CIVIL APPEAL NO. 922 OF 1914.

November 3, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

PACHKAURI RAUT AN ANOTHER—APPELLANTS—PETITIONERS

versus

RAM KHELAWAN CHAUBEY AND ANOTHER—RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. I, r. 10, O. XLI, r. 20—Power of High Court to add party in second appeal.

The High Court cannot make a person who was not a party in the lower Appellate Court a party in second appeal.

Chunni v. *Lala Ram*, 16 A. 5; A. W. N. (1893) 141, followed.

Application to make a party in second appeal a person who was not a party in the lower Appellate Court.

Mr. *S. Musharam* (with him Mr. *Jawahir Lal Nehru*), for the Petitioners.

Mr. *Parmeshwar Dayal*, for the Opposite Party.

JUDGMENT.—This is an application by the appellants in Second Appeal No. 922 of 1914 praying the Court to make one Gajadhar Prasad a party to the appeal. The object of the suit brought by the respondent was to have a deed of sale executed by his father in favour of the appellants set aside. The respondent's elder brother Gajadhar Prasad, who attested the deed of sale, was impleaded as a defendant. The first Court decreed the claim. The defendants appealed, but they did not make Gajadhar Prasad a party to the appeal and it is admitted that they did not ask the Court to exclude the share of Gajadhar Prasad from the operation of the decree of the first Court. In this second appeal the defendants are apparently asking this Court to exclude from the operation of the decree the share of Gajadhar Prasad on the ground that he attested the sale-deed.

The application is resisted on the strength of a decision of this Court in *Chunni* v. *Lala Ram* (1). This ruling has not been accepted by the Madras High Court; but so far as we are aware it has been consistently followed by this Court or, at all events, has never been dissented from. On the broad question whether a Court in second appeal can, under Order I, rule 10, make a person who was not a party in the lower Appellate Court a party in second appeal, we are not prepared to differ from the decision of this Court. We note, however, that in the present case our decision will not tie the hands of the Bench trying the second appeal. If the Bench hearing the appeal come to the conclusion that the lower Appellate Court ought to have taken up the question which has now been raised, it will be able to remand the case under Order XLI, rule 23, and the lower Appellate Court will then be able to make Gajadhar Prasad a party. The substantial question for decision at the hearing of the appeal will be whether the defendants are entitled to raise the question at this stage. We have been referred to Order XLI, rule 33. We express no opinion as to the applicability of this rule beyond saying that we are certainly not prepared to act under it at this stage.

The present application is dismissed with costs.

Application dismissed.

(1) 16 A. 5; A. W. N. (1893) 141.

VISHUNATH KUAR *v.* LADLI PRASAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 34 OF 1914.

August 12, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

Thakurain VISHUNATH KUAR—DEFENDANT—APPELLANT

versus

LADLI PRASAD—PLAINTIFF ANOTHER AND—DEFENDANTS—RESPONDENTS.

Sale-deed, setting aside of, suit for—Claim under litigation, sale of—Validity or invalidity of sale to be judged by circumstances attending it—Petition-writer, position of—Case, conduct of, entrusted to petition-writer—Litigation, experience in, effect of—Legal consequences of acts—Transaction, true import of—Undue influence.

The validity or invalidity of the sale of a claim under litigation is not to be judged by the value of the property affected thereby after the claim is decreed, but by the circumstances as they stood when the sale was effected.

Where a petition-writer, who was engaged as an expert in litigation to prosecute a case and was to get a share in the claim under litigation in case of success and who during the pendency of that case sold off his share, subsequently sued, after the claim was decreed, for setting aside the sale on the ground that it was brought about under undue influence:

Held, that the petition-writer could not be considered to be a person who did not understand the legal consequences of his acts or the true import of the transaction in which he had entered or to be in the position of a person upon whom undue influence could be exercised.

Appeal from the decree of the Subordinate Judge, Bahraich, dated 15th January 1914.

Mr. *Muhammad Wasim*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Babus *Bisheshwar Nath* and *Lachman Prasad*, for the Respondents.

JUDGMENT.—The suit out of which these two appeals have arisen was brought by one Ladli Prasad, calling himself a resident of *Mohalla* Begamganj, city Lucknow, against the two persons who lay claim to the estate of the late Rawat Raghuraj Singh, to set aside a sale-deed dated the 8th February 1910 executed by the plaintiff in Rawat Raghuraj Singh's favour and for a declaration that the plaintiff was the owner of a one-anna share in the property detailed in the list attached to the plaint. The plaintiff expressed his readiness, if so ordered, to refund the consideration-money for that sale which he had received.

The facts of the case will be better understood from the following brief *resume* of antecedent events. One Birj Bahadur came somehow to know that he was the owner of certain property which was in the possession of the Maharaja of Balrampur. He was not in a position to stand the expenses of a law suit, and determined to sell some portion of this property to find the necessary funds. He had a brother-in-law Ram Het, a Pleader in Sitapur, whom he approached for advice. They appealed to Ladli Prasad, who was then a petition-writer at Sitapur and who may be termed an expert in litigation. With Ladli Prasad they visited Lucknow and interviewed Mr. Zahur Ahmad, one of the Pleaders practising in the Judicial Commissioner's Court. Arrangements were finally come to by which money was advanced by one Abdul Rahim of Mau Aima of the Allahabad District, a near connection of Mr. Zahur Ahmad. A sale-deed was drawn up on the 9th of May 1908. Mr. Zahur Ahmad stated in examination that rough calculation was made as to the probable costs of the litigation, and that these probable costs were set out as the consideration in this sale-deed, according to the terms of which seven annas of the property in dispute were sold to Abdul Rahim, the entire consideration money being left with him to defray the expenses of litigation. One anna was transferred to Ladli Prasad unconditionally; and it was set out that the expenses of litigation would be borne by Abdul Rahim. On the 19th December 1908 a suit was duly filed by Birj Bahadur and his two vendees, and a power-of-attorney in the name of Ladli Prasad was executed by both Birj Bahadur and Abdul Rahim. The suit with mesne profits was valued at one lac and ten thousands. In his written statement the Maharaja objected that Abdul Rahim was *benami* for Mr. Zahur Ahmad, who it was asserted was fostering the litigation. Mr. Zahur Ahmad occupies by no means a low position among the legal practitioners who appear before this Court; and to a gentleman in such a position anything approaching a promotion of litigation for his own personal profit would savour strongly of unprofessional

conduct. Mr. Zahur Ahmad, therefore, as he states in examination, sought the advice of the Judicial Commissioner. As a result of that advice the property was re-transferred to Birj Bahadur and re-sold to Rawat Raghuraj Singh and certain other persons, Ladli Prasad again receiving a one-anna share as before. To meet any objections which might be made, Mr. Zahur Ahmad associated himself with Abdul Rahim in the re-transfer to Birj Bahadur. Both transactions were completed by a single document dated the 30th of April 1909; and it is admitted that the same conditions applied as applied in the case of the first sale-deed, namely, that the consideration money, which in this case was Rs. 7,000, was left with Rawat Raghuraj Singh who was responsible to bear the costs of the litigation and that Ladli Prasad should have his one-anna share as before without incurring liability for the payment of any money. On the 8th of February 1910 Ladli Prasad transferred half of his one-anna share to Rawat Raghuraj Singh for Rs. 1,000, Rs. 200 being paid at the time of the transfer and the remainder to be paid in instalments of Rs. 100; and it is admitted that these payments were completed by the end of the year 1910. At the time of the execution of this sale-deed the plaintiffs' preliminary evidence had been completed. The dispute between the parties in that suit was mainly one of custom. A large number of witnesses had at that date been examined on behalf of the defendant; and it still remained for the defendant to complete his case and for the plaintiffs to produce rebutting evidence on the question of custom. It is admitted that in all some seven hundred witnesses were examined in that case. On the 21st of April 1910 Ladli Prasad filed an application to the Court that the shares of the plaintiffs in that case should be altered in accordance with this sale-deed of 8th February 1910. It may be noted here that under that sale-deed the obligation lay upon Rawat Raghuraj Singh to make this application and that the doing so by Ladli Prasad was optional. This is the sale-deed which Ladli Prasad seeks to have set aside in this present suit. The claim of the plaintiffs was decreed on the 7th June 1911, the share of each plaintiff being specified in the decree. On the 17th of August 1911 Rawat Raghuraj Singh died. The Maharaja of Balrampur appealed to this Court and a compromise was arrived at. Birj Bahadur was paid a lac of rupees and a lac of rupees were to be distributed between the owners of the other eight annas. Before the sale-deed of 8th February the other persons who had been associated with the Rawat as purchasers in the sale-deed of the 30th April 1909, had parted with their rights to him. After the decree had been passed the Rawat conveyed six pies of his share to one Nazir Ahmad, and nine pies to one Sri Newas; and when the compromise was arrived at Nazir Ahmad received Rs. 6,250 for his six pies and Sri Newas Rs. 9,375 for his nine pies. Ladli Prasad made in some way his own arrangements with the Maharaja, and for his one-anna share, half of which had been sold as noted above to Rawat Raghuraj Singh, Rs. 20,000 was to be paid. Rupees 10,000 Ladli Prasad has received.

Ladli Prasad then on the 7th February 1913 brought this present suit in the Court of the Subordinate Judge of Bahraich. He alleged that under an oral agreement come to at the time of the first sale-deed, and continued at the time of the second sale-deed, it was stipulated that he was to continue to conduct the suit and that Abdul Rahim, and subsequently Rawat Raghuraj Singh, was to continue to pay him (Ladli Prasad) one rupee a day diet money till the suit was finished, besides reimbursing him for expenses incurred in the search for a purchaser. He alleged in his plaint that the property in suit was valued at four lacs and that the entire claim including mesne profits was for five lacs, which allegation is unture. He alleged in paragraph 12 that he was not in a position to leave his home and to go to other cities for months and to bear expenses of travelling and food, and that this was within the knowledge of Rawat Raghuraj Singh. In paragraph 13 he stated that the latter stopped the payment of the travelling expenses and diet money which had been agreed upon; and that he alleged fraudulently to him (Ladli Prasad) that Birj Bahadur and Ram Het Singh denied any contract with him, and pro-

hibited the payment of these expenses and this diet money. As a result of this he (plaintiff) found himself, he alleged, unable to join certain commission proceedings at Shahjahanpur, Fatehpur and other places. In paragraph 15 he stated that, seeing this, Rawat Raghuraj Singh threatened that he (Ladli Prasad) would not be entitled to get one-anna share and would be liable for damages, because he was not prosecuting the case; and that he had further added that if a sale deed in respect of half of his share was executed in his (the Rawat's) favour, expenses and diet money should continue to be paid. Fully believing, therefore, that his one-anna share would be lost if he did not conduct the suit, he executed the said sale-deed in Rawat Raghuraj's favour for what he terms to be the insignificant sum of Rs. 1,000. In paragraph 17 he stated that he did this on account of false statements, fraud and unlawful pressure of Rawat Raghuraj Singh.

The lower Court found that no misstatement of facts and no fraud had been proved; and this finding has not been disputed in this Court. In fact the learned Advocate who has represented him in this Court opened his address with the words, "I do not charge fraud or misrepresentation." The lower Court found that there a was no doubt that one-anna share was given to Ladli Prasad to find out a financier for litigation and to do *pairwi* in the case. He was to engage Pleaders, that is to say, to suggest points and questions and to hunt out evidence in proof and rebuttal. It finds that there was a contract between the plaintiff and the Rawat, by which the plaintiff should be paid travelling allowances and daily allowance at a fixed rate, and that he was paid up to the 16th August 1909. It finds that no satisfactory cause has been shown as to why that payment should have ceased as it did on the 16th August 1909; and it thinks that the Rawat, finding expenses heavier than anticipated, determined to harass Ladli Prasad by withholding payments and putting him in jeopardy of his own share. It finds further that Ladli Prasad, having been told by Muhammad Ismail, Pleader, that if he did not prosecute the case he would probably lose his one-anna share, thought that six pies were better than no pie at all; and thus adroitly influenced, he consented to execute the sale-deed for half of his one-anna share in favour of the Rawat. From the 8th February 1910 it found that daily allowance was again paid; and it was, therefore, satisfied that the sale-deed must have been obtained under undue influence.

The two defendants have filed separate appeals against this finding.

We are entirely unable to agree with the finding of the lower Court, which is purely conjectural. Ladli Prasad was not such a person as to be deceived by anything that Rawat Raghuraj Singh might say as to the legal consequences of his failure to be present at every hearing of the suit. Ladli Prasad alleges that he consulted Pleaders, from whom he was led to believe that his right to one-anna share depended on his continuous *pairwi*. From the evidence of those Pleaders, however, all we can find is that he was told that if the case did not succeed, he would not get his one-anna share; and this was in itself a patent fact. The sale-deed, under which the rights of Ladli Prasad to his one-anna share arose, contained no condition as to *pairwi* but rather set out an unconditional transfer: and we have no doubt that Ladli Prasad, with his experience in litigation, was perfectly aware of the provisions of section 92 of the Evidence Act and that he would be the last person to allow for a moment that evidence could be admitted as between the parties to those sale-deeds, for the purposes of varying or adding to their terms. The past history of this gentleman is interesting. According to his own description from 1877 to 1894 he was a petition-writer in the Revenue and Civil Courts at Sitapur. From thence till 1899 he was a petition-writer in this Court. After that he became a *mukhtar* of Chaudhri Sher Bahadur Singh, *Talukdar* of Deokaliya, in the District of Bahraich. He was in his service till 1905 in charge of the estate litigation, as we learn from the statement of Mr. Zahur Ahmad; and he achieved a certain amount of success. After that he became *mukhtar* of Sardar Labh Singh for two or three months. After that he fell ill and returned to Sitapur, where he again adopted the profession of a petition-writer in the Revenue and subsequently in the Civil Courts until February 1908, when

he, as he says, engaged himself in the *pairwi* in this suit with the Maharaja of Balrampur. He gave his address in the sale-deed as a resident of Lucknow, and not of Sitapur. There is absolutely nothing upon the record which can justify a finding that the sale-deed of a half-anna share was brought about owing to any improper pressure brought to bear upon Ladli Prasad by the Rawat. It is admitted in this Court that all the bills presented for payment to Rawat Raghuraj Singh from 1st May 1909, that is to say, from the very first date after the execution of the sale-deed were all paid. It is admitted that he received advances, for which he gave credit in those bills; it is admitted that he did not expect payment except on presentation of those bills, and it is admitted that he only submitted bills for the days when he actually worked. One Banke Lal kept on behalf of Raghuraj Singh a full account of the expenses incurred in connection with this suit; and Exhibit 8 on the record is the register in which those accounts were written. By means of six bills Ladli Prasad obtained payment for work done on every day between the 1st May and the 5th August 1909. Payments of two other accounts appear in the register, 6th to 9th August and 15th to 18th August. From the evidence it is shown that Ladli Prasad presented a bill for work done from the 6th to 21st August, Exhibit 9. The Rawat and his legal advisers began to come to the conclusion that Ladli Prasad was becoming extortionate. It was, therefore, ordered that he should only be paid for the days for which he actually worked; and Rs. 9 were cut out of his demand on this occasion. They were also suspecting that Ladli Prasad, strictly against the conditions of the instrument of the 30th April, was feeling his way towards making his own terms with the Maharaja. With reference to this day (18th August) it is to be noticed that the plaintiffs' evidence in the Balrampur suit closed on the 17th of August. The defendant's evidence was commenced on the 23rd of August. Ladli Prasad was being summoned as a witness for the Maharaja. What did this portend? On the 21st of August Ladli Prasad wrote a letter, Exhibit 7, to Banke Lal which, in our opinion, betrays the cloven hoof. The gist of it was:—"I am very ill. After looking through my account please have it paid up, so that I may not be prevented from attending Court day after to-morrow." We think a covert threat may be read in between the lines of this letter; and it is evident that the Rawat was of the same opinion. The reply of Banke Lal on the reverse of the letter is to the following effect:—"Mirza Saheb handed me your account and has instructed me that you are to be paid, as arranged, in accordance with the days you actually worked, so Rs. 9 are cut. When you go to Bahraich you will continue to be paid at the daily rate: and you must go on the day after to-morrow, as you have been summoned." This amounts to a reply:—"You will be paid the proper amount: and don't hold threats over me: you have got to go to Bahraich."

On the 4th of September Birj Bahadur wrote to the Mirza Saheb. His letter is Exhibit M on this record. In it he refers to a letter from Ladli Prasad, in which the latter threatens that as he had not been paid his travelling expenses he proposed to come to a settlement regarding his share, which is in direct contravention with the arrangement they had come to on the 30th April. It is admitted for Ladli Prasad that such a letter was written. He suggests to Mirza Saheb that when he goes to Bahraich, he should file an application in the Subordinate Judge's Court on behalf of the vendees, calling the Court's attention to those provisions of the 30th April and asking that any application Ladli Prasad might make for a settlement or a dismissal of his suit in respect of his share should be rejected. He also shows willingness to cancel the power-of-attorney in Ladli Prasad's favour if advised, and records his suspicion that Ladli Prasad is intriguing with the opposite party. He notes at the end that they will have to be careful how they deal with him, because he is a witness on the other side and they cannot tell what he may say if he chose. By the Mirza Saheb is meant Mr. Sami Ullah Beg, Vakil of this Court, who was conducting the plaintiffs' case. The responsibility for the conduct of the suit had been definitely left to Abdul Rahim, and after him to Rawat Raghuraj Singh. This was a case depending on custom, where not only *Wajib-ul-araiz* had to be searched out, but also it would be necessary to elaborate a mass of oral evidence; and it was, no doubt,

for this reason that, treating Ladli Prasad as an expert in such matters, Birj Bahadur and the other vendees had executed a power-of-attorney and had put themselves to some extent in his hands. It is quite clear that by the end of August 1909 they had come to suspect his good faith. They did not think he was dealing straight with them in the matter of expenses; and they thought that he was unscrupulous enough to sacrifice them to a better offer from the other side. We have no doubt, therefore, that from that time Rawat Raghuraj Singh determined to keep matters more in his own hands; and it is in evidence that he employed the services of six or seven *karindas* to visit various Districts, with a view to finding the necessary evidence. Ladli Prasad produced a medical certificate to show that about the 21st of August he was suffering from liver complaint and was, therefore, absent from the case for some time. But we are of opinion that he was cunning enough to begin to see that his independent reign was over and that those responsible under the sale-deed for the prosecution of the case were going to take matters pretty well in their own hands. He saw that under the terms of the deed he could not oppose their so doing; and feeling now no longer so sure of the success of the case, when he had no longer the controlling hand in it, he was only too ready to reduce his risk by selling half his rights for a considerable sum down. It must be remembered that the seven-annas share was only valued at Rs. 5,000 at the time of the first sale-deed and at Rs. 7,000 at the time of the second, so that he was obtaining for his share a valuation which exceeded by no less than 100 per cent. what had gone before. The most expensive part of the case had still to be gone through, in which he would have a liability of 1/32nd instead of 1/16th; so that he was not making such a bad bargain. When he came to find afterwards that the claim was decreed and that he had lost a half-anna share for a thousand rupees, he determined dishonestly to try to avoid the sale and to recover the half anna by means of this suit.

In our opinion the claim of the plaintiff was entirely improper and false and we allow the appeals and dismiss the suit. We allow the appellants one set of costs in the two appeals together in both the Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

CIVIL SUIT No. 900 OF 1913.

June 4, 1914.

Present:—Mr. Justice Imam.

JOGESH CHANDRA CHAUDHURI—PLAINTIFF

versus

MOHINI CHANDRA RAY AND OTHERS—DEFENDANTS.

Copyright Act (III of 1914), s. 2—Infringement of copyright—Law Reports—Judgments—Extracts and facts collected by Reporter, whether can be copied.

It is generally true that in the reports of judgments the reporter has no copyright, but it cannot be said that in the selection of cases and in the arrangement of reporting the reportor has not the protection of the law. He is entitled to report such judgments as he obtains by expenditure of his time, labour and money, but where he fails to exert his own energies, he cannot be allowed to avail himself of other people's industry.

Therefore, where the defendant reproduced, not only the judgments which had been reported by the plaintiff, but also such parts of the plaintiff's reports as formed no part of judgments and also took from the plaintiff's reports extracts and facts which had been collected by the plaintiff from the records of the cases:

Held, that the defendant had infringed the plaintiff's copyright.

FACTS.—This is a suit for an injunction and damages on account of literary loss against the defendants on the ground that the first defendant, who had been bringing out a law periodical named the "Calcutta Case Law", had committed piracy and that the second defendants were the printers of that periodical. The plaintiff is the proprietor and publisher of a law periodical known as the "Calcutta Weekly Notes" and he charges the first defendant with infringement of copyright. The copying has been so slavish that in several instances the mistakes in the reports in the "Calcutta Weekly Notes" as well as errors and omissions, head-notes and even Reporters' initials have been copied by the "Calcutta Case Law."

Messrs. *B. Chakravarti*, *H. D. Bose* and *B. K. Lahiri*, for the Plaintiff.

The Defendant No. 1 appeared in person.

Mr. *M. N. Bose*, for Defendant No. 2.

The *Defendant* No. 1:—The similarity in the two publications are due to accidents and coincidences and not to piracy. When the subject is the same, independent labour may give the same result. If there is an accidental mistake as to date, that does not show infringement of copyright. None of the

head-notes in my publication were *verbatim* copies of the head-notes in the plaintiff's publication. Out of 1000 cases, the plaintiff has only been able to cite five as having been copied. Therefore, if I say that those five were due to accident or to the same nature of the subject, I state nothing unusual. If I can digest 995 cases independently I could surely have digested those five cases.

As regards the question of law, I submit that I am entitled to take notes from other Law Journals so long as they are not material or substantial portions of such notes. No one can claim copyright with regard to judgments. With regard to head-notes I am entitled to take them from any book.

Mr. *Chakravarti* (with him Mr. *B. K. Lahiri*):—The defendant has not been able to furnish any evidence to show that he had ever obtained a single judgment from the Court, because if the judgment had been taken he was entitled to go to the original materials. It is not suggested further that he employed a single person for the purpose of obtaining copies of judgments. There is no evidence to show that the defendant ever employed any one to assist him in digesting or making head-notes.

As regards the point of law, there is a great distinction between "piratical appropriation" and "fair abridgment" and "the right of extract for the purpose of comment or criticism." What I contend is that the plaintiff, who through expense and labour has made a selection of a number of judgments in the course of the year out of the voluminous judgments of the Court, has a copyright, and there can be a copyright in that selection itself, that is to say, in the report of a case which consisted of head-notes, short head-notes, statement of facts and judgment. It is not the judgment by itself, but it is the report consisting of a number of things, and the plaintiff has certainly an exclusive right of property in respect of those in which he spends a large sum of money.

JUDGMENT.—The plaintiff in this suit is the proprietor and editor of a law periodical, known as the "Calcutta Weekly Notes." The first defendant is the proprietor, editor and publisher of a rival law periodical, known as the "Calcutta Case Law." The second defendant is a company of printers. The suit is to restrain the defendants from committing piracy on the plaintiff's periodical, for an account of the profits made by the first defendant by the sale of the piratical issues of the "Calcutta Case Law", for damages and for other consequential relief.

The plaintiff's case is that the reports of the decisions of this Court as well as of the Judicial Committee of the Privy Council published in the "Calcutta Weekly Notes" are the result of considerable labour and expense on his part as well as on the part of the staff employed by him and that in his reports he has an exclusive copyright. He complains that the defendants have been systematically pirating the reports from the "Calcutta Weekly Notes" and printing and publishing the same in the "Calcutta Case Law." In the schedule of the plaint some of the instances of piracy have been set out. A comparison of the reports in the "Calcutta Weekly Notes" with those of the "Calcutta Case Law" establishes the fact of the latter reproducing the reports of the former with a degree of faithfulness that leaves no room for doubt that the defendants have availed themselves of the benefits of the plaintiff's labour.

The second defendant has undertaken not to print any more of the piracies of the first defendant. The trial, therefore, has proceeded on the contest of the latter only. The contesting defendant maintains that the plaintiff has no copyright in the reports of judgments of any Court of law and denied the alleged piracy.

It is generally true that in the reports of judgments the Reporter has no copyright, but it cannot be said that in the selection of cases and in the arrangement of the reporting the Reporter has not the protection of the law. The defendant is entitled to report such judgments as he obtains by expenditure of his time, labour and money, but where he fails to exert his own energies, he cannot be allowed to avail himself of other people's industry. The contesting defendant, instead of restricting himself to reporting the judgments only, has gone much farther. What he has done in the present case is that he has freely drawn on such portions of the plaintiff's reports as form no part of the judgment. He has also taken from

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the plaintiff's reports the quotations from judgments that were appropriate to the reports. The plaintiff's reports in many instances contained statements of facts not to be found in the judgments, but have been gathered by the Reporters from the records of the cases. The defendant, no doubt, is at liberty to bestow his labour on collecting the facts for himself, but he is not entitled to avail himself of the labours of others.

"Whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works, subject to copyright and entitled to protection." So said Lord Langdale, M. R., in *Lewis* v. *Fullarton* (1). The offending instances in this case are either copying or merely colourable alterations of the plaintiff's reports accompanied by blind repetition of obvious errors.

I have no doubt in this case that the contesting defendant has committed literary piracy on the plaintiff's periodical, and in this view this suit has to be decreed. The result is that the plaintiff succeeds and the defendant No. 1 will be restrained from pirating from the "Calcutta Weekly Notes" for the purpose of his publication. He is further restrained from selling or circulating any of the copies of the pirated publication since August 1910. The defendant is directed to render a full account to the plaintiff of the pirated issues of the "Calcutta Case Law" published since August 1910 and of the profits made by their sale. He is further directed to deliver in Court the unsold copies of the pirated issues of the "Calcutta Case Law" published since August 1910 and the same shall be destroyed. The defendant No. 1 will pay to the plaintiff the costs of this suit on scale No. II. The defendant Company is only to be liable for such costs as are occasioned by joining it as a defendant up to December 1st, 1913.

Suit decreed.

(1) (1839) 2 Beav. 6 at p. 8; 8 L. J. Ch. 291; 3 Jur. 669; 50 R. R. 84; 48 Eng. Rep. 1080.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 31 OF 1914.

June 5, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Rafique.

JAGANNATH AND OTHERS—APPELLANTS

versus

LACHMAN DAS AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Jurisdiction of District Judge to refer matter to subordinate Court.

An inquiry under section 36 of the Provincial Insolvency Act cannot be delegated to a subordinate Court. The District Judge must himself decide whether or not action should be taken to annul a transfer under the section.

First appeal from the order of the District Judge of Bareilly.

Mr. *Purushottam Das Tandon*, for the Appellants.

The Hon'ble Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—Lachman Das was adjudicated insolvent on December the 6th, 1912. He appears to have made a mortgage of his property on April 11th, 1912. The Receiver appointed in the insolvency proceedings made a report to the District Judge suggesting that this mortgage should be annulled under section 36 of the Act. On the 23rd of January 1913 the District Judge asked the Munsif of Pilibhit to hold an inquiry and report whether the mortgage was made *bona fide* or not. The Munsif after taking evidence reported that the mortgage had been made *bona fide*. The District Judge accepted his finding and held that the mortgage must stand. The Act makes no provision for the reference of such a matter to a subordinate Court. The District Judge alone had jurisdiction in the matter and should himself decide upon such evidence as may be avaliable whether or not action should be taken to have the mortgage set aside. The District Judge should give the Receiver and the creditors an opportunity of being heard in the matter before he arrives at a decision. We set aside the present order that the mortgage is to stand. No order as to costs.

Appeal allowed.

AKKARAJU NARAYANA RAO *v.* AKKARAJU SESHAMMA.

MADRAS HIGH COURT.

CIVIL APPEAL No 227 OF 1910.

CIVIL MISCELLANEOUS PETITION No. 2078 OF 1911.

September 4, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN APPEAL SUIT No. 227 OF 1910.

AKKARAJU NARAYANA RAO—PLAINTIFF—APPELLANT

versus

AKKARAJU SESHAMMA (DIED) AND OTHERS—DEFENDANTS—RESPONDENTS

AND

IN CIVIL MISCELLANEOUS PETITION No. 2078 OF 1911.

NAMBURI VENKATAKRISHNA RAO—PETITIONER

versus

AKKARAJU NARAYANA RAO—RESPONDENT.

Hindu Law—Joint family—Nucleus of ancestral property—Separate acquisition by individual members—Presumption—Civil Procedure Code (Act V of 1908), s. 149—Appeal, delay in filing—Court-fee insufficient—Discretion.

A joint Hindu family pre-supposes the possession of common property. Under the Hindu Law mere living together of the members of the family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilized for the purpose of making the subsequent acquisition, or the members must have thrown their joint earnings into hotchpot with the intention of giving up their individual rights in them.

Ram Kishen Das v. *Tanda Mal*, 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 723; *Dhurm Das Pandey* v. *Musammat Shama Soondri Debiah*, 3 M. I. A. 229; 6 W. R. (P. C.) 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. 271; 18 Eng. Rep. 484; *Vedavalli* v. *Narayana*, 2 M. 19; 2 Ind. Jur. 709, followed.

Under section 149, Civil Procedure Code, a Court has a discretion in all cases to allow the payment of the Court-fee at any time.

Balkaran Rai v. *Gobind Nath Tiwari*, 12 A. 129 at p. 151 (F. B.): A. W. N. (1890 39; *Achut Ramachandra Pal* v. *Nagappa Balb Balgaya*, 21 Ind. Cas. 337; 38 B. 41; 15 Bom. L. R. 902, distinguished from.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Original Suit No. 4 of 1909.

Mr *T. Prakasam*, for the Appellant.

Messrs. *P. Narayanamurthi* and *V. Ramadoss*, for the Respondents.

Petition praying that in the circumstances stated and in the affidavit filed therewith the High Court will be pleased to dismiss Appeal No. 227 of 1910 as being presented out of time without sufficient cause.

JUDGMENT.

IN C. M. P. No. 2078 OF 1911.

The true question is as to whether the appeal is out of time. The appellant under Order XLIV presented an application for leave to prosecute his appeal in *forma pauperis* accompanied by a memorandum of appeal as required by the Order. The application for leave was two months out of time and was filed on the last day allowed for filing the appeal. Eight days later the Court returned the application and the memorandum on the ground that the application was out of time and gave two days' time to explain the delay. Two days later the appellant again presented the memorandum of appeal with the full Court-fee and applied under section 149 that the delay should be excused. In the case of plaints insufficiently stamped Order VII, rule 11 (section 54 of the old Code), the Court is bound to give a few days to pay the correct fee. Delay could be excused if the insufficiency was caused by a mistake as to the amount of the requisite stamps. But under section 149 it is now left to the discretion of the Court.

In *Balkaran Rai* v. *Gobind Nath Tiwari* (1) the opinion was expressed that these provisions of section 54 as regards a plaint were not made applicable to a memorandum of appeal by virtue of section 582. To meet this decision, a new section 582A was inserted which allowed the admission of insufficiently stamped memorandum of appeal presented within the proper period of limitation, provided the insufficiency of the stamps was caused by a mistake on the part of the appellant as to the amount of the requisite stamps. This enactment appears to us to recognis the correctness of the Allahabad ruling that section 54 did not apply to memoranda of appeals as, if it did, there would have been no need of the new section. Then we come to the present Code which, for section 582A, substituted a new section 149 not confined to memoranda of appeals but giving the Court a discretion in all cases to allow the payment of the fee at any time. This, in our opinion, is the section which governs the present case, and with respect we are not satisfied as to the correctness of the ruling in *Achut Ramchandra Pal* v. *Nagappa Balb Balgaya* (2) that under the present Code

(1) 12 A. 129 at p. 151 (F. B.); A. W. N. (1890) 39.
(2) 21 Ind. Cas. 337; 38 B. 41; 15 Bom. L. R 902.

Order VII, rule 11, is rendered applicable to memoranda of appeals by section 148 so as to make it incumbent upon us to admit memoranda out of time where the conditions of the rule are complied with. In the present case we are not prepared to differ from the exercise of the single Judge's discretion in admitting the appeal.

IN APPEAL No. 227 OF 1910.

Akkarazu Ramadoss had two sons, Sitaramayya and Janakiramayya. The plaintiff is the grandson of Sitaramayya. The defendant is the widow of Janakiramayya, who died in 1907. This suit is for the recovery of his property on the ground that the plaintiff and the deceased were members of an undivided Hindu family and that by survivorship the plaintiff has become entitled to it. The case for the defendant is that the properties were the self-acquisition of Janakiramayya.

The Subordinate Judge upheld the defendant's plea and dismissed the suit. Hence this appeal.

The plaintiff bases his claim on two grounds: (*a*) that Ramadoss, the common ancestor of himself and Janakiramayya, acquired large property with the aid of which the latter purchased the properties in suit; and (*b*) that his grandfather, Sitaramayya, and Janakiramayya had thrown their earnings into a common stock and that the properties sued for represent the savings and accumulations from the joint acquisition. We have heard Mr. Prakasam at considerable length and we are not satisfied that either of these allegations has been made out in this case. Ramadoss was apparently a man of methodical habits. He kept accounts and although, owing to lapse of time, all of them are not available, Exhibit E which relates to the period immediately preceding his death shows that he left only Rs. 84 and odd at the time of his death. This sum has been proved to have been spent for his funeral expenses. We see no reason to disagree with the conclusion of the Subordinate Judge that it has not been established that there was any nucleus of the property of Ramadoss in the hands of Janakiramayya. It has not been shown that any *inams* were in the possession of Ramadoss and that they descended to his sons. Exhibit N has not been proved. The property mentioned in Exhibit D has not been shown to be ancestral property. There is no evidence that the *inam* mentioned in Exhibit C ever was in the possession of Ramadoss.

As regards the theory of joint acquisition, *prima facie* the facts that the two brothers were lending their savings in their individual names, transacted separate business and kept separate accounts are against it. There is no reliable evidence that Sitaramayya remitted his earnings to his father or brother. On the death of Sitaramayya the properties left by him and the debts which he had advanced were all collected by one Gopalakrishnayya on behalf of the widow. No portion of these was mixed up with the earnings of Janakiramayya. On the other hand we have full and exhaustive accounts kept by Janakiramayya (Exhibit III series) after the death of his father in 1870, which show with what small beginnings he began life and how they were augmented month after month. The totals in Exhibit III series approximate to the properties now claimed in the suit. These accounts prove beyond doubt that the properties in dispute were the self-acquisition of Janakiramayya.

Mr. Prakasam laid stress on the fact that Ramadoss applied for a succession certificate to the estate of his son, Sitaramayya. There is nothing to show that the certificate was granted or that any moneys were collected by him; *non constat* that any money, if collected, reached Janakiramayya and was mixed up by him with his own money. Subsequent to the death of Sitaramayya and Ramadoss, Janakiramayya brought up his brother's son and grandsons, educated them and got them married. They were apparently living with their mother in Janakiramayya's house. From these facts Mr. Prakasam argues that they constituted members of a joint Hindu family with the deceased and that the burden was upon the defendant to prove that the properties were not ancestral. We are unable to uphold this contention. As the Subordinate Judge has pointed out, Janakiramayya appears to have done just as much for the descendants of his brother who have never made any claim to share in his property. Further, all these relations including the plaintiff and his father appear to have been treated by Janakiramayya rather as dependents than as co-sharers. A joint family pre-supposes the possession of common property. Under the Hindu Law mere living

together of the members of the family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilized for the purpose of making the subsequent acquisition, or the members must have thrown their joint earnings into hotchpot with the intention of giving up their individual rights in them. Mr. Justice Chamier examines all the previous rulings upon the subject in *Ram Kishen Das* v. *Tanda Mal* (3) and says that "there is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property." In another place the learned Judge says that it is only when there is "ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate." We entirely agree with these propositions. In *Dhurm Das Pandey* v. *Musammat Shama Soondri Debiah* (4) Lord Campbell states distinctly at page 240: "It was allowed that this was a family who lived in commensality, eating together and possessing joint property." The Judicial Committee laid down that under these circumstances the mere fact that purchases were made in the names of individual members of the family was not evidence of separate ownership. *Vedavalli* v. *Narayana* (5) proceeds on the same principle.

We have found that there was no nucleus of ancestral property proceeding from Ramadoss and that his two sons did not throw their earnings into a common stock. On these findings the decisions quoted by Mr. Prakasam have no application. We agree with the Subordinate Judge in his conclusion and dismiss the appeal with costs.

Appeal dismissed.

(3) 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 723.
(4) 3 M. I. A. 229; 6 W. R. (P. C.) 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 Eng. Rep. 484.
(5) 2 M. 19; 2 Ind. Jur. 709.

MADRAS HIGH COURT.
CIVIL APPEAL No. 189 OF 1909.
August 10, 1914.
Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Kumarasawmy Sastri.

ADAIKULAM CHETTI—PLAINTIFF—APPELLANT

versus

SUBBAN CHETTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Managing member living separately—Mortgage in his sole name—Loan advanced out of family funds—Suit on mortgage—Non-joinder of other members, whether bars suit—Assignment—Consideration.

Where a person purporting to act for his sole benefit uses funds in which his brothers have a share for obtaining a bond, the fact that he may be accountable to his brothers affords no ground for dismissing the suit on the mortgage for non-joinder. The fact that there are disputes between the plaintiff and those interested in the profit of the transaction, would be no ground for holding that he has lost the sole right of suit.

Sachitanada Mohapatra v. *Baloram Gorain*, 24 C. 644; *Kishen Parshad* v. *Har Narain Singh*, 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 C. L. J. 345; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.); *Adaikkalam Chetti* v. *Marimuthu*, 22 M. 326; 9 M. L. J. 31; *Bungsee Singh* v. *Soodist Lall*, 7 C. 739; 10 C. L. R. 263 and *Gopal Dass* v. *Badri Nath*, 27 A. 361; 2 A. L. J. 3, followed.

Sheikh Ibrahim Tharagan v. *Rama Aiyar*, 10 Ind. Cas. 874; 35 M. 685; 21 M. L. J. 508; (1911) 2 M. W. N. 442, distinguished.

Where there has been an assignment of mortgage, the mere non-payment of consideration to the assignor will not afford the mortgagor a good defence.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Original Suit No. 49 of 1906.

Mr. *T. Narasimha Aiyangar*, for the Appellant.

Messrs. *T. Rangachariar*, *L. S. Veeraraghava Aiyar*, for Mr. *L. A. Govindaraghava Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, OFFG. C. J.—I have had the advantage of reading the judgment of my learned brother and shall only deal with the right of the plaintiff, a member of a joint family, to maintain a suit to recover money belonging to the joint family advanced by him on mortgage to the defendants without joining the other members of his family interested in the money.

ADAIKULAM CHETTI *v.* SUBBAN CHETTI.

According to the view we take of the facts and for reasons given in the judgment of my learned brother, we hold that the money was advanced to the mortgagor without disclosing that it belonged to the joint family, and at a time when the plaintiff was not the managing member of the family. It was held in *Adaikkalam Chetti* v. *Marimuthu* (1) and other cases that in the cases of joint family where the contract was in the name of the plaintiff, he was entitled as the agent of an undisclosed principal to sue on it himself without joining the other members of the family. This decision, it is true, was not approved of in *Seshan Pattar* v. *Veera Raghava Pattar* (2) but appears to me to be supported by the recent ruling of the Privy Council in *Kishen Parshad* v. *Har Narain Singh* (3) where the fact that the contract was properly entered into by the plaintiff, was, it seems to me, treated as one of the grounds entitling him to sue. I do not find anything inconsistent with the proposition in the judgment of Benson and Sundara Aiyar, JJ., in *Sheikh Ibrahim Tharagan* v. *Rama Aiyar* (4). The bond in that case had not been taken in the name of the managing member who brought the suit, but in the name of another member who was joined as the 16th defendant. Certain payments to 16th defendant were held bad on the ground that they were fraudulent, but there is no suggestion that in the absence of fraud he could not have sued himself. He had not done so, and the managing member sued as such making him a defendant. The second question in the appeal was whether the managing member could maintain the suit without joining all the members of the joint family in addition to the member who had taken the bond. It was held that he could, and the learned Judges referred to the decision of the Privy Council in *Kishen Parshad* v. *Har Narain Singh* (3) in support of their view that in such a suit the managing member was entitled to represent the family. The observation at the bottom of page 690, as I read it, means no more than that their Lordships did not rest their decision solely on the ground that the contract sued on was in the name of the managing member. In any case this point was not before the learned Judges for decision. I agree that the appeal must be allowed with costs and on the other terms in the order of my learned brother.

KUMARASAWMY SASTRI, J.—The plaintiff, who is the appellant, sues to recover Rs. 13,000 alleged to be due on a mortgage in his favour, dated 13th August 1895, and Rs. 4,000 due to him and second defendant on a subsequent mortgage, dated 21st June 1888, executed by the first defendant in favour of the second defendant and two others and in respect of which the plaintiff got assigned to him two of the shares of the other two persons.

The case for the plaintiff was that he and the second defendant were divided and that the money claimed belonged to him. Various defences were raised by the defendants, but, for the purpose of this appeal, it is only necessary to consider a few of them. One defence was that the moneys claimed were not due to the plaintiff alone, but to the plaintiff and his brothers who were members of an undivided family and that the plaintiff was not entitled to maintain the suit without joining all those who were interested in the mortgage-money. Another defence was that the plaintiff was not entitled to sue for his money by a sale of the properties as the mortgage was a usufructuary mortgage. It was also pleaded that the suit was barred by limitation. The Subordinate Judge held that, though the mortgage for Rs. 13,000 was obtained by the plaintiff in his name, it was obtained by him as a member of an undivided family and that the loan was advanced out of family funds.

As regards the claim for Rs. 4,000 he held that it was not proved that Rangam Chetti, one of the plaintiff's assignors, received consideration for the transfer and that consequently the transfer, Exhibit B, was not valid. He held that the suit was not barred by limitation, as the bond contained a covenant to pay and was not a purely usufructuary mortgage. He dismissed the suit on the ground of non-joinder of the other persons interested in the mortgage-money.

As regards the finding of the Subordinate Judge on the first issue I am of opinion that the plaintiff has not proved that the

(1) 22 M. 326; 9 M. L. J. 31.

(2) 4 Ind. Cas. 38; 32 M. 284; 5 M. L. T. 351; 19 M. L. J. 372.

(3) 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J 378; 13 C. L. J. 345; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.).

(4) 10 Ind. Cas. 874; 35 M. 685; 21 M. L. J. 508; (1911) 2 M. W. N. 412.

mortgage-money was his separate or self-acquired property. It is not denied that the plaintiff and his brothers were at one time joint members of a family owning extensive properties. The plaintiff has not proved that on the date of Exhibit A there was a partition between himself and his brothers and it is not shown how he acquired Rs. 13,000. The second defendant, no doubt, admits that, on the date of Exhibit A, the plaintiff was living separately, but mere separate living will not entitle the plaintiff to use properties, which were joint properties and which were not divided, so as to give him an absolute title to the mortgage-money lent by him out of such funds. The question, however, is whether the mere fact that others are entitled to an account of the mortgage-money and to a share therein would make them necessary parties to the suit. It appears from the document, Exhibit A, that it was taken in the sole name of the plaintiff without reference to any other person and the appellant's Vakil argued that it was open to the plaintiff to sue in his own name, (1) because the contract was between himself and the first defendant without disclosing the fact that the plaintiff was acting for anybody else or using the funds of third parties and consequently he should be deemed to be in the position of an agent contracting for an undisclosed principal and (2) because the plaintiff, who on the finding of the Subordinate Judge must be taken to be the managing member of the family, can maintain the suit on the mortgage which was taken in his own name without joining the other members of the family who may be interested in the mortgage-money.

As regards the first point, the evidence on record shows that, though there was no actual partition by metes and bounds, the plaintiff was living separately from his brothers for several years. The separate living is spoken to by the plaintiff and his witnesses and the second defendant in his evidence admits that at the time of the execution of Exhibit A (deed of mortgage for Rs. 13,000) the plaintiff was not living in the family but taking his meals separately. It also appears from the evidence that there was an ineffectual attempt to effect a partition by metes and bounds. The position, therefore, was that the plaintiff at the date of the mortgage, Exhibit A, was living separately and that he took the mortgage in his own name with funds in which his brothers were interested and had a share. The evidence of the plaintiff and his brothers leaves no room for supposing that, when he lent the money, the plaintiff was acting as the managing member of an undivided family or was representing any interests but his own. Where a person purporting to act for his sole benefit, uses funds in which his brothers have a share, the fact that he may be accountable to his brothers affords no ground for dismissing the suit on the mortgage for non-joinder. It is not the case of a member of an undivided family suing in respect of a mortgage taken by the members of a family, and the mere fact that the plaintiff used family funds to obtain the benefit for himself will not entitle the mortgagor to question the plaintiff's rights to enforce the contract between the parties. The position of the plaintiff in such a case could not be worse than that of a *benamidar* and it has been held in *Sachitananda Mohapatra* v. *Baloram Gorain* (5) that a *benamidar* can sue to recover his dues on a mortgage taken in his name.

In *Adaikkalam Chetti* v. *Marimuthu* (1) it was held that the mortgagee can sue to recover the mortgage-money due on a bond taken in his sole name without joining the other members of the family, even though he might be a member of an undivided Hindu family. The ground of the decision was that the contract on which the suit was based was in his sole name and did not purport to have been obtained by him on behalf of any others but himself. The recent decision of the Privy Council in *Kishen Parshad Singh* v. *Har Narain Singh* (3) supports the view taken in the above case. It is argued that though living separately plaintiff, who was dealing with family moneys, must be treated as the agent for the other members of the undivided family and that in such cases the contract is really with all the members of the family. Even if plaintiff was the agent, I am of opinion that he can sue alone as he did not disclose that he was acting for the other members of the family. In *Bungsee Singh* v. *Soodist Lall* (6) the right of the mortgagee to sue on the mortgage was upheld on the ground

(5) 24 C. 644.
(6) 7 C. 739; 10 C. L. R. 263.

that the plaintiff should be regarded as contracting not only on behalf of himself but on behalf of undisclosed principals, *i.e.*, the other members of the family. As this case was cited with approval in *Adaikkalam Chetti* v. *Marimuthu* (1) it must be taken that their Lordships approved of the principle on which the decision was based. A similar view was taken in *Gopal Das* v. *Badri Nath* (7). Having regard to the fact that the plaintiff while living separately was using family funds to obtain a mortgage in his own name, it is hardly likely that he would have disclosed to the mortgagor the fact that he was using family funds or was acting on behalf of anybody except himself. The first defendant, who is the mortgagor, does not state that at the time of the mortgage the plaintiff disclosed the name of any other person as having an interest. He admits that the mortgage-deed was executed in plaintiff's name and simply states that the second defendant, Rangam Chetti, and Vydialingam Chetti, referred to in the plaint, are undivided. It is not pleaded and there is no evidence on record to show that the plaintiff did at the time of making the contract disclose that he was contracting not only on behalf of himself but also on behalf of the other members of the family. In *Bungsee Singh* v. *Soodist Lall* (6) and *Gopal Das* v. *Badri Nath* (7) it was held that the onus of proving the plea is on the defendant. I am, therefore, of opinion that the plaintiff is entitled to sue on a mortgage obtained by him in his sole name while he was living separately from his brothers and that the mere fact that his brothers had an interest in the funds, would afford no defence to the mortgagor in a suit filed on the mortgage. Even assuming that the plaintiff was on the date of the mortgage in the position of the managing member of an undivided family, the decision of the Privy Council in *Kishen Parshad* v. *Har Narain Singh* (3) is a clear authority for holding that the managing member of an undivided family can sue on a contract entered into by him in his own name without joining the other members of the family. The ground upon which their Lordships based their decision is that it was competent for the managing member to enforce at law contracts which he was entitled to make or discharge in his own name and that the defendant, while entitled to insist that all persons with whom he *expressly* contracted should be made parties, is not entitled to demand that persons who were merely interested in the profits of the transaction should be treated as parties necessary to its enforcement.

It is argued for the respondents that the right of the managing member to sue on contracts entered into by him in his own name ceases as soon as disputes arise in the family or if any member begins to live separately. I am unable to find any authority for this broad proposition. The only ground on which it can be supported is that the sole right to sue is based on the right of the managing member to represent the family in all transactions affecting the family and that such right ceases on the other members of the family revoking the authority of the managing member to bind them. There are, no doubt, observations in *Sheikh Ibrahim Tharagan* v. *Rama Aiyar* (4) to the effect that the right of the managing member to sue on a contract entered into with him without joining the other members is based on the theory that he completely represents the family in all transactions with other parties, but their Lordships of the Privy Council rested their decision on broader grounds. Their observations at pages 276 and 277 make this clear. If the right of the plaintiff to sue without joining the other members of the family rests on the general principle of law that the person in whose name the contract is made can enforce it without joining persons simply interested in it, the fact that there are disputes between the plaintiff and those interested would be no ground for holding that he has lost the sole right of suit. It would, of course, be open to those who have an interest in the mortgage-money to apply to be made parties to the suit, and even if they do not do so, the Court has the power to safeguard their interests. There

(7) 27 A. 361; 2 A. L. J. 3.

is no reason why the mortgagor, whose contract was with one member of the family, should take advantage of the disputes between the members and withhold a payment which, under his contract, he was legally bound to make to the person with whom he mortgaged the property. I am of opinion that the Subordinate Judge was wrong in dismissing the suit on the mortgage Exhibit A on the ground of non-joinder.

As regards the claim for Rs. 4,000, it is difficult to see how the decision of the Subordinate Judge can be supported. The mortgage was in the name of the second defendant and two of his brothers, Rangam Chetti and Vydialingam Chetti. Exhibits B and B1 are transfers by Rangam Chetti and Vydialingam Chetti to the plaintiff of their interests in the mortgage. These documents which were duly executed on the 6th January 1906 and 28th December 1905, were registered. The evidence that the consideration for Rangam Chetti's assignment was not paid is very meagre. Even assuming that consideration was not paid, it would not invalidate the transfer, as mere non-payment of consideration would be no ground for holding that property did not pass. The question as to consideration is one between the transferor and the transferee and it is difficult to see how the mortgagor can take advantage of the non-payment of consideration for the assignment.

The appellant's Vakil states that the appellant is willing to give such security as the Court may direct to safeguard the interests of the second defendant and the other members of the family who might be interested in the mortgage-money. I am of opinion that their interests will be sufficiently safeguarded by requiring the appellant to give security to the satisfaction of the Subordinate Judge before he executes the decree.

I would, therefore, reverse the decree of the Subordinate Judge and pass a decree for the plaintiff as prayed with costs in this and in the lower Court. There will be the usual mortgage-decree. Time for redemption six months.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 83 OF 1912.

June 24, 1914.

Present: —Mr. Justice Ormond and Mr. Justice Twomey.

MAUNG PU AND OTHERS—APPELLANTS

versus

LUCY MOSS AND ANOTHER—RESPONDENTS.

Gift by old lady to her children—Undue influence—Presumption of domination or confidential relationship.

Under English Law there is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law, even if made during the donor's illness and a few days before his death.

Beanland v. *Bradley*, 2 Sm. & G. 339; 65 Eng. Rep. 427; quoted in Lord Halsbury's Laws of England, Volume XV, at page 108, referred to.

The Indian Law in this respect would be the same. Otherwise no gift by an old father to his son would be valid unless the son could show that the confidential relationship, *i.e.*, the intimate relationship of father and son, had ceased.

Morley v. *Loughnan*, (1893) 1 Ch. D. 736; 3 R. 592; 68 L. T. 619; 62 L. J. Ch. 515, referred to.

Ismail Mussajee Mookerdam v. *Hafiz Boo*, 10 C. W. N. 570; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 3 A. L. J. 353; 33 C 773 (P. C.), followed.

Mr. *Lentaigne*, for the Appellants.

Mr. *N. M. Cowasjee*, with him Mr. *Dantra*, for the Respondents.

JUDGMENT.

ORMOND, J.—This was a suit originally instituted by Ma Hmwe Gaing, the widow of John Nepean deceased, against Maung Pu (her son-in-law), Mi Mi (her adopted daughter), (Maung Pu's wife), Ma Kin Min (another adopted daughter) and Maung Shu Maung (the minor son of Mi Mi and Maung Pu), to set aside a deed of gift, dated the 5th March 1909, on the ground that it was obtained by the undue influence of Maung Pu. Ma Hmwe Gaing died during the pendency of this suit and her daughter and son, Lucy Moss and Charles Nepean, were substituted as the plaintiffs. Mi Mi, wife of Maung Pu, also died and her representatives were substituted in her place. The plaintiffs obtained a decree on the original side of this Court and the defendants now appeal.

Ma Hmwe Gaing had a house at Shwegyin where she lived. She was an old lady of over 80 years of age. Her husband John Nepean, who died about 30 years ago, left a thousand acres of land and Rs. 10,000 to his wife and to each of his three children,

MAUNG PU v. LUCY MOSS.

Lucy Moss, Charles Nepean and George Nepean, since deceased. Maung Pu is an Advocate of this Court. After marrying Mi Mi he was sent to England and was called to the Bar and his expenses were partly defrayed by his mother-in-law, Ma Hmwe Gaing. Shortly after he had returned to this country, Ma Hmwe Gaing in July 1908 made a gift of her 1,000 acres in five equal shares to her two adopted daughters, Mi Mi and Ma Kin Min, and her three natural grandchildren and she appointed Maung Pu as the manager and trustee at a remuneration of 20 per cent. of the profits. In August 1908, Ma Hmwe Gaing gave Rs. 37,000 to Maung Pu to invest for her. At that time Maung Pu was living in Rangoon, Ma Hmwe Gaing was living at Shwegyin and Mrs. Lucy Moss was also living at Shwegyin next door to her mother's. Early in October 1908 Ma Hmwe Gaing wanted the money back and it is clear from the evidence that she wanted it back because her daughter, Mrs. Lucy Moss, had given her to understand that Maung Pu was making a wrong use of the money. Maung Pu and his wife came over to Shwegyin and Ma Hmwe Gaing then wanted to go and stay with Maung Pu at Rangoon. Mrs. Lucy Moss did her best to persuade her mother not to go. In order to prevent her going, Mrs. Lucy Moss on Saturday the 17th October took away her mother's jewelry box and returned it on the 20th October, Tuesday. On that night the old lady, Ma Hmwe Gaing, and her adopted daughter, Ma Kin Min, went with Maung Pu and Mi Mi to Rangoon and stayed with them there until July 1909. On the next day (21st October) Charles Nepean filed a civil suit against his mother and the beneficiaries to set aside the deed of settlement of July 1908 and on the same day Charles Nepean and his sister, Mrs. Lucy Moss, filed a complaint (purporting to act on behalf of their old mother) against Maung Pu and Mi Mi of a criminal misappropriation of the money entrusted to Maung Pu for investment. Rupees 16,000 of the money had been placed on deposit by Maung Pu and the deposit receipt given to his mother-in-law. Mrs. Lucy Moss obtained possession of this receipt and refused to give it back to her mother. On the 5th January 1909 an agreement for the purchase of a house at a price of Rs. 35,000 was made in the name of Mi Mi and Rs. 5,000 was paid to the vendor. On the 15th January 1909 Rs. 15,000 was paid and on the 15th February 1909, the balance of Rs. 15,000 was paid and possession given. On the 5th March 1909 Ma Hmwe Gaing executed a deed of gift of certain jewelry to her two adopted daughters and Rs. 36,000 in three equal shares to her two adopted daughters, Mi Mi and Ma Kin Min, and Maung Shu Maung, the minor son of Maung Pu and Mi Mi. That document was prepared by Mr. Rahman, an Advocate of this Court, who had received instructions from Ma Hmwe Gaing two months previously. That is the document which is sought to be set aside. On the 11th February 1909 the deposit receipt having been recovered by Ma Hmwe Gaing, Rs. 16,000 was transferred from deposit to current account in the name of Maung Pu. The moneys paid for the house were the moneys belonging to Ma Hmwe Gaing and formed part of the original Rs. 37,000, and it is clear that that was the money which Ma Hmwe Gaing intended to make a gift. In July 1909 Ma Hmwe Gaing became very ill and Maung Pu telegraphed to Mrs. Lucy Moss to come to Rangoon. She came and found her mother very ill and shortly after she took her back to Shwegyin. On the 23rd November 1908 the old lady filed a written statement in Charles Neapen's suit (to set aside the settlement of July 1908), in which she supported the settlement, but on the 29th July 1909 after she had returned to Shwegyin after her illness, she filed a second written statement in which she confessed judgment and consented to a decree for the relief prayed for. On the 5th January 1909, the day when the agreement for the purchase of the house was made, Colonel Davis was called in and he certified that the old lady was of sound mind and capable. On the 5th March 1909 when the deed of gift was executed, Major Rost was called in and he certified to the same effect. Charles Nepean having alleged in his plaint (in October 1908) in the suit to set aside the settlement of July 1908 that Ma Hmwe Gaing was 82 years old and her mental capacity had been affected by old age and that she was under the influence of Mi Mi and Maung Pu, it was only prudent on the occasion of this second gift to have reliable medical evidence

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to show that the old lady's mental capacity was not impaired. The learned Judge held that the deed could not be set aside on the ground of unsoundness of mind in the old lady, but he found that she was of weak intellect and infirm and liable to be influenced and that she did not have full capacity of knowledge as to what she was doing, that the gift was produced by influence brought to bear upon her and further that the relationship which existed between her and Maung Pu and his wife was such as would bring the case within the purview of the rule of equity as to confidential relationship and that, therefore, even assuming that the gift was properly made, it was the effect of influence induced by those relations and that the burden, therefore, lay on Maung Pu to show that she had independent advice or that she adopted the transaction after the influence was removed.

The learned Judge, in finding that at the time of the gift the old lady was of weak intellect, infirm and liable to be influenced and that she did not have full capacity of knowledge as to what she was doing, relied upon the evidence of Colonel Davis. Colonel Davis at the hearing, though called as a witness for the plaintiff, emphasises the fact that the old lady was fairly clear and understood clearly enough what she was doing. In my opinion there is nothing in the evidence to warrant the finding that the old lady was of weak intellect. Colonel Davis says that she might have been influenced. He came to that conclusion owing to the want of decision that she displayed. She appeared to him to be vacillating and undecided, because she would mix up the buying of the house with giving money to buy the house. He goes on to say: "I think she knew she was giving a large sum of money for buying a house and was quite willing to do so. But at the same time I think she might have been influenced; her willingness may possibly have been due to influence brought to bear upon her." At that time there was only a contract to buy the house and the old lady may well have considered the house was really her gift. But there is nothing in Colonel Davis' evidence to show that the old lady was at any time vacillating or undecided about making the gift: whether the gift took the form of the house or of the purchase-money for the house. His surmise that she might possibly have been influenced is a pure hypothesis which has nothing to support it. There is nothing in the evidence to show that the gift was induced by influence exerted by Maung Pu.

The learned Judge has found that there was a confidential relationship existing between the old lady and Maung Pu and his wife which vitiated the gift, unless Maung Pu could show that the gift was made without any influence having been exerted by him. The learned Judge has, I think, overlooked the fact that under English Law there is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law even if made during the donor's illness and a few days before his death [*Beanland* v. *Bradley* (1) quoted in Lord Halsbury's Laws of England, Vol. XV, at page 108]. The Indian Law in this respect would be the same. Otherwise no gift by an old father to his son would be valid unless the son could show that the confidential relationship, *i.e.*, the intimate relationship of father and son, had ceased.

The learned Judge has relied to a great extent upon the English decision of *Morley* v. *Loughnan* (2). That was a very strong case in which the donee was to all intents and purposes in the position of both medical and spiritual adviser to the donor. Mr. Cowasjee, for the respondents, has urged before us that the confidential relationship of lawyer and client existed and that Maung Pu was the old lady's legal adviser. This suggestion was first made in appeal; no mention of it is to be found in the plaint or in the issues. Maung Pu, no doubt, consulted lawyers on behalf of the old lady and he may have given her legal advice; but I think he clearly did so as a son-in-law and not as a professional lawyer. It is clear that Mrs. Lucy Moss tried to exert her influence over the old lady to prevent her from benefiting her adopted children. There is nothing to show that Maung Pu exerted any counter-influence; but assuming that he did, there was no undue influence. The remarks of their Lordships of the Privy Council in the

(1) (1854) 2 Sm. & G. 339; 65 Eng. Rep. 427.
(2) (1893) 1 Ch. D. 736; 3 R. 592; 68 L. T. 619; 62 L. J. Ch. 515.

case of *Ismail Mussajee Mookerdam* v. *Hafiz Boo* (3) are apposite. The transaction was very natural and reasonable under the circumstances existing at the time. The natural family had been provided for. The old lady must have been deeply irritated by the conduct of Mrs. Lucy Moss and Charles Nepean in seizing her jewels and in filing the criminal and civil proceedings in October 1908 and she had never wished to benefit them. She was old and in case of her death they would have inherited equally with the adopted children. As in the case cited above, there is no evidence establishing any general case of domination on the part of Maung Pu and his wife and of subjection on the part of the donor. Even if a presumption is to be raised against Maung Pu in this case with reference to the interest taken by Maung Pu's wife and child under the gift, no such presumption could be raised in connection with the interest taken by Ma Kin Min who had lived all along with her adoptive mother. The gift to her could only be set aside if it were established by evidence that the gift had in fact been induced by undue influence; and there is no such evidence. In my opinion the plaintiffs have failed to make out their case, and no *onus* rested on Maung Pu to disprove influence. I would allow the appeal with costs in both Courts, ten gold *mohurs* a day as Advocate's fee for every day's effective hearing after the first in both Courts.

TWOMEY, J.—I concur.

Appeal allowed.

(3) 33 C. 773(P.C.); 10 C. W. N. 570; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 3 A. L. J. 353.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 428 OF 1912.

April 15, 1914.

Present:—Mr. Justice Tudball and Mr. Justice Chamier.

BISHESHAR PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GOBINDRAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Introducing cause of action barred by limitation, whether permissible.

A plaintiff cannot be allowed to amend his plaint by introducing a cause of action which since the institution of the suit has become barred by limitation.

First appeal from a decree of the Officiating Additional Subordinate Judge of Allahabad.

Dr. *Satish Chandra Banerji* (with him Mr. *Durga Charan Banerji*), for the Appelants.

Mr. *A. P. Dube* (with him Mr. *Damodar Das*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellants upon a *hundi* drawn in their favour by the respondents on March 2nd, 1909, made payable 54 days after date, *i. e.*, on April 25th. The *hundi* was dishonoured on or about March 7th (the exact date is not known). The suit was instituted on April 9th, 1912, and was clearly barred by limitation, as was held by the Court below. The only question for decision in this appeal is whether the Court below was right in refusing to allow the appellants to amend their plaint so as to rest their claim upon a letter, dated March 11th, 1909, said to have been written to them by respondents containing a promise to pay the amount of the *hundi* on or about April 23rd. It appears that the appellants endorsed the *hundi* to the Allahabad Bank by whom it was presented for acceptance. When the appellants were informed by the Bank that the *hundi* had been dishonoured, they gave the Bank a *jakri hundi* on another firm in Bombay from whom the Bank in due course received payment. Meanwhile the appellants had informed the respondents that the original *hundi* had been dishonoured and the respondents are said to have written to them the letter of March 11th, 1909, on which they now wish to rest their case. In this letter the respondents said that the dishonour of the *hundi* was due to a mistake and they hoped to arrange to have it accepted. They said also that if the *jakri hundi* was accepted, they would arrange to pay the amount two or three days before it fell due. After the question of limitation had been argued and the case of limitation had been reserved for judgment, the appellants put in a petition saying that they had been unable to find the letter of March 11th, 1909, when they brought the suit but

that they had recently come across it and they asked for leave to amend the plaint by setting out the contents of the letter and alleging that a cause of action accrued to them on April 23rd. The Subordinate Judge rejected this petition. It was urged before us that under Order VI, rule 17, a Court has power to allow an amendment of this kind at any stage of the proceedings and that the Subordinate Judge ought to have allowed it.

It may be that the Court has power under the present Code to allow an amendment of this kind which would introduce a fresh cause of action and alter the whole basis of the suit. Amendments have been allowed under the existing Code of Civil Procedure which could not have been allowed under the former Code and we have been referred to cases upon the corresponding provisions in force in England in which far-reaching amendments were allowed (Order XXVIII, rule 1, Rules of Supreme Court, 1883) but neither in England nor in India will the Courts as a rule allow a plaintiff to amend his plaint by introducing a cause of action which since the institution of the suit has become barred by limitation. That is the case here. It must also be noticed that this suit was not instituted till more than three years after the transaction, and that the application for leave to amend was made at a very late stage of the suit after the parties had definitely agreed not to put in any evidence on the question of limitation. The affidavit in support of the application for leave to amend is vague and we doubt whether the appellants made any search for the letter before instituting the suit. In the circumstances we are not prepared to hold that the Court below was wrong in refusing to allow the plaint to be amended. The appeal is dismissed with costs, but the decree will not be prepared until the respondents make good the deficiency of Rs. 355 in Court-fees in the Court below.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 119 OF 1910.

January 26, 1914.

Present:—Mr. Justice Miller and Mr. Justice Tyabji.

GADIAN CHETTIAR—PLAINTIFF—APPELLANT

versus

GADIAN CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law - Partition—One member separating from others—Presumption—Evidence—Re-union, separation.

Where one co-parcener separates from the rest, there is no presumption that the latter remain united.

Balabux v. *Rukhmabai*, 30 C. 725 (P. C.); 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469, followed.

Where subsequent to the separation of one member, the other members take separate meals, acquire property in their own names, separately pay *kists*, etc., all these things point to a separation in interest between the members of the family and outweigh the effect of any recital of non-division made in stray documents.

Appeal against the decree and judgment of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 55 of 1907.

FACTS.—Plaintiff sued for partition and delivery of his share of family properties, on the ground that plaintiff's father, Sundaram, and 1st defendant's father, Vythilinga, were undivided brothers. Defendant No. 2 was the undivided son of the 1st defendant. The said Vythilinga had another son named Subramania, who had a son named Vythilinga, both of whom had died before suit. Defendants Nos. 5, 7, 9, and 10 were the plaintiff's sons. Defendants Nos. 6 and 8 were the sons of the 5th and 7th defendants respectively. Plaintiff's father had predeceased 1st defendant's father. After the death of Vythilinga, his son Subramania and the 1st defendant were managing the family affairs.

Defendants Nos. 1 and 2 pleaded division when Subban, the brother of the plaintiff's father and of the 1st defendant's father separated and left the family a long time ago. They also contended that plaintiff should have sued for the share which belonged to his branch of the family and that the present suit confined only to his share was not sustainable.

They further pleaded that plaintiff's suit was barred by limitation, he having been excluded from participation in profits from suit lands to his knowledge for over twelve years preceding the suit. They, how-

ever, admitted that items 1 to 97 of the plaint Schedule were ancestral properties and alleged that they were not divided by metes and bounds but enjoyed according to shares.

The lower Court found that the plaintiff's suit was maintainable, but that the family had become divided at the time Subban separated and left the family and that the plaintiff's suit was also barred by limitation, inasmuch as he was excluded to his knowledge from participation in profits for more than twelve years preceding the suit, and finally dismissed the plaintiff's suit.

Mr. *V. C. Seshachariar*, for the Appellant :—The contesting defendants who alleged division had not proved it. There was no document to evidence, nor was any date assigned to, it. Though the members lived separately, they had joint money dealings. There were documents which contained recitals as to the family being in a state of non-division. The ordinary presumption was that a Hindu family was joint in estate, food and worship and that the burden of proof as to division lay heavily on the contesting defendants, and they had not discharged the same. Enjoyment of different items of properties by different members could only affect the mode of enjoyment and not the status of the parties. As to exclusion from participation in profits there was no clear finding that the plaintiff had been excluded, to his knowledge, from participation in the profits of all the items of suit properties for over twelve years preceding the suit. In any event the plaintiff was entitled to a partition of plaint items 1 to 97 which were admittedly ancestral.

Mr. *G. S. Ramachandra Iyer*, for the contesting Respondents :—When one member of an undivided Hindu family separated, there was a separation in interest among all the members. The members messed separately and lived in different places. The payments of *kist* were made in equal halves. The joint money dealings could not signify much as there were numerous separate money dealings. The recitals in documents as to a state of non-division were simply attempts on the part of the plaintiff to create evidence in his favour. The evidence taken as a whole warranted the finding of the lower Court that the plaintiff was excluded, to his knoweldge, from participation in the profits of the properties in dispute for over twelve years preceding the suit. And so far as items 1 to 97 of the plaint were concerned, plaintiff was not entitled to ask for their partition inasmuch as there were strangers, who were not parties to the suit, entitled to participate in the profits of at least some of those items.

JUDGMENT.

MILLER, J.—The first question to be decided is whether the plaintiff is a member of the joint family of which the 1st defendant and some of the other defendants are also members. The facts stand like this: admittedly a good many years ago—the date is not fixed —one of three brothers, Subban Chetty, Vythilingam Chetty and Sundaram Chetty, became divided from the family. Vythilingam was the father of the 1st defendant and one Subramaniam who is now dead, and Sundaram Chetty was the father of the plaintiff. According to the defendants the family became divided when Subban Chetty left it and lived separately, and according to the plaintiff Sundaram and Vythilingam remained members of a joint family. The ancestral lands of the family, items 1 to 97, were not divided by metes and bounds and there were after Subban Chetti's departure some joint dealings —money-lending transactions—in which the plaintiff and his uncle operated together. The Subordinate Judge found that there was a division on the date when Subban Chetty separated himself from the family and, on the whole, I think he is right. In paragraph 29 of his judgment, he states the law, it seems to me, a little too strongly where he says: "This separation must in law be deemed to have been complete as amongst the three brothers." But the effect of the case in the Privy Council, *Balabux* v. *Rukhmabai* (1), on which he relied, is to my mind, where one brother out of three has separated from the others, there must be something to indicate an agreement among the others to remain members of a joint family or some evidence of subsequent re-union : in other words there would be a presumption that the partition was complete, that is, it would no longer lie

(1) 30 C. 725 (P. C.); 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469.

on the party alleging separation to prove it affirmatively in the first instance. Here we have the fact that Subban Chetti went away; we have no details as to any agreement between the other brothers at that time and on the other hand we have some other circumstances which strongly suggest that after that time, the members of the family were separate. They were living separately in the same house, with separate preparation of meals. This is not adequately explained on the plaintiff's side. There is a still stronger circumstance: the separate payment of *kists* in equal halves on lands which at one time belonged to the joint family. There were also separate dealings during the life-time of the plaintiff's uncle Vythilingam. There were also separate acquisitions of property by the plaintiff and Vythilingam. All these things certainly point to a separation in interest between the members of the family.

We have besides that what is undoubtedly a strong circumstance. We do not find the management of the family income by one member of the family but the division of the produce into shares. That is only explained on behalf of the plaintiff as being a convenient mode of enjoyment but, undoubtedly, that mode of enjoyment gives rise to the inference that the parties were separate in interest.

I need not discuss all the documents in the case. There are some—and Exhibit S is one—in which there are recitals of non-division and Subramaniam Chetty seems to have subscribed to a recital of that sort. In others are found statements made by the plaintiff himself and the reason for making them may be that he was only seeking to establish a claim for the properties which were acquired by Vythilingam. It seems to me that the recitals in these documents are not strong enough to warrant the decision that the family remained undivided after the departure of Subban Chetti from it.

There are other documents which point distinctly the other way, for instance, Exhibits U and U1. These show that money was borrowed from the plaintiff himself to pay off the debt due to another member of the family, Subramaniam Chetty. I do not think it is necessary to refer to the other documents produced on both sides. We have considered them all as well as the oral evidence and on the whole I am unable to differ from the Subordinate Judge in his decision that the family is a divided family. The result of that is that the plaintiff is not entitled to a share as a co-parcener. But in respect of the 97 items of property admittedly ancestral, he is entitled to a partition as a tenant-in-common. The Subordinate Judge has refused decree on the ground that the plaintiff must bring a separate suit, and that decision has been to some extent supported on behalf of the respondents on the ground that there may be other parties interested in the division of those lands the *melvaram* of which formed the family property. I am unable to see any reason why the plaintiff should not in this suit be held entitled to have his partition. To my mind there is no difficulty in arriving at a correct preliminary decree for partition, even though there may be some persons who are not parties to the suit but who may be interested in another portion of the *melvaram*.

As regards the other items, some of them were purchased by the plaintiff and in these the defendants claim no relief, and the remainder, it is asserted, was purchased by Vythilingam and as regards those I am satisfied that the plaintiff's right to claim a share in them was denied by Vythilingam's sons, Subramaniam, and the 1st defendant more than twelve years before the suit. I agree with the Subordinate Judge on the evidence that the plaintiff must have been early in 1895, to his knowledge, denied a right to share in these lands and in the produce thereof and that he has not been in possession of any of them or received anything therefrom since that date. In these circumstances I do not see how to avoid the conclusion in respect of these items that the plaintiff's claim to a partition is barred by limitation.

The result will be that the decree of the Subordinate Judge will be modified by directing a partition of the plaintiff's 1/10th share in items 1 to 97 and confirmed as to the rest.

The decree which I propose to make is that a preliminary decree be passed for the partition of the plaintiff's 1/10th share in items 1 to 97 and that the suit as regards the other items be dismissed. The order of the Court below in respect of costs will stand and in this Court proportionate costs are to be paid and received as between the plaintiff and Mr. Ramachandra Aiyar's clients and the other defendants will bear their own costs.

MUTHIAH CHETTIAR v. BAWA SAHIB.

TYABJI, J.—I agree. I only wish to point out that in the Privy Council decision in *Balabux* v. *Rukhmabai* (1) the arguments seem to have been that the general presumption that property belonging to a Hindu family is joint unless the contrary is proved, continues to prevail even after it is shown that there has been a partition and as the result of the partition one of the co-parceners has taken away his share and severed his interest from the co-parcenary. See reports of arguments for the appellants in *Balabux* v. *Rukhmabai* (1). It was in respect of that contention apparently that their Lordships say at page 736: "It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united."

I have nothing to add to what my learned brother has said with reference to the rest of the case.

Decree modified.

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST APPELLATE ORDER NO. 80 OF 1913.

CIVIL REVISION PETITION NO. 793 OF 1913.

September 30, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

MUTHIAH CHETTIAR AND ANOTHER—COUNTER-PETITIONERS NOS. 1 AND 2—APPELLANTS

versus

BAWA SAHIB AND OTHERS—PETITIONER AND COUNTER-PETITIONERS NOS. 3 TO 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, r. 90, application under, made out of time—Inherent powers of Court, exercise of—Limitation (Act IX of 1908), Sch. I, Art. 181.

The inherent powers of a Court are not to be used for the benefit of a litigant who has his remedy under the Code of Civil Procedure, much less for one who, having his remedy, has lost it by his own delay.

Therefore, a Court cannot in the exercise of its inherent powers set aside an irregular sale held in execution of a decree when the application of the judgment-debtor under Order XXI, rule 90, is found to be barred by time.

Venkata v. *Sama*, 14 M. 227; *Tasadduk Rasul Khan* v. *Ahmad Husain*, 20 I. A. 176; 21 C. 66 (P.C.), followed.

Deridas Jagjivan v. *Pirjada Begum*, 8 B. 377 and *Dwarka Nath Misser* v. *Barinda Nath Misser*, 22 C. 425, referred to.

Syud Tuffuzzool Hossein Khan v. *Rughoonath Pershad*, 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 Eng. Rep. 701; *Gurdeo Singh* v. *Chandrikah Singh*, 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611 at p. 620; *Badaricharya* v. *Ramachandra*, 19 B. 113; *Ramchandra* v. *Draupadi*, 20 B. 288, *Reasut Hossein* v. *Hajee Abdoollah*, 3 I. A. 221; 2 C. 131; 26 W. R. 50 (P. C.), *Ram Kirpal* v. *Musammat Rup Koeri*, 11 I. A. 37; 6 A. 269 (P. C.); 4 Saraswati's P. C. J. 489; *Chandi Charan Laha* v. *Manoranjan Chattopadhya*, 18 Ind. Cas. 275; 17 C. L. J. 416, *Gokul Mandar* v. *Padmanand Singh*, 29 C. 707 at p. 715; 4 Bom. L. R. 793; 6 C. W. N. 825; 29 I. A. 189 (P. C.) and *Athikarath Nanu Menon* v. *Erathanikat Komu Nayar*, 21 M. 42, referred to.

Per *Tyabji, J.*—The expression "inherent power" implies that the power is not conferred by or affected by an act of the Legislature.

Appeal against the order of the District Court of Madura, in Civil Miscellaneous Appeal No. 8 of 1913, dated 26th April 1913, preferred against that of the District Munsif of Melur, in Execution Appeals Nos. 396 and 397 of 1912.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Madura, in Civil Miscellaneous Appeal No. 8 of 1913, preferred against the order of the Court of the District Munsif of Melur, in Execution Appeals Nos. 396 and 397 of 1912.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Mr. *A. Krishnaswamy Aiyar*, for Mr. *T. Natesa Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—This appeal and the revision petition relate to an order by the District Munsif which the District Judge has confirmed, setting aside a sale in the following circumstances:—The decree under execution directed the sale of items in a particular order and the sale proclamation followed it. They were, however, sold in a different order and the sale was confirmed. The judgment-debtor then moved the Court unsuccessfully under Order XXI, rule 89, of the Code of Civil Procedure. After an appeal against the order dismissing that petition had failed, he applied under Order XXI, rule 90, of the Code of Civil Procedure, obtaining an order excusing his delay in doing so. The District Munsif held that no case of interference under that rule had been established, but set aside the sale in the exercise of the inherent powers. The learned District Judge in the order under appeal held that the

delay could not be excused with reference to sections 5 and 14 of the Limitation Act, but that the exercise of the Court's inherent powers was not subject to the law of limitation and was justified by the circumstances of the case. He confirmed the District Munsif's order without deciding explicitly whether there was irregularity in the conduct of the sale or consequent loss, either with reference to rule 89 or generally.

The existence of the inherent powers of Courts is first recognised by Statute in the present Code, though it has frequently been the basis of decisions. It is necessary to scrutinise cases, in which it is relied on, closely in order that it may not, owing to that recognition or otherwise, lead to arbitrary disposals, actuated by individual sentiment or mere disinclination for the exertion involved in investigation of the law. It is necessary in order to such scrutiny here to ascertain what the necessity was for resort by the judgment-debtor, the petitioner before the District Munsif and the 1st respondent here, to the inherent powers of the Court; that is what remedies he had under the Code of Civil Procedure and what obstacle by way of limitation or otherwise there was to his taking them. The appellant's contention is shortly that he had his remedy under Order XXI, rule 90, or section 47 of the Code of Civil Procedure, but lost it through his delay, and that in such circumstances the use of the Court's inherent powers for his benefit is not justified.

Order XXI, rule 90, of the Code of Civil Procedure deals with the circumstances in which sales may be vitiated by irregularity in their conduct; and here, no doubt, the complaint was that the Court had no jurisdiction to sell as it did because the decree under execution authorized it to sell item 3 only after item 4, instead of, as it did, before it. There was, therefore, it is argued, not an irregularity to which rule 90 applied, but an illegality. Now it is doubtful whether this distinction is open to the 1st respondent who proceeded statedly under rule 90. Vide *Venkata* v. *Sama* (1) and *Tasadduk Rasul Khan* v. *Ahmad Husain* (2). But I pursu that argument no further, because if the proceedings are not under rule 90, they were certainly under section 47. In the former case it would have been necessary for the 1st respondent to prove substantial loss. But in both cases he would have been out of time.

It is not disputed that his petition was presented too late, if it was one under rule 90. If, however, it was under section 47 it is urged that Article 181, Schedule II, of the Limitation Act applied and he was in time, the special Article 166 covering only applications under rules 89 and 90. This restriction of Article 166 corresponds with nothing in its wording, which is absolutely general; and the attempt to impose it has been supported by reference to the fact that the Article was substituted for Articles 166 and 172 in the prior Act of 1877, which related only to applications under sections 310A and 311 of the Code then in force. It is stated that this is borne out by the statement of reasons and objects connected with the present Act. But it has not been shown how reference to such a statement is a legitimate or necessary aid to the interpretation of a provision, the language of which is clear. The 1st respondent's application, though it may have been made under section 47, was one to set aside a sale, and under Article 166 it must be held to have been out of time. It is not contended here that, if the application is subject to the Limitation Act, either section 5 or section 14 would have enabled the District Munsif to excuse the delay in its presentation.

The questions are then whether (1) the inherent powers of the Court can be invoked for an object which resort to its statutory powers could have secured, (2) whether such invocation is subject to any limitation. It may be stated at once that, as (1) must be answered in the negative, there is not, and is not likely to be any authority dealing with (2). It is only necessary to add that, though no doubt Article 18, Schedule II, of the Limitation Act, the general Article, is not exhaustive, vide *Devidas Jagajivan* v. *Pirjada Begum* (3) and *Dwarka Nath Misser* v. *Barinda Nath Misser* (4), the cases exempted from it form a well-defined class to which further

(1) 14 M. 227.
(2) 20 I. A. 176; 21 C. 66 (P. C).
(3) 8 B. 377.
(4) 22 C. 425.

reference will be made, those in which the inherent power exercised is ministerial or impliedly necessary in order to the performance of the Court's statutory duties.

As regards (1) reliance has been placed mainly on a very widely expressed *dictum* in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (5) and its adoption in *Gurdeo Singh* v. *Chandrikah Singh* (6): "To proceed, as far as the practice of this Court will allow him, to re-call and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor." By this general statement what did their Lordships of the Privy Council intend to decide? *Firstly*, it may be doubted whether their reference to the practice of the Court was not intended to safeguard the Court's duty to respect, not only the practice, but also the law. And next, though the application of the *dictum* is somewhat obscure, it is doubted whether it was meant to authorise the unconditional license for which 1st respondent argues. As appears from the statement of facts, there had been a sale alleged (without contradiction) to have become absolute, of property which no Court could sell. The Judge set the sale aside of his own motion, though he afterwards heard the purchaser. The observation quoted was made in appeal against the decision in the latter's suit to enforce his right under the sale; and it apparently meant no more than that he could not disregard the order of attachment and rely on the absolute character of the sale, since the discussion of the merits, which follows, could not have been necessary on any other interpretation. It did not mean that such an order of cancellation created or annihilated rights or was more than declaratory of the void nature of a transaction, which was void *ab initio*; and there was no question raised of the order having been passed, under any procedure similar to that under section 47, or of such procedure being available to the aggrieved person. In the other case referred to it was not suggested that there was any question of the statutory powers of the Court by the use of which the same result could have been reached, and it may (with all due respect) be doubted whether the reference to the Court's right to re-call an erroneous order was necessary or justified, since (for all that appears) the order of transfer to the file of the District Court, which was in question, was proper when it was passed and a re transfer appeared necessary only later. The case then, as the judgment also specifies, really fell under the other heading of the exercise of inherent power already referred to, that recognised as legitimate in cases not provided for by statute. Here again there was accordingly no question, as there is in the present case, of a form of procedure available, of which advantage has not been taken.

The distinction between the use of inherent powers proposed in the present case and that which is permitted in cases not contemplated by Statute may be illustrated by contrast between two sets of decisions, in both of which the cancellation of erroneous orders was in question. In the first, *Badaricharya* v. *Ramchandra* (7), *Ramsing* v. *Babu Kisansing* (8) and *Ramchandra* v. *Draupadi* (9), a Court constituted by special enactment, to whose procedure the Code of Civil Procedure did not apply, was in question and recourse was permitted to its inherent powers to justify a review and its setting aside of an order passed *ex parte*. But in the case of Courts subject to the Code of Civil Procedure, it has been held that they are bound by its provisions. In *Reasut Hossein* v. *Hajee Abdoollah* (10) the District Judge had re-called his erroneous order statedly on the ground that he could do so notwithstanding the absence of "any rule laid down for such a proceeding" in the Registration Act, under which his first order was passed. But the Privy Council holding that the Code of Civil Procedure applied, devoted its judgment to bringing a case within its provisions. In *Ram Kirpal* v. *Musammat Rup Kuari* (11) inherent powers were not mentioned; but it was held that the adjudication of a competent Court could not be set aside or disregarded by a Superior Court except in an

(5) 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J 434; 2 Sar. P. C. J. 656; 20 Eng. Rep. 701.

(6) 1 Ind. Cas. 913; 5 C. L. J. 611 at p. 620; 36 C. 193.

(7) 19 B. 113.

(8) 19 B. 116.

(9) 20 B. 281.

(10) 3 I. A. 221; 2 C. 131; 26 W. R. 50 (P. C.).

(11) 11 I. A. 37; 6 A. 269 (P. C.); 4 Saraswati's P. C. J. 189.

appeal properly preferred. And in *Chandi Charan Laha* v. *Manoranjan Chattopadhya* (12) the grant of a review on grounds other than those contemplated by Order XLVII, rule 1, and in the exercise of inherent powers was held to be unsound, the proper course being to leave the party to seek his remedy in appeal.

The principle to be deduced from the cases referred to and others is clear, that the inherent powers of the Court are not to be used for the benefit of a litigant who has his remedy under the Code of Civil Procedure, much less for one who having his remedy has lost it by his own delay. The result is that the decisions of both the lower Courts must be set aside, the appeal against appellate order being allowed with costs throughout. The case falling under section 47, the civil revision petition is unnecessary and is dismissed. There will be no order as to costs.

TYABJI, J.—It is admitted that the execution sale was not in accordance with the terms of the decree, inasmuch as the decree required that the third item of property should be sold after the 4th, but the 3rd was actually sold before the 4th.

It was not contended on behalf of the appellant that there was no remedy open to the respondent. It was suggested that a suit may be available to him, but that Order XXI, rules 89 and 90, provided for cases in which sales could be set aside, that section 47 of the Civil Procedure Code provided for the *forum* and the method by which those rights were to be enforced and that as the present case did not come within the terms of those provisions of a self-contained Code, the Court could not add to these provisions any more than to the rules relating to *res judicata*, *Gokul Mandar* v. *Padmanund Singh* (13). The answer to this argument seems to me to be that though the result in this case may have to be brought about by setting aside the sale (to which process section 47 and rules 89 and 90 apply), what is sought to be done is primarily to rectify a wrong procedure followed by the Court. The power to rectify their own mainfest errors of the kind here in question, it seems to me, Courts must always have. I am, therefore, of opinion that the Courts were right in considering the case to fall within their inherent jurisdiction, *Syed Taffazzool Hossein Khan* v. *Rughoonath Pershad* (5). I entirely agree, however, with my learned brother that the inherent jurisdiction of the Court is not to be used so as "to lead to arbitrary disposals actuated by individual sentiment or mere disinclination for the exertion involved in investigation of the law."

The next question is whether the application was barred by limitation. In my view the error was of a nature similar to that in the cases cited by me, and it was within the power and, subject to what I am about to say, it was the duty of the Court to set its procedure right when its error was brought to its notice. In my view, therefore, Article 166 of the Limitation Act does not directly apply.

But though the bar of limitation would not in my view be directly applicable, it seems to me that the Courts would not only be justified in considering the question in the light of the period of limitation allowed by the Legislature for applications resulting in a similar way, but that, for the reasons I am about to state, the Courts are bound to consider it in that light. *Cf. Athikarath Nanu Menon* v. *Erathanikat Komu Nayar* (14). Taking the facts of the present case it seems to me that though there was an error which the Court would have been justified in rectifying of its own motion, it was incumbent on it to consider whether the error having been committed it would be proper to exercise a discretionary jurisdiction arising from its inherent powers. The expression 'inherent power' implies that the power is not conferred by or affected by an act of the Legislature. Where the jurisdiction of the Court is expressly given by the Legislature, it is the legislative jurisdiction that arises and there is no room for speaking of the inherent jurisdiction. In deciding the question whether the Court will exercise its inherent powers, it may well proceed on the basis that if the party aggrieved by the error of procedure has acquiesced in the error and has not chosen

(12) 18 Ind. Cas. 275; 17 C. L. J. 416.

(13) 29 C. 707 at 715; 4 Bom. L. R. 793; 6 C. W. N. 25; 29 I. A. 189 (P. C.).

(14) 21 M. 42.

to apply to the Court with due diligence, his laches would not indeed deprive the Court of the inherent jurisdiction to set right its own error, but indicate that it might be a greater error to set about rectifying a long past error to the detriment perhaps of persons who have honestly proceeded on the basis that the action of the Court was right. Such conduct of the party alleging himself to be aggrieved would also point to the injury suffered by him having been slight. The Court may reasonably take as a guide for the standard of the diligence to be exercised by the parties concerned the provisions of the Indian Limitation Act and for its guidance as to circumstances which would justify interferences the provisions of law contained in regard to matters most nearly analogous to those brought in question by reason of the Court's inherent powers. This will prevent "arbitrary disposal" in the manner above referred to. In the present case by analogy it seems to me that the Courts would have been right in guiding themselves by the provisions of Article 166 of the Indian Limitation Act and Order XXI, rules 89 and 90, of the Civil Procedure Code.

Considering the question in this light I find that there were applications by the respondent under Order XXI, rules 89 and 90, both of which were dismissed; and in the course of the decision in the latter (which alone is printed for our use) it is stated that no case for relief under Order XXI, rule 90, was established, by which I understand that no substantial injury has been sustained by reason of the irregularity in the sale.

In such a case it seems to me to be clear that the Courts exercised that inherent jurisdiction wrongly, and their order setting aside the sale should be reversed. I agree, therefore, in the order proposed by my learned brother.

Appeal allowed;
Petition dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1607 OF 1912.

September 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PEDDIBHOTLA KAMESWARAMMA, MINOR, BY BROTHER AND NEXT FRIEND HEMADRI SRIRAMULU—DEFENDANT—APPELLANT

versus

BEZWADA CHELAPATHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 99—Irregularity not affecting merits of case—Improper admission of additional evidence—Evidence Act (I of 1872), s. 167.

The improper admission of additional evidence by an Appellate Court is no ground for setting aside the decree of that Court, unless the second Appellate Court is satisfied that the decision on the merits is wrong and that the improper admission might have resulted in such a wrong decision.

Andiappa Pillay v. Muthukumara Theran, 14 Ind. Cas. 140; (1912) M. W. N. 450; 11 M. L. T. 241; 36 M. 477, referred to.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 366 of 1911, preferred against that of the Principal Munsif of Masulipatam, in Original Suit No. 375 of 1905.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondent.

JUDGMENT.—So far as the Appellate Court's power to permit additional evidence to be produced before it is concerned, we ought to follow the Full Bench decision in Letters Patent Appeal No. 118 of 1911, which decision seems to us to be in accordance with the ruling in Second Appeal No. 819 of 1911 and with the decision in *Andiappa Pillay v. Muthukumara Theran* (1).

In the present case, we are satisfied that the lower Appellate Court did not go beyond the powers given to it by Order XLI, rule 27 (1) (b), of the Code of Civil Procedure in admitting Exhibits E, E1, F and F1.

But we think that Exhibit D was improperly admitted in evidence, as the order of the Appellate Court requiring documents to be produced before it as additional evidence could not be made to include Exhibit D.

However, on a reading of the provisions found in section 99 and section 100, clause (c), of the Code of Civil Procedure and in

(1) 14 Ind. Cas. 140; (1912) M. W. N. 450; 11 M. L. T. 241; 36 M. 477.

section 167 of the Indian Evidence Act it seems to us that we ought not to interfere with the decision of the Subordinate Judge in appeal, unless we are satisfied that his decision *on the merits* is wrong and unless, *further*, we are satisfied that his improper admission of Exhibit D might possibly have resulted in such a wrong decision on the merits.

As we are not satisfied that his decision on the merits is wrong, we shall dismiss this second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 429 OF 1913.

September 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

The Honourable Raja VASUDEVA RAVI VARMA *styled* VALIA NAMBIDI AVERGAL, RESIDES IN KOLLANGODE AMSON, DESAM, PALGHAUT TALUQ —PLAINTIFF—APPELLANT

versus

ATHI KOTTIL EAZHUVAN KANNANUR VALIA RAMAN'S SON, PAZHANAN *alias* PAZHANIVELAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. II, r. 2 – Misjoinder of causes of action—Appellate Court, right of, to reverse decree - Cause of action not established against some defendants, whether bars fresh suit on true cause of action.

An Appellate Court has no power to reverse the decision of the first Court on the ground of misjoinder.

Lala Rup Narain v. *Gopal Devi*, 3 Ind. Cas. 382; 36 C. 780; 13 C. W. N. 920; 6 A. L. J. 567; 10 C. L. J. 58; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1909; 146 P. W. R. 1909 (P. C.); 19 M. L. J. 548; 36 I. A. 103; 68 P. L. R. 1910, followed.

If a suit is dismissed against some of the defendants, as the cause of action on which the suit was brought is not established so far as those defendants are concerned, the plaintiff is not precluded from bringing a new suit on the true cause of action which he has against them.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghaut, in Appeal Suit No. 886 of 1911, preferred against that of the District Munsif of Alatur, in Original Suit No. 325 of 1911.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *T. R. Krishnaswamy Aiyar*, for Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The lower Appellate Court has dismissed the plaintiff's suit so far as it prayed for relief against the defendants Nos. 2 and 4 to 6 on the ground (as we understand the lower Court's judgment) that the plaintiff's cause of action against these defendants was separate from the plaintiff's cause of action against the other defendants, and hence the suit is bad for misjoinder of parties and causes of action.

It has been held by the Privy Council in *Lala Rup Narain* v. *Gopal Devi* (1) [see section 99 of the Code of Civil Procedure and *Narayana Nambudripad* v. *Narayana Nambudripad* (2)] that an Appellate Court has no power to reverse the decision of the first Court on the ground of misjoinder.

The lower Appellate Court's dismissal of the plaintiff's suit against the defendants Nos. 2 and 4 to 6 might, however, be supported on another ground, that the plaintiff has based his claim only on a single cause of action as against all the defendants. That cause of action included, as its most material allegation of fact, the statement that all the defendants held directly or indirectly under a lease of 1025 M. E. (1850). It has been found that the defendants Nos. 2 and 4 to 6 had nothing to do with that lease. Hence the cause of action on which the suit was brought has not been established so far as the defendants Nos. 2 and 4 to 6 are concerned, and the suit as against them was rightly dismissed. This would, of course, not prevent the plaintiff from bringing a new suit on the true cause of action which he has against the defendants Nos. 2 and 4 to 6.

We, therefore, dismiss the second appeal, but as the defendants Nos. 2 and 4 to 6 raised the untenable pleas of limitation and misjoinder of parties and causes of action, we make no order as to costs in this appeal.

Appeal dismissed.

(1) 3 Ind. Cas. 382; 36 C. 780; 13 C. W. N. 920; 6 A. L. J. 567; 10 C. L. J. 58; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1909; 146 P. W. R. 1909 (P. C.); 19 M. L. J. 548; 36 I. A. 103; 68 P. L. R. 1910.

(2) 25 Ind. Cas. 25.

JAGANNATH v. RAM NATH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 877 OF 1908.

November 25, 1909.

Present:—Mr. Justice Tudball.

JAGANNATH—PLAINTIFF—APPELLANT

versus

RAM NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (III of 1877), ss. 28, 32, 49, 60—Registration by Sub-Registrar within whose jurisdiction property not situate - Fictitious property mentioned in deed—Fraud.

The object of registration is the prevention of fraud and to make public all transfers of property.

Therefore, a document is not registered in accordance with the Act if no part of the property comprised in the deed is situate within the jurisdiction of the Registrar who registers the deed.

Mujib-un-nissa v. *Abdur Rahim*, 23 A. 233 (P. C.); 28 I. A. 15; 5 C. W. N. 177, followed.

Hardei v. *Ram Lal*, 11 A. 319; A. W. N. (1889) 101 (F. B.), referred to.

Second appeal from the decree of the District Judge of Agra.

Dr. *Satish Chandra Banerji*, for the Appellant.

Mr. *J. N. Chaudhri*, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal has arisen are as follows:—One Chiraunji Lal was the owner of the property now in suit. He died on 19th February 1909, leaving as his heirs the plaintiff-appellant, Bansi Dhar, defendant No. 1, and one Sham Lal. Some ten years prior to his death, that is, on 27th April 1890, he executed a deed of gift to defendant No. 2 of the whole of his property. The deed was registered in the office of the Sub-Registrar of Bindraban, but no part of Chiraunji's property was situate within the local jurisdiction of that officer. In order, therefore, to secure registration an item of property was included in the deed of gift purporting to be within the jurisdiction of that officer. As a matter of fact no such property was ever in existence. The document was, however, presented, accepted and registered. On 21st December 1896 defendant No. 1 sold the property now in suit to defendants Nos. 2 and 3. On 30th August 1899 the plaintiff himself purchased from the donee another portion of the gifted property. In 1900 after the death of Chiraunji, Sham Lal, the third heir, brought a suit to recover a one-third share and the present plaintiff was made a defendent. He contested the claim basing his title on the deed of gift and his own sale-deed.

Then on 19th March 1907 the plaintiff brought the present suit, alleging that Chiraunji was a man of weak intellect and that the deed of gift had been obtained from him by undue influence and was, therefore, invalid, that the registration had been fraudulently obtained by including in the document property which was non-existent and, therefore, the deed was of no avail, that Chiraunji was dispossessed from 21st December 1896, the date of the sale-deed, by Bansi Dhar, defendant No. 1, in favour of defendants Nos. 2 and 3. He, therefore, claimed as heir his one-third share in the house in suit and asked for partition. The defendants contested the suit pleading (1) that there had been no undue influence, (2) that the suit was time-barred, (3) that the registration was good in law. There were other defences to the suit with which I am not concerned.

The Court of first instance held (1) that the deed of gift had been obtained by the exercise of undue influence over a man of weak mind, (2) that the deed of gift had not been duly registered in accordance with the Registration Act and (applying section 49) that it did not operate to pass title, that the suit was not time-barred in that it had been brought within the time allowed for suits for possession. I presume the Munsif meant that it had been brought within 12 years of Chiraunji's death. The claim was decreed.

On appeal the District Judge held (1) that the deed of gift was duly registered in accordance with the Act, (2) that undue influence had not been exercised and that Chiraunji was not of weak mind, (3) that the suit was time-barred, in that it had not been brought within three years of Chiraunji's death if he were insane, and also because it had not been brought within twelve years of the deed of gift, the date thereof being the date on which the donee took possession adversely to the donor, and the plaintiff being the representative of the latter. The suit was, therefore, dismissed.

The plaintiff appeals and urges (1) that

the deed of gift has not been registered in accordance with the provisions of the Registration Act and, therefore, section 49 operated to prevent the passing of the title, and (2) that the suit is not barred by time. In regard to registration stress is laid on the decision of their Lordships of the Privy Council in *Mujib-un-nissa* v. *Abdur Rahim* (1) as practically overruling the decisions of this Court in *Hardei* v. *Ram Lal* (2) and other earlier cases *Har Sahai* v. *Chunni Kuar* (3), *Husaini Begam* v. *Mulo* (4). In my opinion this argument has great force. In *Hardei* v. *Ram Lal* (2) it was held by a Full Bench of this Court that the word "registered" as used in section 49 of the Act refers to the act of registration by the Registering Officer and not to matters of procedure or conduct of parties, that that section read with section 60 only means that a document to be admissible in evidence for the purposes of section 49 must be registered, *i.e.*, the officer must have put upon it the certificate mentioned in section 60, and that if he has done so, the document bearing the certificate becomes admissible in evidence, and it has been registered within the meaning of section 60, and becomes under the second paragraph thereof admissible in evidence and the operation of the second paragraph is not interfered with by section 49. In this case the document had been presented and execution admitted by a person who was not qualified to do so under sections 32 and 35 of the Act.

In *Mujib-un-nissa* v. *Abdur Rahim* (1) the facts were similar. A document was presented in the proper office by a person who was not qualified to do so. Moreover, he also admitted execution not being qualified to do so. A Bench of this Court expressed dissent from the ruling of the Full Bench in *Hardei* v. *Ram Lal* (2), but considered itself bound by that ruling. The judgment of Burkitt, J., is a very clear one and shows the palpable departure from the Act that had taken place in the course of the registration, and how in his opinion the latter was not in accordance with the Act. Before their Lordships of the Privy Council no attempt was made to justify the registration as having been done regularly in accordance with the Act. Reliance, however, was placed on section 87 and it was urged that there had only been a defect in procedure which did not validate the act of registration. Their Lordships of the Privy Council repelled this, holding that the error was of a more radical nature and that in view of the terms of section 32, it was clear that the power and jurisdiction of the Registrar only came into play when he was invoked by some person having a direct relation to the deed. They held that the registration was invalid and illegal and section 49, therefore, operated to prevent the document affecting the immoveable property comprised therein. It seems to me clear, therefore, from this ruling that the endorsement on a document of the certificate of registration, unless it is made by a Registrar whose power and jurisdiction have been properly invoked, does not amount to a registration in accordance with the Act within the meaning of section 49. This ruling clearly overrides that of the Full Bench in *Hardei* v. *Ram Lal* (2).

But the facts of these two cases are different from those of the present case, and it remains to be seen whether the principle of the Privy Council ruling applies equally to the latter as to the former. In the present case it is urged that the document was not presented at the proper Registration office, because no part of the property to which it related was situate within the sub-district of the Sub-Registrar and, therefore, the Sub-Registrar had no jurisdiction. It is pleaded that though a property was entered as situate within the sub-district, as a matter of fact it was not so situate, and section 28 demands that the document shall be presented in the office of a Sub-Registrar within whose sub-district a part at least of the property "is" situate and not in the office of one in whose sub-district a part of the property purports to be situate. On the other hand it is urged that it is not one of the duties of a Registrar to make inquiries as to whether the property does or does not, as a matter

(1) 23 A. 233 (P. C.); 28 I. A. 15; 5 C. W. N. 177.
(2) 11 A. 319; A. W. N. (1889) 101 (F. B.).
(3) 4 A. 14; A. W. N. (1881) 105; 6 Ind. Jur. 379.
(4) 5 A. 84; A. W. N. (1882) 183.

of fact, lie within his sub-district, that if on the face of the document any of the properties lies within his territorial jurisdiction, he has jurisdiction to register. It is true that the Act does not contemplate any such inquiry by the Sub-Registrar. In a case such as the present he has merely to examine the document, if presented by a proper person, to see if on the face of it he has jurisdiction; but if a fraud of this nature (and it amounts to a fraud) be practiced on him, it cannot be said that he, as a matter of fact, has jurisdiction. Section 28 ends as follows: "within whose sub-district the whole or some portion of the property to which such document relates is situate." This clearly means "is, as a matter of fact, actually situate" and not "purports on the face of the document to be situate." The language of the section is clear and unambiguous and must receive its plain ordinary meaning. In the present case the property entered in the document as lying within the sub-district of Bindraban has been held to be non-existent, no portion of that property was situate in that sub-district and, in my opinion, the Sub-Registrar had no jurisdiction over the property to which the document actually related. No portion was within his sub-district. In these circumstances the principle of the Privy Council ruling in *Mujib-un-nissa* v. *Abdur Rahim* (1) applies. Section 32 of the Act lays down that the document shall be presented at the proper Registration office by the proper person or persons. If not presented at the proper office, but at the wrong office, the Sub-Registrar clearly has no jurisdiction and his registration is not in accordance with the Act. It is not an error in procedure within the meaning of section 87, but an entire absence of jurisdiction. The object of registration is the prevention of fraud and to make public all transfers of property. To hold that the Registrar of Bindraban had jurisdiction in such a case as this would be to open a very wide door to fraud. I, therefore, hold that the document in question was not registered in accordance with the Act and that section 49 of the Act applies.

The next point is one of limitation. The suit was brought more than 12 years after the execution of the deed of gift. The lower Appellate Court has held that Bansi Dhar defendant took possession on 27th April 1890 adversely to the donor, that being the date of the gift. It is urged for the appellant that he, in his plaint, stated that Chiraunji was first dispossessed on 21st December 1896 and that the defendants produced no evidence to prove 12 years' adverse possession. The finding of the lower Court is one of fact, *viz.*, that the donee took possession in 1890. This finding is not attacked in the petition of appeal on the ground that there is no evidence at all, to support it, on the record. The possession of the donee under the invalid deed of gift was adverse to the donor and time began to run from 1890. The plaintiff sues as heir of the donor. He brought his suit in 1907. It is, therefore, barred by time.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 185 OF 1911.

September 11, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

NALLURY KRISHNAMMA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KAMAPALLI RAMALINGAM (DIED) AND OTHERS—DEFENDANTS—RESPONDENTS.

Adoption, Illatom *form of—Custom—Presence of son of adoptive father, whether invalidates* Illatom *adoption—Hindu Law—Presumption.*

Under Hindu Law an adoption is invalid where the adoptive father has a son, but the *illatom* adoption is opposed to Hindu Law and is based on custom and, therefore, no presumption of Hindu Law can apply to such an adoption.

The existence of a son is no bar to an *illatom* adoption.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Original Suit No. 1 of 1910.

Mr. *T. Prakasam*, for the Appellants.

Messrs. *L. A. Govindaraghava Aiyar* and *A. Venkatarayaliah*, for the Respondents.

JUDGMENT.—One Lingayya adopted in the *illatom* form Ramakrishnamma and married him to his daughter while he had

a son Venkatachallam living. The question now in issue between the sons of Venkatachallam and Ramakrishnamma is, whether that adoption is valid and whether the descendants of the latter are entitled to a share of the property held by Lingayya.

The Subordinate Judge has upheld the adoption and their right to a share. The sons of Venkatachallam appeal.

The adoption took place more than 50 years ago when Lingayya was living with his two brothers as members of an undivided family. Ever since the adoption or marriage Ramakrishnamma was living with the other members of the family. An *illatom* son is adopted when assistance is needed by the adopter in the cultivation of the family estate or for its management, and in this case there is no doubt that Ramakrishnamma participated in the management of the estate. When a partition was effected between Lingayya and his brothers, Ramakrishnamma was treated as a member of Lingayya's branch and remained with them. Shortly before Venkatachallam's death in August 1904, there was an agreement for partition between him and Ramakrishnamma. This, no doubt, is denied by the appellants. But Ramakrishnamma's descendants are admittedly in exclusive possession of certain properties which were in the possession of Venkatachallam and the appellants' plea that such possession was obtained by trespass, is not proved. Their complaint was dismissed by the Magistrate; and the Judge rightly points out that possession by trespass is inconsistent with the fact that the respondents are in possession of portions of properties. After Venkatachallam's death his son, one of the appellants before us, called Ramakrishnamma's son a co-sharer (Exhibit B2). This conduct of the family for about 50 years and the agreement for partition in particular is very strong evidence against the appellants. It is contended before us that an *illatom* adoption made when there is a son living, is invalid. It is true that an adoption is invalid under Hindu Law when the adoptive father has a son. But the *illatom* adoption itself is opposed to Hindu Law and no presumption of invalidity, therefore, arises on the ground suggested. The evidence of the appellants' witnesses is, not that the existence of a son alone precludes an adoption, but no adoption can be legally made when there is a son or brother alive. This finds no support in Hindu Law and is in favour of the view that we should not look to the principles of the Hindu Law to determine the incidents of the custom. The respondents have proved only two instances of adoption where there was a son and the Judge rightly observes that the evidence is insufficient to prove a custom. But we find that it has been judicially recognized. In the suit out of which Second Appeal No. 45 of 1905 arose, many instances of *illatom* adoption by persons who had sons were proved and this Court held that the evidence was sufficient to prove the custom.

We are, therefore, of opinion that Ramakrishnamma's adoption is valid and dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1200 TO 1202 OF 1913.

September 25, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

ALAVALA BALAYYA AND OTHERS—PLAINTIFFS NOS. 1 TO 6—APPELLANTS IN ALL

versus

IN SECOND APPEAL NOS. 1200 AND 1201 OF 1913.

ALAVALA GURUVAYYA—DEFENDANT No. 2—RESPONDENT

AND

IN SECOND APPEAL NO. 1202 OF 1913.

LALAM SWAMI AND ANOTHER—DEFENDANTS NOS. 2 AND 6—RESPONDENTS.

Trusts Act (II of 1882), s. 90—Co-owner, renewal of debt by, in his sole name—Unfair advantage—Cestui que trust—Declaratory suit, maintainability of.

Where one of the two co-owners of a debt obtains a document in his own name in derogation of the right of the other, the latter has a right to have it declared that the former holds the document for the latter's benefit also under section 90 of the Trusts Act, 1882.

Second appeals against the decrees of the District Court of Kurnool, in Appeal Suits Nos. 116, 117 and 113 of 1912, preferred against that of the District Munsif of Kurnool, in Original Suits Nos. 149, 150 and 148 of 1912, respectively.

DULARE LAL *v.* HAZARI LAL.

FACTS.—The facts of the case appear from the judgment.

Mr. *T. Prakasam*, for the Appellants:—The plaint, though not happily worded, is to the effect that the 2nd defendant gained an undue advantage over the plaintiffs (co-owners of the debt with him) by availing himself of his position as such co-owner in getting the deed renewed in his sole name. The plaintiffs had thus a cause of action for the declaration prayed for. The District Judge erred in dismissing the suit.

Mr *T. R. Ramachandra Iyer*, for the Respondents:—The plaint as framed does not disclose a cause of action. The plaintiffs are not jeopardized by the deed. The District Judge is right in dismissing the suit.

JUDGMENT.—Though the plaint is not worded in legal phraseology, we think that the allegations therein are intended to convey that the 2nd defendant, a co-owner with the plaintiffs of a certain debt, "availing himself of his position as such" gained the advantage of a fresh deed for the debt in his sole name in derogation of the plaintiffs' right. Put in this manenr the plaintiffs have a cause of action for a declaration that the 2nd defendant holds that document for the plaintiffs' benefit also, the plaintiffs having a 4/5ths interest in it (see section 90 of the Trusts Act).

That was practically the decree given by the District Munsif and the learned District Judge ought not to have disturbed that decree. His decision is set aside, and the District Munsif's decree restored with costs in this and in the lower Appellate Court.

The connected second appeals follow.

Appeals allowed; Decrees set aside.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 724 OF 1913.

June 19, 1914.

Present:—Mr. Justice Sundar Lal.

DULARE LAL—DEFENDANT—APPELLANT

versus

HAZARI LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 24, cl. (4)—Res judicata—*Suit transferred from Court of Small Causes to that of Munsif for trial—Appeal, whether competent—Decision, whether can operate as* res judicata *in suits not cognizable by Small Cause Courts.*

A small cause suit which is transferred to a Munsif retains its character as such and no appeal lies against the decision of the Munsif in such a suit, nor can his decision operate as *res judicata* for purposes of other suits not cognizable by Small Cause Courts.

Second appeal from the decree of the Subordinate Judge of Farrukhabad.

Mr. *A. P. Dube*, for the Appellant.

Dr. *Surendra Nath Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of the following circumstances. One Hazari Lal obtained a consignment of treacle, to pay for and take delivery of which he borrowed money from Dulare Lal. The understanding was that the treacle was to be sold and the money advanced by Dulare Lal was to be realized in the first instance from the price it may fetch; and the balance, if any, was payable to Hazari Lal. Hazari Lal, alleging that there was a balance of Rs. 841-10-3 due to him after satisfying Dulare Lal's debt, instituted the present suit against the defendant in the Court of the Munsif of Farrukhabad. Dulare Lal on his part alleged that the price realized at the sale was not sufficient to pay the amount due to him from the plaintiff and that a sum of Rs. 308-5-6 was due to him from the plaintiff. He brought a suit to recover this amount in the Court of Small Causes. The suit of Dulare Lal was transferred from the Court of Small Causes to that of the Munsif for trial along with the cross suit which had been filed by Hazari Lal. The two suits were tried together. The Munsif came to the conclusion that a sum of Rs. 308-5-6 was due to Dulare Lal. He, therefore, decreed Dulare Lal's suit and as a result of his finding, he dismissed the suit of Hazari Lal. Now the suit of Dulare Lal was a suit of the nature of suits triable by a Court of Small Causes and it was filed in that Court. Under section 24, clause 4, of the Code of Civil Procedure the suit still retained its character as a Small Cause Court suit though tried by the Munsif and the decree passed in that case, therefore, was final and not open to appeal, and was not in fact appealed against. Hazari Lal, however, filed an appeal against the decree in the suit for Rs. 841-10-3 which he had instituted,

In that suit the Court came to the conclusion that a sum of Rs. 898-5-0 (including interest) was due to Dulare Lal and after setting off against it the sum of Rs. 308-5-6 for which a decree had been obtained in the Small Cause Court suit, it gave a decree for the balance. The defendants' contention in this case is that an appeal ought to have been preferred to the Court below from the decree passed in the Small Cause Court suit and as no appeal was preferred, the said decree operated as *res judicata* and it was not open to the Court in appeal to go behind it and determine that a sum of Rs. 898-5-0 was due to the plaintiff. And he relies for that purpose upon the analogy of the case in which decrees had been passed in suits tried together but in which all the decrees passed had not been appealed against. As I have already observed, the Small Cause Court suit which had been transferred to the Munsif retained its character as such. It was not open to appeal. It was tried by the Munsif only as a Court of Small Causes and his decision in that case could not operate as *res judicata* for purposes of the other suit for Rs. 841-10-3, which the Court of Small Causes was not competent to try. The plea has no force and I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 7 OF 1913.

August 19, 1914.

[*Present*:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

AIYA GOUNDEN AND OTHERS—APPELLANTS

versus

JAYAN MANDALATHIPATHI GOPANNA MAURADIYAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit—"Sufficient grounds"—Material irregularity—Revision—Letters Patent Appeal.

The words "sufficient grounds" referred to in Order XXIII, rule 1 (2) *(b)*, of the Civil Procedure Code are *ejusdem generis* with the defect referred to in rule 1 (2) *(a)* of the said Order.

Burathagunta Pentadee v. *Thurlapatti Rajamma*, 8 Ind. Cas. 868; (1911) 1 M. W. N. 105; 9 M. L. T. 204, followed.

Discretion vested in a Court to allow a plaintiff to withdraw a suit is not judicially exercised when it is exercised inspite of the defendant's opposition to condone defects in the plaintiff's conduct of his case which were due entirely to the plaintiff's own default and for which no excuse was attempted.

An illadvised grant of permission to withdraw a suit with leave to sue again may be such a material irregularity as is contemplated by section 115 *(c)*, Civil Procedure Code.

Where a single Judge of the High Court rejects a petition for revision, a Letters Patent Appeal lies against the order of rejection.

Rama Aiyer v. *Venkatachala Padayachi*, 30 M. 311; 2 M. L. T. 84; 17 M. L. J. 123; 5 Cr. L. J. 288, followed.

Appeal, under section 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Sankaran Nair, dated 12th December 1912, in Civil Revision Petition No. 698 of 1911, presented against that of the District Munsif of Udamulpet, in Original Suit No. 665 of 1910.

FACTS.—A civil revision petition was filed in the High Court under section 115 of the Code of Civil Procedure against an order of the District Munsif of Udamulpet, granting leave to withdraw a suit pending before him with liberty to institute a fresh suit for the subject-matter of the suit, under Order XXIII, rule 1, of the Code of Civil Procedure. The above application was made by the plaintiff after he had almost closed his case. The grounds of the application were that by reason of the death of his brother he could not be present at the adjourned hearing of the suit, that the extent of the suit land given in the plaint was incorrect and that a commission must be issued for taking the measurements of the said land. The suggestion of a commission was apparently made for the first time in the petition. The defendant opposed the application on the grounds that it ought not to be granted at that stage of the case and that the reasons assigned were not sufficient, within the meaning of "other sufficient grounds" in clause 2 (*b*) of Order XXIII, rule 1, of the Code. These objections were overruled and leave was granted by the District Munsif. The revision petition filed in the High Court was dismissed by Sankaran Nair, J. His Lordship's order was as follows:—"I see no reason to interfere under section 115 of the Civil Procedure Code. The petition is dismissed with costs." Against this latter order, the defendant preferred the above Letters Patent Appeal.

AIYA GOUNDEN v. JAYAN MANDALATHIPATHI GOPANNA MAURADIYAR.

Mr. *T. R. Venkatrama Sastri*, for the Respondent, took a preliminary objection to the maintainability of the appeal on the ground that the order appealed against was not a "judgment" within the meaning of clause 15 of the Letters Patent, and relied on *Palaniappa Chetti* v. *Annamalai Chetti* (1); *Chinnasami Mudaly* v. *Arumuga Goundan* (2); *Tuljaram Row* v. *Allagappa Chettiar* (3); *Maruthamuthu Pillai* v. *Krishnamachariar* (4).

The preliminary objection was, however, overruled with reference to the decision in *Rama Aiyar* v. *Venkatachala Padayachi* (5).

Mr. *T. Ramachandra Rao*, for the Appellants:—Under Order XXIII, rule 1, of the Civil Procedure Code, leave to withdraw can be given only if there is formal defect or other sufficient grounds. In the present case there is no formal defect and the grounds mentioned in the application do not come under "other sufficient grounds" which must be *ejusdem generis* with those mentioned in clause (*a*). The Court below had, therefore, no jurisdiction to grant leave. Further leave ought not to have been granted at the stage which the case had reached. This Court can consequently interfere in revision under section 115, not only on the ground that the Court below exercised a jurisdicti n not vested in it, but also on the ground that it acted with material irregularity which has affected the decision on the merits,—Vide *Kharada Co. Ld.* v. *Durgatharan* (6), *Burathagunta Pentadee* v. *Thurlapatti Rajamma* (7), *Khub Chand* v. *Ajodhia Prashad* (8), *Mahipat* v. *Nathu* (9), *Hira Lal Mitra* v. *Uday Chandra Dey* (10).

Mr. *T. R. Venkatarama Sastri*, for the Respondent:—The case comes within "other sufficient grounds" in clause (*b*) of Order XXIII, rule 1. "Other sufficient grounds" must not be held to mean causes *ejusdem generis* with the cause mentioned in clause (*a*). The *ejusdem generis* principle of construction ought not to be adopted in such cases. It was not adopted in the construction of Order XLI, rule 27 (additional evidence in appeal), see *Andiappa Pallay* v. *Muthukumara Theran* (11) or in the review sections of the Code, vide *In the matter of the petition of Hadjee Abdoollah, Reasat Hossein* v. *Hadjee Abdoollah* (12). Further, in this case, the Court below had a discretion vested in it and had exercised it in a particular way. This Court will not interfere under section 115 of the Code in such cases.

JUDGMENT.—We disallow the preliminary objection that no Letters Patent Appeal lies with reference to *Rama Aiyar* v. *Venkatachala Padayachi* (5).

There is no doubt that an ill-advised grant of permission to withdraw a suit with leave to sue again under Order XXIII, rule 1 (2) (*b*), may be such a material irregularity as is contemplated by section 115 (*c*) of the Civil Procedure Code.

Here the District Munsif granted permission, after a substantial portion of the plaintiff's case had been heard, on his affidavit that (1) he could not attend the hearing owing to his brothers's death; (2) that he wished for the issue of a commission, apparently then first mentioned; (3) that he ought to have certain measurements made and a plan prepared.

We are prepared to hold that the "sufficient grounds" referred to in Order XXIII, rule 1 (2) (*b*), must be *ejusdem generis* with the defect referred to in rule 1 (2), (*a*) with reference to the usual interpretation of these words elsewhere in the Code and to the explicit authority of *Burathagunta Pentadee* v. *Thurlapatti Rajamma* (7), and that it is clear that the District Munsif acted on nothing in any way resembling a formal defect and that his order is unsustainable. But whether or not this interpretation of the phrase "sufficient grounds" be adopted, we must hold that his discretion was not exercised judicially, since it was exercised in spite of the defendants' opposition to condone defects in the plaintiff's conduct of his case, which were due entirely to his own default and for

(1) 27 M. 223 at p. 225; 14 M. L. J. 74.

(2) 27 M. 432.

(3) 8 Ind. Cas. 340; 35 M. 1; (1910) 1 M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

(4) 30 M. 143.

(5) 30 M. 311; 2 M. L. T. 84; 17 M. L. J. 123; 5 Cr. L. J. 288.

(6) 5 Ind. Cas. 187; 11 C. L. J. 45.

(7) 8 Ind. Cas. 868; (1911) 1 M. W. N. 105; 9 M. L. T. 104.

(8) 21 Ind. Cas. 76; 11 A. L. J. 733.

(9) 4 Ind. Cas. 252; 33 B. 722; 11 Bom. L. R. 1109.

(10) 14 Ind. Cas. 33; 16 C. W. N. 1027; 16 C. L. J. 103.

(11) 14 Ind. Cas. 140; (1912) M. W. N. 450; 11 M. L. T. 241; 36 M. 477.

(12) 2 C. 131 at p. 140 (P. C.); 3 I. A. 221; 26 W. R. 50.

which no excuse was attempted. The facts closely resemble those dealt with in *Bai Kashibai* v. *Shidappa Anapa* (13), a decision in which we express our respectful concurrence. The Letters Patent appeal and petition are allowed with costs. The District Munsif's order is set aside and he is directed to restore the suit and dispose of it according to law.

Appeal allowed.

(13) 21 Ind. Cas. 23; 37 B. 682; 15 Bom. L. R. 823.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1172 OF 1913.

June 1, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MUHAMMAD NAJIB ULLAH—PLAINTIFF—APPELLANT

versus

JAI NARAIN AND ANOTHER—DEFENDANTS—RESPONDETTS.

Civil Procedure Code (Act V of 1908*), O. XXI, rr.* 91, 93—*Suit by auction-purchaser to recover back purchase-money, whether maintainable.*

An auction-purchaser can bring a suit to recover back the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold at the date of the sale.

Munna Singh v. *Gajadhar Singh*, 5 A. 577; A. W. N. (1883) 130, followed.

Kishun Lal v. *Muhammad Safdar Ali Khan*, 13 A. 383; A. W. N. (1891) 138; *Dorab Ally Khan* v. *Abdool Azeez*, 5 I. A. 116; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 3 C. 806 (P. C.); *Sidheswari Prasad Narain Singh* v. *Goshain Mayanand Gir*, 19 Ind. Cas. 986; 11 A. L. J. 606; 35 A. 419, referred to.

Second appeal from the decree of the Additional Judge of Aligarh.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought under the following circumstances. On the 14th of October 1887 a mortgage was executed by Chattar Singh, the defendant No. 2, in favour of Ram Saran Das, father of the defendant Jai Narain. A decree was obtained on foot of this mortgage in the year 1892. Certain property was sold in execution of that decree on the 26th of November 1910 and purchased by the plaintiff. How it was that the decree remained under execution for this protracted period is not explained. The sale was confirmed and the plaintiff was put into formal possession. He then alleges that he applied for mutation when it appeared from a report of the Kanungo that Chattar Singh had already sold the property under two sale-deeds, dated respectively the 17th of September 1883 and the 23rd of June 1886. Mutation was refused and thereupon the present suit was instituted. It is not shown that the plaintiff was in any way opposed by the vendees under the two sale-deeds or their representatives. Various pleas were taken. It was alleged that the judgment-debtor had "a saleable interest" and it was contended that the suit did not lie. The Court of first instance found that the judgment-debtor had no saleable interest and the suit lay and granted the plaintiff a decree. Upon what ground the Court of first instance came to the conclusion that the judgment-debtor had no saleable interest, does not appear from the judgment beyond the facts that the two sale-deeds were proved. The defendant No. 1, Jai Narain, appealed and the lower Appellate Court allowed the appeal and set aside the decree of the Court of first instance. It held that the suit was not maintainable, but left undecided the issue, "whether or not the judgment-debtor had any saleable interest." The plaintiff has appealed and contends that the lower Appellate Court was wrong in deciding that the suit was not maintainable, and his learned Counsel relies on the Full Bench decision of *Munna Singh* v. *Gajadhar Singh* (1) and also on the case of *Kishun Lal* v. *Muhammad Safdar Ali Khan* (2), which followed with hesitation the Full Bench case. Apart from these decisions we should have some difficulty in holding that a suit like the present can be maintained. It seems to us that, apart from the provisions of the Code of Civil Procedure, a suit to recover back the purchase-money by an auction-purchaser does not lie. See remarks of their Lordships of the Privy Council in *Dorab Ally Khan* v. *Abdool Azeez* (3). In the absence of authority we should be disposed to hold that if the right is the creation of the Civil Procedure Code, the remedy ought also to be limited to the remedy provided by the Code. It is obviously most inconvenient after the sale has taken place that the auction-purchaser should be

(1) 5 A. 577; A. W. N. (1883) 130.

(2) 13 A. 383; A. W. N. (1891) 138.

(3) 5 I. A. 116; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 3 C. 806 (P. C.).

entitled to come in and allege that the sale was bad on the ground of a defect in the debtor's title. It may well have been that the money realised by the sale of the property has been distributed amongst a number of creditors. On the other hand if the auction-purchaser's right is confined to the remedy provided by the Code, under ordinary circumstances his application to set aside the sale would be made within one month and before the distribution of the money realised by the sale. We find it, however, impossible to distinguish the present case from the case of *Munna Singh* v. *Gajadhar Singh* (1). The learned Additional District Judge refers to the case of *Sidheswari Prasad Narain Singh* v. *Goshain Mayanand Gir* (4). The head-note of this case is somewhat misleading.* That case like the present was a suit to recover back purchase-money on the ground of defect in the judgment-debtor's title. The Court, no doubt, considered what was the origin of the plaintiff's right to get back his purchase-money and the Court expressed its opinion that such rights as he had were the creation of the Code of Civil Procedure, but it did not and could not as a Bench overrule the Full Bench decision above referred to. We, as a Bench, feel ourselves bound by the decision of the Full Bench ruling in the case of *Munna Singh* v. *Gajadhar Singh* (1). Before deciding whether we will refer the case to a larger Bench or finally deciding the appeal, we think it desirable to refer an issue as to the interest of the judgment-debtor at the time of the sale.

We accordingly refer the following issue, "Had the judgment-debtor any saleable interest in the property at the date of sale?" In deciding this issue the Court will not necessarily be bound to hold merely in proof of the sale-deeds that the judgment-debtor had no saleable interest, because if it should appear that the judgment-debtor was in possession or had acquired a title in any other way he would, in our opinion, have a "saleable interest" and the sale could not be set aside. The parties may adduce any further evidence relevant to this issue. The case will be put up on return of the finding and the usual ten days will be allowed for filing objections.

Issue remitted.

(4) 19 Ind. Cas. 986; 11 A. L. J. 606; 35 A. 419.

* This remark does not apply to the Head-note of Indian Cases.—*Ed.*

Accession No. .....

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1293 OF 1913

September 30, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

MURUGAPPA CHETTIAR—PLAINTIFF—APPELLANT

versus

RAMANATHAN CHETTIAR—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 3 (11) 77—Jurisdiction of Revenue Courts—Tree pattas—Vari *payable for trees, if 'rent.'*

Vari or tax payable in respect of trees held on tree *pattas* is not 'rent' as defined in section 3 (11) of the Madras Estates Land Act I of 1908, and a suit to recover such *vari* or tax is not cognisable by a Revenue Court under section 77 of the said Act.

Second appeal against the decree of the District Court of Ramnad, in Appeal Suit No. 914 of 1911, preferred against that of the Deputy Collector of Devakottah, in Summary Suit No. 225 of 1911.

FACTS.—Plaintiff sued in the Revenue Divisional Officer's Court at Devakottah, Ramnad District, for arrears of rent due from the defendant on a lease of trees alone. The defendant denied the lease and objected to the jurisdiction of the Court on the ground that the trees were not a 'holding,' within the meaning of the Madras Estates Land Act I of 1908, that *vari* payable for trees was not rent and that, consequently, the Revenue Court had no jurisdiction to entertain the suit. The Court, however, passed a decree for the plaintiff. On appeal the District Judge upheld the contention of the defendant as to jurisdiction and dismissed the suit. The plaintiff thereupon preferred this second appeal to the High Court.

Mr. *A. Krishnaswami Iyer*, for the Appellant:—The lower Appellate Court misconstrued the *patta* tendered by the plaintiff. The trees constituted a holding under the Madas Estates Land Act, the rent being fixed from convenience at so much per tree.

Messrs. *K. Srinivasa Iyengar* and *A. Venkatrayaliah*, for the Respondent:—The Madras Estates Land Act does not at all contemplate a *patta* for trees alone as a holding. *Vide* the Amendment Bill now introduced. The suit, therefore, is not brought in the proper *forum*,

JUDGMENT.—We agree with the District Judge that the plaint *pattas* are tree *pattas* only, and not *pattas* for the land on which the trees stand. The '*vari*' payable under them is not 'rent' within the definition of section 3 (11) of the Madras Estates Land Act and the suit is not covered by section 77.

It should not have been dismissed, but the plaint should have been returned for presentation to the proper Court. This will now be done. The appellant must pay the respondent's costs in this Court.

Plaint returned.

MADRAS HIGH COURT.
CIVIL APPEAL No. 280 OF 1911.
August 7, 1914.
Present:—Sir John Power Edward Wallis, Offg. Chief Justice, and Mr. Justice Hannay.
Sri DATLA VENKATASUBBA RAJU GARU AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
GATTEM VENKATARAYADU, MINOR, BY SANI VARAPU VENKIAH—DEFENDANT No. 2—RESPONDENT.

Evidence Act (I of 1872), s. 12—Presumption of legitimacy Alienation by father 276 days before birth of son- Right of son against purchaser for value—Burden of proof.

Section 112 of the Evidence Act raises only a presumption of legitimacy and has no reference to the date of conception.

A purchaser for value is not bound to enquire whether the wife of the seller is *enceinte* and the right of a son in the womb cannot, therefore, prevail against him.

If the son wishes to rely on the defence that he was conceived before the date of the alienation, it is incumbent upon him to prove this by clear and satisfactory evidence.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Original Suit No. 76 of 1910.

Mr. *P. Narayana Murthy*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—In this case the Court has found that the alienation by the first defendant, the undivided father of the 2nd defendant, was made 276 days before the birth of the second defendant, and has come to the conclusion that it was made after the second defendant was conceived and at a time when the second defendant had acquired an interest in the property. This conclusion he has based on section 112 of the Evidence Act which provides: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten." The presumption is that a child born within 280 days after possibility of access shall be deemed to be the legitimate child of the father. It is not that such a child was conceived 280 days before its birth. Two hundred and eighty days was, no doubt, the period chosen in the section because it is accepted as the average period of gestation, but Taylor and other medical authorities show that it is only an average and that the period is often longer or shorter in individual cases. In these circumstances there does not seem to be any strong reason for raising a presumption that the particular child was conceived two hundred and seventy six days before his birth. Whether he was or not is not susceptible of proof as, where access has been continuous, even the mother could not give the date of conception within a few days.

We have not been referred to any more or less arbitrary rule of Hindu Law fixing the date of conception at so many days before birth and, as observed in *Minakshi* v. *Virappa* (1), science has not arrived at such a point that, where there has been frequent opportunity of access between the parents, a conclusive opinion can be formed as to the exact moment of conception. In this state of things the learned Judges observed that there are obvious reasons of convenience for holding that a purchaser for value is not bound to inquire whether the wife of the seller is *enceinte* and suggested

(1) 8 M. 89.

that the rights of a son in the womb to ancestral property might possibly not prevail against an alienee for value. We abstain from discussing the question, as it is unnecessary and the respondent is not represented before us.

For the purposes of the present case it is sufficient to say that if the 2nd defendant desires to rely on the defence that he was conceived before the date of the alienation in question, it is incumbent on him to prove it by clear and satisfactory evidence and this he has failed to do. We must allow the appeal and modify the decree accordingly with costs both here and below.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 36 OF 1914.

June 18, 1914.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

RAM NARAIN—APPLICANT

versus

MUHAMMAD SHAH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Remedy by regular suit available—Practice.

Ordinarily it is contrary to the practice of the High Court to entertain an application in revision when a remedy by way of regular suit is open to the applicant, but each case must be judged upon its own peculiar circumstances.

Application in revision against an order of the Subordinate Judge of Aligarh.

Mr. *Pearey Lal Banerji*, for the Applicant.

Mr. *Agha Haidar*, for the Opposite Party.

JUDGMENT.—This is an application in revision and arises out of the following circumstances. The opposite party obtained a mortgage decree against certain property. The decree was put into execution and the property sold. The present applicant, Ram Narain, filed an application to have the sale set aside. It was disallowed. He appealed to this Court which dismissed the appeal on the 12th of May 1913. The decree-holder purchased the property at the sale. He applied to the Court to be placed in possession of the property. An order was issued to the *Amin*. Ram Narain filed an application under Order XXI, rule 100. On the date fixed the decree-holder failed to appear. The Court found that the objection, filed by Ram Narain, was valid and that he was in possession of the property to which his objection related, and it passed an order *dismissing the application for delivery of possession with costs, for want of prosecution.* The proper order which the Court ought to have passed on this application was an order directing the objector, Ram Narain, to be reinstated in possession of the property.

However, a short time after this the decree-holder again put in a fresh application asking the Court to place him in possession of the property which he had purchased. An order was passed and the *Amin* went and placed him in formal possession. Thereupon Ram Narain again applied to the Court under Order XXI, rule 100, and that Court without making any inquiry rejected the application on the ground that by reason of this Court's order, dated the 12th of May 1913, Ram Narain had no *locus standi* for the objections taken by him against delivery of possession to the opposite party. It is quite clear that the Court below had completely misunderstood the judgment of this Court, dated the 12th of May 1913. Ram Narain within three weeks of this order applied to the Court below for review. That application remained pending till the 2nd of January 1914, when it was finally rejected. He filed the present application in revision on the 2nd of February 1914. There has been, therefore, no undue delay. Objection is taken that it is contrary to the practice of this Court to entertain an application in revision when a remedy by way of regular suit is open to the applicant. We agree with this. Ordinarily this practice should be followed, but each case must be judged upon its own peculiar circumstances. In the present case it is quite clear that Ram Narain had obtained an order entirely in his favour on the 4th of August 1913. It was an order passed after consideration of the merits, though, no doubt, it was *ex parte* in so far as the other side had not appeared. In the circumstances of the present case we think that we ought to entertain the application in revision. It is quite clear that the lower Court's order, which the applicant seeks to revise, is quite wrong. The Court ought to have gone into the question raised by the application and ought to have passed a

proper decision thereon instead of summarily rejecting it. We, therefore, allow this application, set aside the Court's order and remand the case to that Court with orders to re-admit the application on its original number and proceed to hear and determine the same according to law. Costs of this application will be costs in the cause and will abide the result.

Application allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2123 OF 1911.

October 6, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

MOIDEEN KUPPAI AND ANOTHER—RESPONDENTS Nos. 1 AND 2—PETITIONERS

versus

PONNUSWAMY PILLAI—APPELLANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 148, 151—Decree of High Court--Time fixed for performance of act—Extension of time, if can be granted—Jurisdiction.

Where a decree passed by the High Court in second appeal directed that on payment by the plaintiffs to a certain defendant of a sum of Rs. 50 within three months from its date a moiety of the suit property should be delivered to the plaintiffs and where the plaintiffs, without applying for a review of the judgment, prayed for an extension of the time originally granted, on the ground that they were minors and that their next friend, in collusion with the said defendant, had misconducted himself wilfully by not making the payment within the time fixed:

Held, that there was no provision of law under which the extension prayed for could be granted and that neither section 148 nor section 151 of the Civil Procedure Code (Act V of 1908) was applicable to the case.

Kotaghiri Venkata Subbamma Rao v. *Vellanki Venkatarama Rao*, 24 M. 1, at p. 10 (P. C.); 4 C. W. N. 725; 27 I. A. 197, followed.

Per Tyabji, J.—Ordinarily inherent power is something which inheres in a Court by the very fact of its being empowered to exercise any jurisdiction at all, so that it comes either within the express sense of the law or within the consequences that may be gathered from it.

Hukum Chand Boid v. *Kamalanand Singh*, 33 C. 927 at p. 931; 3 C. L. J. 67 and *Preston Banking Co.* v. *William Allsup and Sons*, (1895) 1 Ch. 141; 64 L. J. Ch. 196; 12 R. 51; 71 L. T. 708; 43 W. R. 231; referred to.

Petition praying that, in the circumstances stated in the affidavit filed herewith the High Court will be pleased to extend the time for payment by (the respondents petitioner to the (appellant) respondent herein the sum of Rs. 50 decreed to him by this Hon'ble Court in Second Appeal No. 587 of 1904, dated 20th November 1906, and to direct the (appellant) respondent herein to deliver a moiety of the property in suit described in the schedule attached to the decree of this Hon'ble Court in the said Second Appeal No. 587 of 1904.

FACTS.—The present petitioners (minors represented by their next friend) were the respondents (plaintiffs) in Second Appeal No. 587 of 1904 on the file of the High Court, Madras, and the present respondent was the appellant (8th defendant) therein. By the decree passed by the High Court in the said second appeal, it was directed that on the payment by the respondents in that appeal (hereinafter called the petitioners) to the appellant therein (hereinafter called the respondent) of a sum of Rs. 50 within three months of the said decree, the respondent do deliver possession of a moiety of the property in suit to the petitioners. Default having been made in paying the Rs. 50 within the time fixed, the petitioners by a new next friend applied to the lower Court for extension of time to pay the amount on the ground that the former next friend had fraudulently colluded with the 8th defendant and wilfully committed default in paying the same in time. This petition was dismissed and the dismissal was eventually upheld by the High Court in *Mohideen Kuppai* v. *Mariam Kanni* (1), on the ground that the lower Court had no power to extend the time fixed by a decree of the High Court. Their Lordships, however, having left open the question whether they would interfere when a proper application was made to them, the present application was filed by the petitioners praying for the extension of time.

Mr. *K. Raja Iyer*, for Mr. *S. Srinivasa Iyengar*, for the Petitioners:—The plaintiffs are minors and ought not to be prejudiced by any fraudulent act on the part of their next friend in colluding with the 8th defendant. Being infants they are wards of Court and Courts are bound to watch

(1) 12 Ind. Cas. 139; 10 M. L. T. 284; 21 M. L. J. 1018; (1911) 2 M. W. N. 240.

their interests. The Court has got inherent power to remedy injustice. Sections 148 and 151 of the Civil Procedure Code have invested Courts with ample powers to vary decrees as justice may require. If Courts do not interfere in such cases administration of justice will become futile. Further, their Lordships in prior proceedings held they had power to interfere and only left open the question whether the case was one fit for interference. The respondent cannot now go behind the decision and rake up the question of jurisdiction. The affidavits filed clearly prove collusion and fraud on the part of the former next friend.

Mr. *T. V. Gopalaswami Mudaliar*, for the Respondent:—The decree mentions payment within the time fixed as a condition precedent to the delivery of the property. Their Lordships in prior proceedings held it to be so. Being an essential part of the decree it could only be set right by an appeal or review. *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (2). None of these courses have been adopted. The grant of the extension of time prayed for will have the effect of varying the decree, which the Court has no power to do on this petition. Section 148 of the Code of Civil Procedure is inapplicable, since this is not an act prescribed or allowed by the Code. Section 151 of the Code of Civil Procedure also is inapplicable.

JUDGMENT.

OLDFIELD, J.—The decree in question in this petition was passed by this Court in second appeal and is for delivery to plaintiffs of certain property on their paying Rs. 50 within three months from its date. The payment was not made, and plaintiffs were refused an extension of the time for making it when they applied for one to the lower Courts. They appealed to this Court against this refusal in *Mohideen Kuppai* v. *Mariam Kanni* (1) and failed here also, one ground for the decision being that the lower Courts had no power to extend time fixed by the decree of this Court. The judgment concluded with the observation: "We do not decide the question whether this Court should extend the time, if and when a proper application is made to it for the purpose." The present application has, therefore, been made. It is opposed on the merits and also on the ground that payment within the time fixed being specified in the decree as a condition precedent to plaintiffs' right to delivery under it, the grant of an extension of time would be in effect a modification of the decree, which the Court has no power to make otherwise than on a proper application for review. It is not contended by plaintiffs that their present application is or could be treated as one for review.

We deal with the question, without reference to the argument that it is already concluded by the description in the judgment of *Mohideen Kuppai* v. *Mariam Kanni* (1), of the provision as to payment within a fixed time as a condition precedent, that is, as an essential part of the decree, for it is not clear that the implications of that view were considered by the learned Judges.

We, however, cannot see how the specific direction as to time, given in the decree, is not an essential part of it; and we have not been shown by argument or authority that we have power to modify the decree in respect of it to respondent's prejudice. Section 148, Code of Civil Procedure, is inapplicable, since it applies only to cases in which time has been fixed for the doing of acts prescribed or allowed by the Code. Cases of extension of time for payment under a mortgage decree are covered by Order XXXIV, rule 8, (section 87, Transfer of Property Act). Specific provision being absent, petitioners would rely on the inherent powers of the Court. But there is no precedent for their exercise in order to the modification of a decree not alleged to be erroneous in itself.

Petitioners have also contended that the time fixed in the decree does not run against them, because they are minors and that an extension is, therefore, unnecessary. That is not material in connection with their present application and we express no opinion regarding it. It is sufficient that the grant of the relief now asked for is not within the power of the Court. The civil miscellaneous petition must, therefore, be dismissed with costs.

TYABJI, J.—On the 20th November 1906 a Division Bench of this Court decreed that

(2) 24 M. 1 at p. 10 (P. C.); 4 C. W. N. 725; 27 I. A. 197.

GUPTAR TEWARI *v.* DEBI SARAN TEWARI.

the 8th defendant (the respondent to this petition) do deliver over a moiety of the property in suit to the plaintiffs (the present petitioners) on payment of Rs. 50 within three months from the date of the decree.

The present petition prays in form for an extension of the time for the payment. The ground is that the plaintiffs are minors and that their next friend, in collusion with the 8th defendant, misconducted himself wifully in not making the payment within the time. Section 148 of the Civil Procedure Code, 1908, has no application as the act for doing which time is sought to be enlarged, is not an act "prescribed [See section 2 (16)] or allowed by the Code." Obviously the petition is by way neither of appeal nor review under section 114 or 151, and must fail on the authority of *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (1).

It is argued, however, that the Court has inherent powers under section 151 to vary the decree as suggested. It is difficult to consider that the addition of section 151 to the law of Civil Procedure in 1908 can affect the exposition of the law contained in *Kotaghiri Venkata Subamma Rao* v. *Vellunki Venkatarama Rao* (1), but I will for the purposes of argument assume that it may be so.

On this assumption and without attempting to define what inherent power means or to restrict its ambit, I presume it may ordinarily be taken to be something which inheres in a Court by the very fact of its being empowered to exercise any jurisdiction at all, so that it comes either within the express sense of the law or within the consequences that may be gathered from it, as Woodroffe, J., said in *Hukum Chand Boid* v. *Kamalanand Singh* (2). If inherent powers are to be invoked for a solution of the question now before us, will they not tell rather in support of the view that the Court in 1906 had inherent powers to settle finally the disputes between the parties on terms which cannot be disturbed? *Preston Banking Co.*, v. *William Allsup and Sons* (3).

But assuming further that we have the fullest powers untrammelled by the Legislature or the decisions, the present case does not seem to me to be one in which it is necessary to grasp at powers not falling within sections 151 and 152 of the Civil Procedure Code. The lure that it is necessary to interfere for otherwise the Court's efforts to administer justice would be futile, is akin to the invocation of public policy, and that as we all know is an unruly horse. But even that unruly horse is not available to the applicant. I see nothing approaching public policy in favour of adopting the view that the question whether the plaintiffs' next friend colluded with the 8th defendant and the legal effect of any such collusion on the rights of the parties in the decree of 1906, should be determined in the present application.

I express no opinion on the question whether a review application would be open to the petitioner as that question is not directly before us.

The petition will be dismissed with costs.

Petition dismissed.

(2) 33 C. 927 at p. 946; 3 C. L. J. 67.
(3) (1895 1 Ch. 141; 64 L. J. Ch. 196; 12 R. 51; 71 L. T. 708; 43 W. R. 231.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1390 OF 1913.

May 23, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

GUPTAR TEWARI—OPPOSITE PARTY—APPELLANT

versus

DEBI SARAN TEWARI—APPLICANT—RESPONDENT.

Pre-emption—Appeal—Amount increased—No time fixed for payment of additional amount—Payment within reasonable time, validity of.

In a pre-emption decree the plaintiff was ordered to pay a certain sum of money within a limited time. In appeal this amount was increased, but no time was fixed for the payment of this additional amount. The pre-emptor, however, paid it in a month and one day after the decree:

Held, that the payment was within reasonable time and the pre-emptor was entitled to execute his decree.

Execution second appeal from a decree of the Subordinate Judge of Gorakhpur.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—This is an execution case arising out of a pre-emption suit. The

real facts seem to have been that the Court of first instance decreed the plaintiff's suit subject to his making a payment of Rs. 999, Rs. 24 out of which should be paid to the vendee. The Munsif's decree was not strictly in accordance with the judgment. We are, however, not concerned with that now. He subsequently amended it. Whether he had power to do so, we need not decide. The vendee appealed complaining that the consideration allowed ought to be more than that decreed by the Court of first instance. Mr. Rose by his judgment directed that he (the pre-emptor) should deposit the further sum of Rs. 825, including the Rs. 24 directed by the first Court. This was really in addition to the money payable to the prior mortgagee. No time was mentioned when this Rs. 801 should be paid. The decree which was made was a simple dismissal of the appeal, obviously not in accordance with the judgment and in a grossly careless way. The pre-emptor in a month and one day after the decree paid the Rs. 801 into Court, and then claimed possession of the property. The Court to whom application was made for execution of the decree refused to order possession holding that as the money was not paid within the time allowed by the Court of first instance, the applicant was not entitled to execution. It was an absolute impossibility for the pre-emptor to pay the sum of Rs. 801 at the time allowed by the Court of first instance, because it was not until the 12th of April 1912 that any Court had directed that he should pay this sum and the time allowed by the first Court expired on the 4th of April 1912. The matter, therefore, stands thus. The Court has not limited any time within which the Rs. 801 should be paid. The pre-emptor certainly paid it within a reasonable time after he was ordered to pay it. Under the circumstances of the case we think material justice requires that the plaintiff should be entitled to execute his decree. We accordingly set aside the decrees of both the Courts below and order that the application should be restored to its original number on the file of the first Court and determined according to law, having regard to what we have said above. The appellant will have his costs.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2606 OF 1913.

August 25, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

RAMINEEDI RAMACHANDRAYYA *alias* RAMACHANDRA ROW—PLAINTIFF—APPELLANT

versus

BOBBA JANKIRAMAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Alienation of land by guardian for valid debt—Recitals in documents as to its binding nature, whether sufficient—Evidence.

Mere recitals in documents as to the binding nature of debts incurred by a minor's guardian are not enough to charge a minor with liability. There must be evidence *aliunde* to establish it.

Lala Brij Lal v. *Musammat Inda Kunwar*, 23 Ind. Cas. 715; 26 M. L. J. 443 (P. C.); 18 C. W. N. 649; 12 A. L. J. 495; 36 A. 187; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Bezwada, in Appeal Suit No. 45 of 1912, preferred against that of the District Munsif of Narasapur, in Original Suit No. 102 of 1909.

FACTS.—A mother, acting as the guardian of her minor son, sold the *inam* lands in order to pay off debts incurred by her husband and to give maintenance to the paternal grandmother of the minor. The sale-deed recited how the purchase-money was spent. On attaining majority the son sued to have the sale set aside and to get possession restored to him. The first Court found that the entire consideration had not passed and decreed the suit. On appeal the District Judge set aside the decree holding that the recitals in the sale-deed were sufficient evidence of the binding nature of the debt and the money was satisfactorily shown to have been spent by the guardian for purposes binding upon the plaintiff. The plaintiff then preferred a second appeal to the High Court.

Mr. *V. Ramesam*, for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondent.

RAVULAPATI PAPI REDDI *v.* NANDURU PEDA VENKATACHARYULU.

JUDGMENT.—The Subordinate Judge, reversing the decree of the District Munsif, has held that consideration binding on the plaintiff passed to the extent of Rs. 291 out of Rs. 425 recited in Exhibit I and that the circumstances of the case justified the inference that the balance of the sale price was also applied for his benefit. We do not find any evidence on which these findings could be legitimately based. Except for two items (to which Exhibits II and VII C relate) aggregating Rs. 129, there is no evidence beyond recitals in the documents themselves to show that the debts were binding on the minor (plaintiff).

In the case of the suit sale-deed, Exhibit I, the recital is to the effect that the sale was effected (apart from the debts evidenced by Exhibit II) to clear off debts left by the minor's father, which is not at all the case put forward now and which is found to be untrue by the Subordinate Judge. It has been held by the Privy Council in *Lala Brij Lal* v. *Musammat Inda Kunwar* (1) that such a recital should not by itself be treated as evidence of the binding nature of the debt and that there must be evidence *aliunde*. There is no such evidence here. The same principle applies to the recitals in Exhibits II to VII C. There is no evidence of representations made by the plaintiff's mother to second defendant and no evidence of inquiries made by him.

We must, therefore, set aside the decree of the Subordinate Judge and give the plaintiff a decree for recovery of possession of the suit property on payment of Rs. 129 and the declaration sued for.

Each party should bear its own costs throughout.

Appeal allowed: Suit decreed.

(1) 23 Ind. Cas. 715; 26 M. L. J. 443 (P. C.); 18 C. W. N. 649; 12 A. L. J. 495; 36 A. 187; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 73 OF 1913.

August 28, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

RAVULAPATI PAPI REDDI—DEFENDANT—APPELLANT

versus

NANDURU PEDA VENKATACHARYULU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 3 (2 (d) —Agraharam - Grant—Presumption—Burden of proof.

There is no presumption that the grantees of lands situated in an *agraharam* were not possessed of the *kudivaram* right on the date of the grant.

Where, therefore, such grantees allege that land revenue only and not land was the subject of the grant, it is for them in order to oust the jurisdiction of the Civil Court to establish by evidence that the *agraharam* is an estate within the meaning of section 3 (2) *(d)* of the Madras Estates Land Act.

Kidambi Jagannathcharyulu v. *Pidipite Katumbarayudu*, 25 Ind. Cas. 891; 27 M. L. J. 233, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 70 of 1912, preferred against that of the Court of the District Munsif of Bezwada, in Original Suit No. 566 of 1910.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *P. Nagabushanam*, for the Respondent.

JUDGMENT.—The first point for decision is one of jurisdiction, which turns on whether the *agraharam* in which the suit lands lie is an "estate" within the definition of section 3 (2) (*d*) of the Madras Estates Land Act. If it is so, the jurisdiction of the Civil Court is ousted, but this has to be established by the party who seeks to oust the jurisdiction, in this case the appellant (defendant). He has to show in this case:

(1) That the original grant by the *zemindar* was of the land revenue alone.

(2) That the original grantee or grantees were not at the time of the grant possessed of the *kudivaram* of the village.

(3) That the grant was confirmed or recognised by the British Government.

There is no question about (3) and as regards (1), the circumstances in evidence justify the inference that the *zemindar* only granted what he was himself possessed of, *i.e.*, the land revenue only. The difficulty is about (2). Appellant's Vakil admits that he has adduced

no evidence on the point, but he contends that the burden of proof has been wrongly thrown upon him. We must hold, following the decision in the latest case, *Kidambi Jagannathcharyulu* v. *Pidipite in Katumbarayudu*(1), that in deciding whether a village falls within the scope of section 3 (2) (*d*), Madras Estates Land Act, there is *ab initio* no presumption that the grantees were not possessed of the *kudiwaram* at the time of the grant. This has to be proved by the party alleging it: no doubt facts might be proved from which the desired inference could be drawn and in the case of an old grant like the present, no other means of proof would probably be available. But this has not been done in the present case: and we must hold the decision of the lower Appellate Court on the question of jurisdiction to be correct.

As regards the right to eject, the findings of the lower Appellate Court conclude the case.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 25 Ind. Cas. 891; 27 M. L. J. 233.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 568 OF 1913.

June 11, 1914.

Present:—Mr. Justice Rafique.

GAYA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHOTOO AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), s. 5—Omission of respondent's name in memorandum of appeal—Bona fide *mistake, effect of—Admission of receipt of consideration in mortgage-deed, whether admissible in evidence.*

Where the omission of the name of a respondent from the memorandum of appeal is due to an oversight and *bona fide* mistake, the Court can extend the period in favour of the appellant under section 5 of the Limitation Act.

Jamna v. *Ibrahim*, A. W. N. (1888) 58, *Noothi Subbarayadu* v. *Dara Lingayya Garu Suryapracharalingam Garu*, 18 M. L. J. 461, *Corporation of the Town of Calcutta* v. *Anderson*, 10 C. 445, referred to.

An admission of the receipt of consideration contained in a mortgage-deed is admissible in evidence against a purchaser by private treaty.

Manohar Singh v. *Sumirta Kuar*, 17 A. 428; A. W. N. (1895) 93, *Behari Lal* v. *Makhdum Baksh*, 18 Ind. Cas. 744; 11 A. L. J. 221; 35 A. 194, referred to.

Second appeal from the decree of the District Judge of Allahabad.

Messrs. *W. Wallach* and *Haribans Sahai*, for the Appellants.

Mr. *Ladli Prasad Zutshi*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought to enforce a mortgage. It appears that one Alopi executed a deed of mortgage in respect of a house on the 25th of June 1888 in favour of Sham Lal and Gaya Prasad. After the death of the mortgagor and one of the mortgagees, *viz.*, Sham Lal, the surviving mortgagee, Gaya Prasad, instituted a suit in the Court of the Munsif of Allahabad on the 29th of May 1909 to recover the mortgage money by sale of the mortgaged house. He joined with him his sons as co-plaintiffs on the allegation that they were members with him of a joint undivided Hindu family. The claim was brought against the heirs of Alopi and some transferees from the latter. The claim was resisted on the ground, among others, that Alopi did not execute the mortgage-deed in suit nor did any consideration pass on it. On the 2nd of August 1909 the learned Munsif dismissed the suit. The plaintiffs preferred an appeal to the District Judge who remanded the case on the 29th of April 1910. The defendants appealed to this Court from the order of remand. They were successful in their appeal and the order of the first Court was restored. The judgment of this Court was delivered on the 4th of November 1911. On the 23rd of February 1912 one Babu Lal purchased the house in question from *Musammat* Ram Kali. In April 1912 the plaintiffs filed an application for a review of the judgment of the Bench of this Court which had dismissed their claim on the 4th of November 1911. They contended that the Court should have set aside the order of remand if it was erroneous, but should not have dismissed the plaintiffs' claim and restored the decree of the first Court. On the 4th of June 1912 the application of the plaintiffs was accepted and the decree of this Court dated the 4th of November 1911 was modified. It was held that the order of remand made by the District Judge on the 29th of April 1910 could not be sustained, and

it was accordingly set aside. The case was remanded to the District Judge for disposal according to law. It should be observed here that Babu Lal was brought on the record as respondent in the case during the pendency of the application for review. The learned District Judge disposed of the appeal first by a judgment dated the 7th of December 1912, by which he decreed the claim of the plaintiffs. Subsequently Babu Lal appeared before the District Judge and said that no notice of the hearing of the appeal was sent to or served upon him and the decree made in the appeal should not be held to be binding upon him. The learned District Judge found that by some mistake notice had not been sent to Babu Lal and re-heard the appeal against him. He wrote his second judgment on the 12th of February 1913 and came to the conclusion, that the passing of consideration on the mortgage in suit had not been proved and he, therefore, dismissed the claim. The plaintiffs preferred an appeal to this Court on the 24th of May 1913. They did not implead Babu Lal as a respondent in the appeal. About two and half months afterwards an application, supported by an affidavit, was filed on behalf of the plaintiffs asking to have the name of Babu Lal brought on the record among the respondents, on the ground that his name had been left out by an oversight. The application was allowed by a learned Judge of this Court subject to any objections that may be taken by Babu Lal at the hearing of the appeal.

Babu Lal accordingly takes a preliminary objection to the appeal against him on the ground that so far as he is concerned, the appeal is barred by limitation. On the other hand the contention for the plaintiffs-appellants is that the omission of the name of Babu Lal from the memorandum of appeal was due to an oversight on the part of the clerk of Mr. Wallach and under section 5 of the Limitation Act the period should be extended against Babu Lal. In support of this contention the learned Counsel for the plaintiffs-appellants relies on *Jamna* v. *Ibrahim* (1) and *Noothi Subbarayadu* v. *Dara Lingayya Garu Suryapracharalingam Garu* (2). On the other hand the learned Counsel for Babu Lal cites the case of *Corporation of the Town of Calcutta* v. *Anderson* (3). All that the Calcutta case lays down is that sufficient cause must be shown to the satisfaction of the Court before the provisions of section 5 of the Limitation Act can be applied. This proposition of law cannot be disputed. On the other hand the Allahabad and Madras cases show that under circumstances similar to those of the present case section 5 of the Limitation Act was applied. I think that the affidavit on behalf of the plaintiffs-appellants shows clearly that the omission of the name of Babu Lal from the appeal was due to a *bona fide* mistake. Under section 5 of the Limitation Act I extend the period in favour of the plaintiffs-appellants.

Now as to the merits of the appeal, it is contended on behalf of the plaintiffs-appellants that the learned Judge under a misapprehension of law came to the conclusion that the recital as to the passing of consideration contained in the deed of mortgage was no evidence against Babu Lal, the purchaser of the property. It is further said that the learned Judge ignored the evidence on the point in the case. It appears that the learned Judge relied upon *Manohar Singh* v. *Sumirta Kuar* (4) as to the effect of the recital made in the deed about the passing of consideration. In *Behari Lal* v. *Makhdum Bakhsh* (5) it has been held recently by a Bench of this Court that the admission of the receipt of consideration contained in a mortgage-deed is admissible in evidence against a purchaser by private treaty. In the last mentioned case the case of *Manohar Singh* v. *Sumirta Kuar* (4) was considered, but not followed. The learned Judge of the Court below was, therefore, in error in holding that the admission of the receipt of consideration contained in the mortgage-deed was not admissible in evidence. He also ignored the direct evidence in the case. In his first judgment of the 7th of December 1912 he referred

(1) A. W. N. (1888) 58.

(2) 18 M. L. J. 461.
(3) 10 C. 445.
(4) 17 A. 428; A. W. N. (1895) 93.
(5) 18 Ind. Cas, 744; 35 A. 194; 11 A. L. J 221.

to the depositions of Gaya Prasad and Mahabir Prasad and believed them as to the passing of consideration for the bond in suit, but he made no reference to them in his second judgment. Moreover, he says that the deed in suit was given in lieu of a prior deed, which the plaintiffs have not produced nor accounted for its non-production. As a matter of fact the prior deed is on the record. The plaintiffs-appellants contend that the case should be remanded to the Court below under Order XLI, rule 25, Civil Procedure Code, for disposal according to law. I think that is the proper course to adopt in the present case, vide *Yarali* v. *Hashmat Bibi* (6).

I, therefore, remand the case to the lower Appellate Court with reference to the remarks made above for the trial of the issue, whether consideration passed on the mortgage-deed in suit. The learned Judge will decide this issue upon the evidence already on the record. Ten days will be allowed for objections on return of the findings.

Case remanded.

(6) A. W. N. (1897) 90.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1195 OF 1913.

June 24, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

ABDUL HAMID—PLAINTIFF—APPELLANT

versus

MASEETULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption, suit for—Alternative relief, whether can be claimed—Suit based on Muhammadan Law—Custom proved—Suit, whether to be decreed.

A pre-emptor ought to be allowed to base his case in the alternative, on the Muhammadan Law or custom. Therefore, a suit for pre-emption based on Muhammadan Law can be decreed without an amendment, if it is proved that a custom of pre-emption prevails and the plaintiff has brought himself within it.

Second appeal from the decree of the Additional Judge of Moradabad.

Dr. *Satish Chandra Banerji* and Mr. *Muhammad Ishaq*, for the Appellant.

Mr. *B. E. O'Conor* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The sale dates back to the year 1910 and the present suit was instituted the same year. The plaintiff based his suit on Muhammadan Law. When the suit had been pending for some time (apparently as a reply to paragraph 2 of the written statement), plaintiff applied to the Court for leave to amend the plaint by claiming pre-emption under Muhammadan Law and in the alternative under the *Wajib-ul-arz*. The Court refused to grant this amendment on the ground that it would alter the nature of the cause of action. The Court then proceeded to try the case as a case based on Muhammadan Law. It found that the conditions of Muhammadan Law had not been fulfilled and dismissed the plaintiff's suit. The plaintiff appealed. The learned District Judge held that an application for amendment might have been made, but it was made altogether too late. It seems to have assumed that a custom of pre-emption did prevail and then dismissed the suit without deciding any other issues. It held that inasmuch as a custom of pre-emption prevailed a claim under the Muhammadan Law could not be sustained.

In our opinion where a plaintiff seeks pre-emption, he ought to be allowed to put his case in the alternative and we think that in the present case the amendment should have been allowed, but even without an amendment the Court could have decreed the plaintiff's claim under the custom if it found that such a custom prevailed and the plaintiff brought himself within it. The real object of the suit was to get possession by pre-emption and such a course could not possibly have taken the other side by surprise because it was the defendant who was setting up the existence of the custom in order to defeat the plaintiff's claim under the Muhammadan Law. In effect the judgment of the lower Appellate Court has refused the plaintiff a decree for pre-emption on the ground that a custom exists under which he has a right to get it. We wish it clearly to be understood that in the foregoing remarks we are in no way expressing any opinion on the merits of the case. For example, the Court of first instance has held that the plaintiff

was offered this property in the first instance and refused to take it. If this should turn out to be the fact, the plaintiff cannot possibly succeed either under the Muhammadan or Customary Law. Another point which has not been gone into by the Courts is whether or not, assuming that there is a custom of pre-emption prevailing in the village, it applies to the property the subject-matter of the present suit. We may point out that it does not follow that because there is a custom of pre-emption amongst the *zemindars*, there is also a custom of pre-emption prevailing between *muafidars*. An extract from the *Wajib-ul-arz* might under certain circumstances be sufficient to prove the existence of the custom between the *zemindars* while it would be quite insufficient to prove the existence of the custom between *muafidars*.

Before finally deciding the appeal we think it desirable to send down certain issues to the Court below. We accordingly refer the following issues:

(1) Did the plaintiff refuse to purchase the property?

(2) Does any custom of pre-emption prevail which applies to the property the subject-matter of the suit and if so, is the plaintiff entitled under that custom to a decree in respect of the property which formed the subject-matter of the two sale-deeds?

(3) Did the plaintiff perform the conditions required by the Muhammadan Law?

(4) What was the real price?

If the Court finds it convenient without dislocating its business it will dispose of these issues as soon as possible. The parties may adduce further evidence relevant to the second issue but to no other issue. On return of the findings the usual ten days will be allowed for filing objections. The case will be put up early on return of the findings.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 375 OF 1913.

October 6, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

ANANTHA IYER—PLAINTIFF—APPELLANT

versus

Mittadar RAMASWAMI IYER—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 58 (a)—Mortgage—Document styled Diggu Bhoghyam—*Construction—Transfer of interest in immoveable property.*

A document styled as Diggu Bhoghyam ran as follows:

Diggu Bhoghyam executed and delivered on 10th September 1863, corresponding to 27th Avani of Rudirodhgari year, in favour of Ranga Rayar Avergal *Zamindar*.....by Varadayyan and Anantayyan, sons of.....as follows: "A Cowle has been granted for the land in the Cusbah Kandeli, village named Nagari Divitkaran Punja, which was granted as Manyam to us by you, (Here follow details of the land) to Chinna Gownden, son of.....for Rs. 12-4-0 per annum. My father put that into your possession on 29th Chithrai of Kalayukthi year (1858) and executed a document. In that matter you have still to enjoy it from the current year Rudirodghari (1863) to Prabhava (1867-1868). Besides that, Rs. 55 have again been received this day on the security of the said land. This shall bear interest from to-day according to law. For the total of the principal and interest you shall enjoy the said land for 13 years from Vibhava (1868-1869) up to Vikaram (1880-1881) and put the land into our possession at the cultivation season in Chitrai month of Vishu. That is to say, Rs. 12-4-0 being the *thirva* on the aforesaid land should be collected from the aforesaid Chinna Gownden. Even though the said lands should lie waste owing to act of God or the State during the said years, you need not grant any remission to him. This is Diggu Bhoghyam executed of our own free will":

Held, that the document is a mortgage, as there is a transfer of an interest in specific immoveable property within the meaning of section 58 of the Transfer of Property Act, and not merely an assignment of the income for a period.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 312 of 1912, preferred against that of the District Munsif of Tirupathur, in Original Suit No. 13 of 1911.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *K. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—The question is whether the lower Courts are right in holding that Exhibit A, the contract between the parties which is the basis of the suit, is not a mortgage.

The document is described as Diggu Bhoghyam. Bhoghyam is an ordinary Telugu word for an usufructuary mortgage, and it was stated by the Vakil for the appellant that Bhoghyam is the term generally used in the North Arcot District for an usufructuary mortgage for a fixed term within which the whole debt is discharged. These conditions are to be found in the present document which has been translated thus:—"Diggu Bhoghyam executed and delivered on 10th September 1863, corresponding to 27th Avani of Rudirodghari year, in favour of Ranga Rayar Avergal *Zamindar*.....by Varadayyan and Anantayyan, sons of... ...as follows:—'A Cowle has been granted for the land in the Cusbah Kandeli, village named Nagari Divitkaran Punja, which was granted as Manyam to us by you, (here follow details of the land) to Chinna Gownden, son of.....for Rs. 12-4-0 per annum, is it not so? My father put that into your possession on 29th Chithrai of Kalayukthi year (1858) and executed a document. In that matter you have still to enjoy it from the current year Rudirodghari (1863) to Prabhava (1867-1868.) Besides that, Rs. 55 have again been received this day on the security of the said land. This shall bear interest from to-day according to law. For the total of the principal and interest you shall enjoy the said land for 13 years from Vibhava (1868-1869) up to Vikrama (1880-1881) and put the land into our possession at the cultivation season in *Chitrai* month of Vishu. That is to say, Rs. 12-4-0 being the *thirva* on the aforesaid land should be collected from the aforesaid Chinna Gownden. Even though the said lands should lie waste owing to act of God or the State during the said years you need not grant any remission to him. This is the Diggu Bhoghyam executed of our own free will.'"

On the 18th September Ranga Rayar executed a counterpart of Exhibit A to the executant of Exhibit A. The counterpart agreement is Exhibit A (1).

The lower Court, as we understand the judgment, holds that Exhibit A is not a mortgage on two grounds: *viz.*, (1) because the creditor was not placed in possession of the property to enjoy rents and profits until his claim was satisfied and (2) because the instrument does not give the creditor the right to proceed against the land or to enter on it in the event of default of payment of the rent as provided in the document. The cases *Abdulbhai* v. *Kashi* (1) and *Nidha Sah* v. *Murli Dhar* (2) are cited in the judgment apparently as analogous cases, but as has been often observed, a decision as to the nature of the transaction in one document is little or no guide for construing another document executed under a different set of circumstances. There are, of course, points of difference between the document now in question and those considered in the cases cited which the learned Vakil for the appellant has relied upon as distinguishing those cases from the present. It seems to us that the construction of Exhibit A has to be decided with reference to the definition of a mortgage in section 58 of the Transfer of Property Act and the particular facts of the case. As to the first point upon which the lower Court relies, the property was already in the possession of a tenant and the mortgagee was given such possession as the case would admit of, *viz.*, the right to receive rent from the tenant and although there is no authority in so many words that he should retain possession until the debt is paid, it is really to be implied from the fact that the parties appear to have agreed upon the time which would be required to pay off the debt and have entered that period in the instrument. Such an arrangement would not alter the true nature of the document. It might nonetheless be an usufructuary mortgage or if not, an anamolous mortgage under section 58 of the Transfer of Property Act.

The second point would not, we think, be conclusive against the instrument being a mortgage. The question really is whether Exhibit A evidences a debt and the transfer of an interest in specific immoveable property as security therefor. As to there being a debt we think there can be no doubt. Interest is provided for on the

(1) 11 B. 462.

(2) 25 A. 115 (P. C.); 30 I. A. 54; 5 Bom. L. R. 111; 7 C. W. N. 289.

amount borrowed and this would itself indicate that the relationship of debtor and creditor existed during the mortgage period. Whether the interest transferred is the right to receive the rent of the land specified in the document or the right to possession, in either case there was a transfer of an interest in specific immoveable property within the meaning of section 58 (*a*) of the Transfer of Property Act. That the interest so transferred was intended to be a security for the debt is expressly stated in the document itself. We find ourselves unable to accept the contention for the respondent that there was merely an assignment of rent for a period and no transfer of an interest in specific immoveable property. The learned Vakil relied chiefly upon the Privy Council decision in *Nidha Sah* v. *Murli Dhar* (2) in this connection, but as the document therein dealt with is not set out in full in the report, it is impossible to say that the terms were sufficiently similar to justify the application of the ruling to this case. On all points, therefore, it seems to us that the document Exhibit A is essentially a mortgage. A comparison of Exhibit B (the prior document mentioned in Exhibit A) with Exhibit A also furnishes internal evidence that it was the intention of the parties to enter into a mortgage transaction. The first document was merely called a debt-bond and was admittedly not a mortgage. The second was described as a mortgage and contains, as we have said, the essentials of a mortgage. The provision that the land was to be security for the debt is specially important in this connection as illustrating the intention of the parties. In such circumstances it is but reasonable to assume that the parties intended to create a mortgage.

We, therefore, set aside the decrees of the lower Courts and remand the suit to the District Munsif for disposal on the other issues in the case. Costs will abide the ultimate result of the suit.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPLICATION.

May 28, 1914.

Present:—Mr. Justice Chaudhuri.

In the matter of THE INDIAN ARBITRATION ACT

AND

In the matter of ARBITRATION

BETWEEN

JAGAT HARI-BEPIN BEHARY PODDAR —PLAINTIFFS

versus

MORAN & CO.—DEFENDANTS.

Arbitration—Arbitrator going beyond reference—Documents acted upon not disclosed—Award.

An ward is bad if the arbitrators go beyond the scope of reference and decide disputes not submitted to them.

An arbitrator acts illegally if he does not disclose to the parties the documents upon which he acts.

FACTS.—There was a contract between Jagat Hari and Moran and Co. by which the former had contracted to supply 700 bales of jute. These were delivered and were found to be of inferior quality. The plaintiffs asked for an opportunity to make another tender which was granted to them, and they delivered 447 bales under the second contract. These were also found to be of inferior quality and at the invitation of the plaintiffs the matter went for arbitration before the tribunal of the Chamber of Commerce, but later in submitting their case the plaintiffs questioned the competency of the Chamber to try their case.

The grounds of the plaintiffs' objections were—(1) that the arbitrators had gone beyond the scope of the reference, inasmuch as the dispute arising about 447 bales was not covered by the original contract, but was upon a new contract, and that there never had been a submission to the arbitration of the Bengal Chamber of Commerce upon the dispute arising on the second contract; (2) that the plaintiffs did not know the rules nor had they any notice of such rules; (3) that several of the rules were against public policy and against the principles of justice.

The plaintiffs obtained a Rule against the defendants to show cause why the award of the Chamber should not be set aside.

Messrs. *B. C. Mitter* and *Langford James*, for the Respondents, showed cause.

Mr. *C. R. Das* (and in his absence Messrs. *S. R. Das* and *H. D. Bose*), for the Plaintiffs, in support of the Rule.

Mr. *Mitter*:—In the first place, what is meant by reference to arbitration? It means

a contract between the parties contained in the submission that whatever decision the arbitrators would give will be accepted, and it is upon that footing that awards are enforceable and used to be enforced by suits. That is in the nature of a binding contract. It is difficult to see where the question of public policy comes in. The question of public policy can only be applied to cases where the interests of the public are in some manner involved; for instance, the bribery of an officer of Court is a question of public policy and cannot be allowed. But what difference does it make to the public if the applicants in this case are made to refund to my clients Rs. 1,500 (which my client paid in advance for the 700 bales)? It is a dispute between the parties and it concerns them and them alone. It has no effect on the administration of justice. I cannot see the force of the argument which says that because an arbitrator is not bound to hear evidence or can decide in the absence of both parties, that is against good morals. What is against good morals? The parties have chosen their own methods and the public are not affected in the least. There is nothing illegal in two persons agreeing that their disputes were to be settled by *A* without taking any evidence at all. At the most it is an irregularity or informality that is cured by the Bengal Chamber Rule 25 which says: "Nor shall any award be set aside or varied by reason of any informality, omission, delay, mistake or error."

Again, as the plaintiffs were willing to refer the dispute to arbitration, then all those arbitration rules of the Bengal Chamber must be taken to be part of their agreement to refer, whether they had notice of those rules or not.

In *Abdul Aziz Khan* v. *Appayasami Naicker* (1) it was held on the question of title to property that though the law was not a good one, yet since so many titles to property had been accepted under the law, the Court was not going to depart from the practice. I invite your Lordship to adopt the same procedure in this case. These arbitrations have been going on for many years to the satisfaction of the majority of the commercial community.

Mr. *Das*:—I want to deal first of all with the grounds upon which I can get the award set aside, and in this connection I refer to Halsbury's Laws of England, Volume I, page 479.

One of the grounds taken here apart from the facts of the case is that evidence has been taken without my knowledge. Another ground is that the names of the arbitrators were not disclosed. My friend argues that I cannot take these points under the Chamber rules. I show that if you rely upon these rules as part of the agreement to refer, then these rules, inasmuch as they preclude me from exercising my rights under section 28 of the Contract Act, are void and not a part of the agreement and, therefore, I am entitled to get it set aside. If the rules are taken to be part of the agreement, their net result would be that they would take away my right to come to this Court and to ask for stay of proceedings by filing a suit.

One of the question which your Lordship has to consider is whether the agreement by which the parties agreed that the names of the arbitrators shall not be disclosed, is binding upon me or not.

[MR. JUSTICE CHAUDHURI.—What name are you entitled to? The Chamber is a corporate body and you are not entitled to any names designate.]

Mr. *Das*:—My answer is that the Contract Act does not contemplate arbitration by a corporate body.

[MR. JUSTICE CHAUDHURI.—The decisions are against you.]

Mr. *Das*:— No. The decisions which have been shown to your Lordship are decisions of arbitration by fluctuating bodies.

Again, the award was signed by arbitrators and the Registrar and it had nothing to do with the Chamber.

But the rules do not provide for the tribunal of arbitration to act on behalf of the Chamber or that the Registrar is to sign on behalf of the tribunal. On the contrary the rules make a distinction between the tribunal and the Chamber.

JUDGMENT.—In this matter the applicants were a firm known as Jagat Hari-Bepin Behary Poddar. They objected to an award filed by the Bengal Chamber of Commerce and they sought to restrain Messrs. Moran and Co., respondents, from enforcing the same. The contract upon which this matter arose was one No. 3540, dated the 15th October 1913. The petitioners sold

(1) 27 M. 131 (P. C.); 31 I. A. 1; 18 C. W. N. 186; 6 Bom. L. R. 7.

1,000 *kutcha* bales of Jamurki jute to the respondents. Under that contract the delivery was to be within November at the Juzdar Press of the Ludlow Manufacturing Co. Three hundred bales under this contract were delivered and accepted and 700 bales were delivered on the 27th November, but were rejected as being of inferior quality. There was no contest between the parties that the quality of this lot was inferior. Dispute, however, arose relating to the bales so delivered on the 5th of January 1914. The petitioners wrote a letter to the respondents to the effect that they were agreeable to take back the 700 bales rejected, provided they were allowed to deliver equal quality according to the terms of the original contract. They also agreed that in case the second delivery, meaning thereby the proposed delivery, was not up to the contract quality they would take the jute back without question. They enclosed a bill of lading for 447 bales for delivery to the Ludlow Manufacturing Co. in place of 700 bales and offered to deliver the remaining 253 bales within a fortnight. This offer was accepted by the respondents in their letter of the 6th of January 1914, which provided that if the jute the petitioners then offered to deliver was not satisfactory they were to take it back without further question and if questions of inferior quality arose, the jute was to be inspected by their Mr. Alexander. Four hundred and forty-seven bales were then taken to the Juzdar Press and they were rejected on the ground of inferior quality. The petitioners asserted in their letter of the 23rd January 1914 that the jute they had sent was up to the contract quality and they said that the matter be referred to the Bengal Chamber of Commerce. Dispute in the meantime had arisen about the return of the original 700 bales and the respondents claimed the refund of Rs. 14,384-8-6, which they had paid in advance for the 700 bales which had been originally delivered. The respondents, however, refused to refer the matter to the arbitration of the Bengal Chamber of Commerce until the money was refunded and they wrote saying that they would charge godown rents as against the petitioners for the 700 bales as well as 447 bales from the respective dates of delivery, that they would charge interest upon the amounts which had been paid and also the handling charges. The petitioners alleged that interest ought not to be charged, that they should not be made liable to any further charges inasmuch as the respondents-buyers had refused to deliver the 700 bales although the petitioners were ready and willing to take back the 700 bales. Mr. Alexander went to the Press and after inspection rejected the lot in question as being of inferior quality. A letter was written to the petitioners by the respondents, after which they were willing to refer the matter to the Chamber. The petitioners thereupon said that they had placed the matter in the hands of their Solicitors. Thereafter Messrs. Moran and Co. wrote to the Registrar stating their case and the points upon which they asked the decision of the Chamber. The Registrar of the tribunal of the Bengal Chamber of Commerce wrote to the petitioners on the 5th of February about the matter having been referred by the respondents to the Chamber. The petitioners replied on the 12th February that the arbitration had become impracticable and that they could not unhesitatingly refer the question to the Chamber as it was a question of the quality of the lots delivered, which had been mixed up. They, therefore, said that they would defer their answer to the case made by the respondents until they heard from the tribunal again. The Registrar then wrote to the petitioners on the 25th February 1914 that the Court as constituted required a statement by the 4th March. The petitioners sent a reply to that letter which bore no date—which was apparently received by the Registrar on the 26th February—the substance of that letter being that they reserved their statements pending the decision of the first point they had raised. They, however, sent Rs. 250 as arbitration fee to the Chamber. The Registrar then wrote again on the 4th March to the petitioners as follows: "I am instructed by the Court, which has been constituted to adjudicate the above dispute, to direct you, pending the decision of the point raised by you, to submit a full and complete statement regarding all matters of dispute between Messrs. Moran and Co. and yourself in connection with the present case." The letter then proceeded that unless the statements

were sent by the 11th the arbitration would proceed. The petitioners asked for time and finally 16th March was the date fixed for sending their answer. They sent in their letter in which the first point they raised was that the arbitration could not be held. In the meantime the Registrar wrote to the parties on the 13th March to arrange for an inspection and certain bales were selected by the parties and left for inspection of the arbitrators. The petitioners alleged that they had been obliged owing to the circumstances to make the best of the circumstances, that they were not allowed to pack properly and that they did not think that the selection they had made was a proper one. It was, however, noticeable that on the 4th March when the Registrar wrote the letter to the petitioners that pending the decision of the point raised the petitioners would have to submit a full and complete statement, he also wrote a letter to the respondents on that date asking for statements from the Ludlow Manufacturing Co. and the Managing Agents of the Press House and insisted that that statements should be on sworn affidavits. No intimation was sent to the petitioners that the arbitrators had requested the other side to send in their sworn statements and apparently at no time were they informed that the arbitrators received such statements and that they had used them. The affidavit was dated the 9th March and was apparently seen by the respondents and the arbitrators. The award was filed in Court on the 2nd April 1914 and was apparently made on the 24th March 1914.

The petitioners take the following grounds: (1) That the arbitrators have gone beyond the scope of the reference, inasmuch as the dispute arising about 447 bales was not covered by the original contract, but was upon a new contract between the parties and there never has been a submission to the arbitration of the Bengal Chamber upon the dispute arising on the second part; (2) that they did not know the rules nor had they any notice of such rules; (3) that several of the rules are against public policy and against the elementary principles of justice.

I think that the award is bad on the first ground.

As regards the last ground I think that the arbitrators have disregarded the law. How in a judicial proceeding the documents used by the arbitrators cannot be disclosed to the parties I do not understand. In conclusion I make the Rule absolute so far as this application is concerned and set aside the award with costs.

Rule made absolute.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 64 OF 1913.

August 26, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

GOLLAMUDI VENKATASUBBA RAO—PLAINTIFF—APPELLANT

versus

CHAPARALA ROSAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145—Surety, liability of—Bond to restore property attached before judgment—Dismissal of suit—Appeal.

Section 145, Civil Procedure Code, deals with procedure, not with the extent of the surety's liability.

A bond given for release of property attached before judgment becomes defunct on the suit being dismissed, and the liability under the bond comes to an end. An order terminating the attachment is not necessary.

There is nothing in section 145, Civil Procedure Code, to restrict the right of appeal only to sureties. Where there is a refusal to enforce liability, other parties interested may appeal.

Appeal against the order of the District Court of Guntur, in Appeal Suit No. 191 of 1912, dated 18th February 1913, preferred against that of the Principal District Munsif of Guntur, in Execution Petition No. 1280 of 1911 (in Original Suit No. 676 of 1907), dated 15th November 1911.

Mr. *L. S. Veeraraghava Aiyar*, for Mr. *L. A. Govindaraghava Aiyar*, for the Appellants.

Mr. *S. Natesa Sastri* (with him Mr. *R. Vembu Aiyar*), for the Respondents.

JUDGMENT.—A preliminary objection has been made to the hearing of the appeal on the ground that the order in question, one refusing to enforce a security bond against the sureties, is not appealable. It is urged that the last portion of section 145 of the Civil Procedure Code justifies only an appeal by the surety. We do not find anything in the wording

to support this restriction and cannot recognise it.

The question on the merits is whether the bond which appellant seeks to enforce, is enforceable for the amount decreed to him in appeal, or became defunct when his suit was dismissed in the Court of first instance. The language of the bond is general, the guarantee being for the payment of any amount which may be decreed against defendant in this litigation (Thava), though it was, of course, executed to the Court of first instance. Section 145 deals with procedure, not the extent of the surety's liability. So also the cases cited, except *Sheik Suleman* v. *Shivram Bhikaji* (1). In that case the bond was worded rather more definitely than it is in the present. But the reasoning regarding the surety's liability under it supports respondents' contentions here. The proper ground of decision, however, is clearly that the bond before us was given for release of property attached before judgment and that, as such an attachment would be terminated on the suit being dismissed by the Court of first instance, liability under the bond substituted for the attachment would terminate then also. It is urged that under section 485 of the Code in force at the date of the execution of the bond, with reference to which this case must be decided, an attachment would not terminate except on the Court's passing an order removing it. It does not follow the liability under the substituted bond would continue until an order discharging it was passed; and there is in any case nothing to rebut the presumption, which we are prepared to make, that the Court performed its duty and passed such an order. Respondent's liability having terminated on the date of the dismissal of the suit by the Court of first instance, the lower Court's decisions in their favour were right.

The appeal against appellate order is dismissed with costs.

Appeal dismissed.

(1) 12 B. 71.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 682 OF 1913.

June 10, 1914.

Present:—Mr. Justice Chamier.

NOBIN CHANDER BOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GADDA BERHAI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 69, 70—Landlord and tenant—Costs of keeping premises clean—Tenant, whether liable—Suit to recover costs—Jurisdiction.

A landlord is not entitled either under section 69 or section 70 of the Contract Act to recover from his tenant the costs of sweepers and *bhishtis* employed under an order from the Municipal Board to keep the premises clean.

Such a suit is neither for an enhancement of rent nor for the recovery of dues under section 13 of the Provincial Small Cause Courts Act and is cognizable by a Small Cause Court.

Second appeal from the decree of the Additional Subordinate Judge of Cawnpore.

Mr. *A. P. Dube*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—The plaintiffs in this case are the owners of an *ahata* in the city of Cawnpore which contains a number of houses, one of which is occupied by the defendant. The plaintiffs in obedience to an order or notice issued by the Municipal Board of Cawnpore, issued probably under section 104 of the Municipalities Act, appointed two sweepers and a *bhishti* to keep the place clean. The plaintiffs' case is that all the occupants of the houses, including the defendant, are liable to contribute towards the wages of the sweepers. The present claim is for a sum of Re. 1-5-0. The suit was instituted in the Court of Small Causes at Cawnpore; but on the objection of the defendant the plaint was returned for presentation to the proper Court. The Judge of the Court of Small Causes gave no reason for holding that the case was not within the cognizance of a Court of Small Causes, except that it appeared to him to be a suit for enhancement of rent. To my mind it is obviously not a suit for enhancement of rent, and the learned Counsel for the plaintiffs in the Court is unable to suggest that any Article of the second Schedule of the Provincial Small Cause Courts Act could possibly apply to the case except Article 13. He suggests that the suit

is one for dues within the meaning of that Article. I hold that it is nothing of the kind and that the suit is triable by a Court of Small Causes. The suit was, however, tried by the Munsif and decided in favour of the plaintiffs. The defendant appealed. The District Judge held that the plaintiffs had no right of action against the defendant and he dismissed the suit. The plaintiffs have filed this second appeal. On the case being called on, an objection was put forward on behalf of the defendant-respondent that the suit being one of the nature cognizable by a Court of Small Causes, no second appeal lay. As I have already stated there can be no doubt that the suit ought to have been tried by a Court of Small Causes. Therefore, it is one of the kind referred to in section 102 of the Code of Civil Procedure. Then it was suggested that if this Court gave effect to this objection, it should set aside the proceedings altogether and direct that the plaint be returned for presentation to the proper Court. It is open to me, no doubt, to treat the memorandum of appeal as an application for revision. But if I do this the suit will be tried by a Court of Small Causes and inevitably there will be an application to this Court under section 25 of the Provincial Small Cause Courts Act, and this Court will have to decide whether the suit was maintainable. I have heard both sides and it appears to me that it would be waste of time and money to order a fresh trial in this case. It is suggested that the suit is maintainable against he defendant either under section 69 or 70 of the Contract Act. It seems to me that neither section applies. I, therefore, decline to treat this appeal as an application for revision. The appeal is not maintainable. I dismiss it, but make no order as to costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 662 OF 1913.

October 1, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

KAMARAVUTU MRUTYUNJAYUDU—DEFENDANT—APPELLANT

versus

Raja Saheb Maharban-i-Dostan Sree Raja RAVU VENKATA KUMARA MAHIPATHI SURYA ROW BAHADUR, SIRDAR, RAJAMUNDRY SIRCAR AND RAJA OF PITTAPURAM—PLAINTIFF—RESPONDENT.

Grant—Service Inam—*Right of resumption*—Nakesh *service—Grant prior to Permanent Settlement—Distinction between service grant and grant burdened with service.*

Where the grant of certain lands as *inam* is (1) in consideration of past services done, (2) for enjoyment by the grantee from son to grandson, (3) and stipulates for the payment of *kattubadi* at Rs. 3 per annum, and (4) the service is *nakesh*, meaning thereby personal: the grant is resumable when the services are no longer required.

Per *Sadasiva Iyer, J.*—The question whether a grant is resumable or not, has to be decided on consideration of all the circumstances appearing in the evidence, including the nature of the service, the terms of the grant and the question whether the service is attached to it. A grant burdened with service even is liable to resumption, if the grantor by appropriate words reserves to himself the right of resumption.

Lakhamgarda v. Keshav Annaji, 28 B. 305; 6 Bom. L. R. 364; *Sanniyasi Razu v. Salur Zamindar*, 7 M. 268, *Mahadevi v. Vikrama*, 14 M. 365, *Vadisapu Appandora v. Vyricherla Veerabhadraraju Bahadur*, 12 Ind. Cas. 487; 10 M. L. T. 391; (1911) 2 M. W. N. 406, *Raja Lelanund Singh Bahadur v. Government of Bengal*, 6 M. I. A. 101; 4 W. R. 77 (P. C.); 1 Sar. P. C. J. 505; 1 Suth. P. C. J. 248; 19 E. R. 38; *Radha Pershad Singh v. Budhu Dashad*, 22 C. 938, *Karupamaya Ananga Bheema v. Sondhi Prahaladha Bissoyi Ratno*, 21 Ind. Cas. 833; (1914) M. W. N. 179; 14 M. L. T. 562, followed.

Where the service for the discharge of which a grant is made is styled "Nakesh" and is purely personal to the grantor, the grant is more or less of the nature of a *darmilla* grant; and if it was made prior to the Permanent Settlement, it is resumable by the grantor when such service is no longer required.

Alexander John Forbes v. Meer Mahomed Taquee 13 M. I. A. 438; 14 W. R. 28 (P. C.); 5 B. L. R. 529; 2 Suth. P. C. J. 351; 2 Sar. P. C. J. 588; 20 E. R. 614; *Leelanund Singh v. Manorunjun Singh*, I. A. Sup. Vol. 181; 3 C. 251; 2 Ind. Jur. 493; *Venkata Narasimha Appa Rao Bahadur v. Sobhanadri Appa Rao Bahadur*, 29 M. 52 (P. C.); 16 M. L. J. 1; 1 M. L. T. 3; 3 C. L. J. 1; 3 A. L. J. 55; 8 Bom. L. R. 1; 10 C. W. N. 161; 33 I. A. 46, distinguished.

Per *Ayling, J.*, dissenting)—Such a grant is a grant merely burdened with service, and not in lieu of wages, and is not liable to resumption so long as the grantor is willing to perform the services. In

cases of such grant, there is no distinction between services whether public or private.

Second appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Appeal Suit No. 113 of 1911, preferred against that of the District Munsif of Peddapur, in Original Suit No. 608 of 1909.

Mr. *P. Somasundaram*, for Mr. *P. Narayanamurthy*, for the Appellant.

Mr. *S. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.

AYLING, J.—The decision of this appeal turns entirely on the constructions of Exhibit A and Exhibit I, the *muchilika* and *patta* evidencing the terms of the grant in 1868. The primary question is whether it was a grant burdened with a certain service, or a grant in lieu of wages: the distinction is drawn in three Privy Council cases, *Alexander John Forbes* v. *Meer Mahomed Tuquee* (1) and *Leelanund Singh* v. *Munrunjun Singh* (2) and *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (3). The answer is not easy; but looking (1) to the reference to past service whereby the patronage of the Diwan-am was deserved, (2) provision that the grantee was to enjoy from son to grandson and so on in succession, I am inclined to hold that this was a grant burdened with service. I do not think the mere description of the *inam* as a service *inam*, or the condition that "you (the grantee) shall be rendering service so as to deserve the patronage of the Diwan-am," are sufficient to negative this conclusion. There is, moreover, a clause reserving to the Raja a small *kattubadi* of Rs. 3 per annum—a feature which, if I rightly understand the judgment of the Privy Council in *Forbes* v. *Mir Muhammad Tuquee* (1), would, if present in that case, have been held conclusive in favour of the grantee.

Where the grant is of this nature "so long as the holders of those grants are willing and able to perform the services, the *zemindar* has no right to put an end to the tenure whether the services are required or not" [vide *Leelanund Singh* v. *Munrunjun Singh* (2) quoted in *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur*(3)].

(1) 13 M. I. A. 438; 14 W. R. 28 (P. C.); 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 Eng. Rep. 614.

(2) I. A. Sup. Vol. 181; 3 C. 251; 2 Ind. Jur. 493.

(3) 29 M. 52 (P. C.); 16 M. L. J. 1; 1 M. L. T. 3; 3 C. L. J. 1; 3 A. L. J. 55; 8 Bom. L. R. 1; 10 C. W. N. 161; 33 I. A. 46.

I can find no authority for holding that the nature of the services makes any difference in the case of such a grant: though in the case of a service grant where lands are enjoyed in lieu of wages, the power of arbitrary resumption would largely turn on whether the services were private or public. The Subordinate Judge appears to me to have wrongly construed Exhibits A and I and to have misunderstood the law on the subject.

I would set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

SADASIVA AIYAR, J.—The first defendant is the appellant, the plaintiff (respondent) being the Rajah of Pittapur. The question is whether the *nowkari* (service) *inam* granted to the appellant's grandfather in 1868 by the plaintiff's father was granted in order that the income of the *inam* lands might be treated as wages for the personal service of 'Nakesh' or whether it was granted, not as wages for the said service, but as a grant subject to the condition of doing the 'Nakesh' service.

The learned Subordinate Judge on appeal held that the grant was of the former character. His reasons (as I understand them) are: (1) The service performed by the grantee was private and personal to the grantor and not a public service or an obligation of a feudal character. (2) The office goes by a particular designation, namely, 'Nakesh' and that office was conferred on the grantee. (3) This is a Darmilla grant, that is, a grant subsequent to Permanant Settlement. In *Alexander John Forbes* v. *Meer Mahomed Tuquee*(1) their Lordships say at page 464 "that in every case the right to resume must depend in a great measure upon the nature of the particular tenure or the terms of the particular grant." Their Lordships quote with approval on page 463 a decision of the Sudder Dewanny Adawlat of 1858 in which it was held that a tenure will be liable to resumption notwithstanding its hereditary nature, and even if it is a grant subject to conditions of service and not a grant in lieu of service, if the service be not performed. *A fortiori* it seems to me that the hereditary nature of the grant is not against the resumability of the grant where it is a grant in lieu of wages for service. Their Lordships set out in their judgment in that case that the service to be performed by the defendant was not attached to any

particular office or known by any particular designation. They also point out that the grantee was not a private servant of the *zemindar* (See page 461). They further point out that if the public or Government representing the public had an interest in the service, the grant is not resumable (See same page 461 and page 462). Then at page 466 their Lordships say: "*Had this been a grant reserving to the* zemindar *a small money-rent as well as the services, if indeed the latter are reserved to the* zemindar, their Lordships would have had no doubt upon *the case.*" It seems to me that this sentence, read in the light of the other passages in the judgment, means that if the services were reserved to the *zemindar*, the fact that a small money-rent was reserved (whether it is called *katubadi* or quit-rent or by any other name), their Lordships would have had no doubt that it was a resumable tenure.

The case in *Leelanund Singh* v. *Munrunjun Singh* (2) related to lands held on Ghatwali tenure. Ghatwali services were services performed for the protection of properties situated in a *zemindari* from the attacks of mountaineers and other turbulent people [See *Raja Lelanund Singh Bahadur* v. *Government of Bengal* (4)] and the British Government dispensed with those public services. It was held that the *zemindar* could not resume the lands held on such tenure. In *Radha Pershad Singh* v. *Budhu Dashad*(5) the learned Judges rely upon *Alexander John Forbes* v. *Meer Mahomed Tuquee* (1) in support of the distinction between the grant for services of public nature and one of services private or personal to the grantor, and they state that in the former case the *zemindar* is not entitled to resume, while in the latter case he may do so when the services are not required or when the grantee refuses to perform the services (See page 941). Even in the case of the grant of an estate burdened with a certain service (as distinguished from the grant of an office the performance of whose duties is remunerated by the enjoyment of certain lands), though the *zemindar* is not ordinarily entitled to resume, he is so entitled if in the grant itself appropriate terms are introduced giving the grantor a right to resume the lands on the non-fulfilment of certain conditions. See *Alexander John Forbes* v. *Meer Mahomed Tuquee* (1) and *Lakhamgavda* v. *Keshav Annaji* (6). See also *Sanniyasi Razu* v. *Salur Zamindar* (7) and *Mahadevi* v. *Vikrama* (8) as to the *prima facie* right of the *zemindar* to resume the grant made for personal services as distinguished from public service. In the case in *Vadisapu Appandora* v. *Vyricherla Veerabhadraraju Bahadur* (9) White, C. J., and Phillips, J., hold that the nature of a tenure has to be decided upon the evidence in each case and in the case of a grant subsequent to the Permanent Settlement to which services of a personal as opposed to public character are attached, the burden of proving that it is not resumable is on the grantee.

In *Karupamaya Ananga Bheema* v. *Sondi Prahaladha Bissoyi Ratno* (10) the opinion is expressed that a favourable quit-rent being reserved as payable to the *zemindar* was not of much importance on the question of the resumability of the grant [See also *Sanniyasi Razu* v. *Salur Zemindar* (7) and *Mahadevi* v. *Vikrama* (8) on this point, these decisions evidently having followed the opinion of their Lordships of the Privy Council in *Alexander John Forbes* v. *Meer Mahomed Tuquee* (1)]. In *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (3) their Lordships of the Privy Council quote with approval certain sentences from the judgment of this High Court, which indicate a few of the grounds on which this High Court held that the grant in that case was not resumabale. One of those grounds is that "no office by any particular designation was conferred by the original grantee, but an obligation of a feudal character was imposed upon him." Other grounds are the hereditary character of the grant and the invariable *kattubadi* received for a long series of years (about 120 years) without any attempt at resumption. As I said in the beginning the question whether the grant is resumable or not, has to be decided on a consideration of all the circumstances appearing in the evidence, including the nature of the service, the terms of the grant, the question whether the

(4) 4 W. R. (P. C.) 77; 6 M. I. A. 101; 1 Sar. P. C. J. 505; 1 Suth. P. C. J. 248; 19 Eng. Rep. 38.
(5) 22 C. 938.
(6) 28 B. 305; 6 Bom. L. R. 364.
(7) 7 M. 268.
(8) 14 M. 365.
(9) 12 Ind. Cas. 487; 10 M. L. T. 391; (1911) 2 M. W. N. 406.
(10) 21 Ind. Cas. 833; (1914) M. W. N. 179; 14 M. L. T. 562.

service is attached to any office known by any particular designation and so on. In the present case, the learned Subordinate Judge was, it seems to me, entitled to find on the terms of the grant, on the nature of the grant, on the date when it was made, on the nature of the service, on the designation given to the office and similar circumstances that it was a grant made in lieu of wages for the performance of personal service, though certain other circumstances (like the hereditary nature of the grant) tended in the other direction. No one fact is conclusive either way, though it seems to me from the sentence I have quoted from page 466 of Moore's Indian Appeals that their Lordships of the Privy Council considered that where the services were such as are reserved to the *zemindar* personally, there can be very little doubt that the *inam* was a resumable grant.

I would, therefore, dismiss the second appeal with costs.

BY THE COURT.—The appeal is dismissed with costs under section 98 of the Civil Procedure Code.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 587 OF 1914.

June 19, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

Munshi ABDUL KADIR—DECREE-HOLDER—PETITIONER

versus

SHAHABAZPUR CO-OPERATIVE BANK AND OTHERS—OPPOSITE PARTY.

Co-operative Societies Act (II of 1912), ss. 19, 20—Charge, enforceability of—Civil Procedure Code (Act V of 1908), s. 73.

Under section 73 of the Civil Procedure Code, 1908, a Co-operative Society cannot enforce a charge under section 19 of the Co-operative Societies Act, unless they have a decree or a charge under section 20 of the latter Act.

Rule against the order of the Munsif, Nabinagar, in Execution Case No. 147 of 1913, dated the 26th February 1914.

Moulvi *A. K. Fazlul Huq*, for the Petitioner.

Mr. *A. Rasul* (with him Babu *Upendra Kumar Ray*), for the Opposite Party.

JUDGMENT.—This is a Rule which was obtained by the decree-holder in an application under section 73 of the Code of Civil Procedure made by a Co-operative Society for enforcing a charge under section 19 of Act II of 1912. The application was undoubtedly made under section 73, and under that section we are of opinion that the Co-operative Society could have no priority to other creditors, unless there are one or more persons than one who have made applications to the Court for the execution of decrees for payment of money passed against the same judgment-debtors. To hold otherwise would be to give these Co-operative Societies a power which even Government in its much discussed certificate procedure does not claim. They would claim, in other words, to recover money without either decree or certificate or any legal title to enforce their debt. Admittedly there is no charge within the meaning of section 20 of the Co-operative Societies Act, so that the proviso to section 73 does not come in. It is possible that under section 19, the Society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure, but with that we are not concerned. It appears to us perfectly clear that under section 73 the claim of a Co-operative Society cannot be enforced, unless they have a decree or a charge under section 20.

The Rule, therefore, must be made absolute and the order of the lower Court set aside without prejudice to any action which the Society may deem fit to take, if so advised.

The petitioner is entitled to his costs in this Rule which we assess at one gold *mohur*.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2587 OF 1912.

August 4, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswamy Sastri.

KOSURI SURAPARAJU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANDAPAKA NARASIMHAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXI, r. 57, and O. XXXVIII, r. 1—Attachment before judgment—Records, destruction of—Re-attachment ex majori cautela, *if amounts to abandonment of prior attachment*

KOSURI SURAPARAJU v. MANDAPAKA NARASIMHAM.

—*Dismissal of execution petition, whether affects prior attachment before judgment.*

A re-attachment, in execution, *ex majori cautela*, of certain immoveable properties which had already been attached before judgment (the records relating thereto having been destroyed), does not raise any presumption that the original attachment was abandoned.

Hafiz Suleman v. *Sheikh Abdullah*, 16 A. 133; A. W. N. (1894) 13; *Kishen Lal* v. *Charat Singh*, 23 A. 114; A. W. N. (1900) 214; *Puddomonee Dossee* v. *Roy Moothooranath Chowdhry*, 12 B. L. R. 411 (P. C.); 20 W. R. 133, distinguished.

In cases where attachment before judgment has been obtained, no fresh attachment by means of an execution petition is necessary and all that is contemplated by section 64 of the Civil Procedure Code is the existence of a pending attachment. Mere dismissal of an execution petition has not the effect of causing an attachment before judgment to cease to exist.

Ram Newaz v. *Ram Charan*, 18 A. 49, distinguished.

Second appeal against the decree of the District Court of Kistna, in Appeal Suit No. 57 of 1912, preferred against that of the Subordinate Judge of Kistna at Ellore, in Original Suit No. 26 of 1911.

FACTS.—Certain immoveable properties were attached before judgment on 24th September 1904. The suit in which such attachment had been obtained was decreed two days later. On 23rd September 1907 the decree-holder applied for a re-attachment of the suit properties, as he was under the impression that re-attachment was necessary as the records relating to the original attachment had been destroyed. This attachment was duly effected. The plaintiffs who had in the meanwhile purchased the suit properties under a sale-deed, dated 29th September 1907, put in a claim petition which was rejected. They then filed the present suit under Order XXI, rule 103, Civil Procedure Code, for a declaration that their sale-deed was binding on the 4th defendant, who had by that time obtained an assignment of the original decree impleading also their vendors, defendants Nos. 1 to 3, as parties. The 4th defendant contested the suit on the ground that as the purchase had been made after the attachment had been effected, it conveyed no title to the plaintiffs. Both the lower Courts agreed with that contention and dismissed the plaintiffs' suit. The plaintiffs thereupon preferred this second appeal to the High Court.

Mr. *V. Ramadoss*, for the Appellants:—There was no subsisting attachment on the date of the sale to the plaintiffs. The attachment before judgment must be taken to have been abandoned because from 1904 to 1907 the decree-holder did nothing in pursuance thereof and applied for re-attachment of the same properties on 23rd September 1907. The assignment deed in favour of the 4th defendant is silent as to the existence of any attachment.

[The following cases were relied on: *Hafiz Suleman* v. *Sheikh Abdullah* (1), *Kishen Lal* v. *Charat Singh* (2) and *Puddomonee Dossee* v. *Roy Moothooranath Chowdhry* (3)].

Further, as the execution application filed on 23rd September 1907 was subseqently dismissed, the attachment should be deemed to have ceased to subsist; *Krishna Subhudi* v. *Janaki Ram* (4); *Ram Newaz* v. *Ram Charan* (5).

Mr. *B. Somayya*, for Mr. *P. Narayanamurti*, for the Respondents, was not called upon.

JUDGMENT.—The properties in dispute were attached before judgment. After that order the plaintiffs purchased the properties from the judgment-debtors at a private sale. Both the Courts below have held that the plaintiffs acquired no title to the properties against the attaching creditor. We think they are right. We are satisfied that the attachment was subsisting on the date of the sale to the plaintiffs. Exhibits XII and IV make it clear that there was a conditional attachment which was subsequently made absolute. Mr. Ramadoss asks us to say that as there was an application in 1910 to attach the properties again, the presumption is that the first attachment was abandoned. In 1910 the parties were under the impression that as the records relating to the original attachment were destroyed, an application for fresh attachment was necessary. This does not show that the original attachment was abandoned. The decisions in *Hafiz Suleman* v. *Sheikh Abdullah* (1) and *Kishen Lal* v. *Charat Singh* (2) only lay down that if a subsequent valid attachment was made, the title of the purchaser dated from the date of that attachment: they do not warrant the proposition that in all cases where parties *ex majori cautela* apply for a fresh attachment, the original attachment must be presumed to have

(1) 16 A. 133; A. W. N. (1894) 13.
(2) 23 A. 114; A. W. N. (1900) 214.
(3) 12 B. L. R. 411 (P. C.); 20 W. R. 133.
(4) 20 Ind. Cas. 149; 19 C. L. J. 248.
(5) 18 A. 49; A. W. N. (1895) 155.

been abandoned. *Puddomonee Dossee* v. *Roy Mathooranath Chowdhry* (1) is no authority for the proposition contended for.

Then it is argued that as there was no execution application subsisting, the attachment cannot be said to have been in force at the time of the sale. The law lays down that in cases where attachment is applied for prior to decree, no fresh attachment by means of an execution application is necessary and the language of section 64 of the Code makes it clear that all that is contemplated under that section is the existence of a pending attachment. The case in *Ram Newaz* v. *Ram Charan* (5) has no application, as in that case there was no attachment before judgment. We think the Courts below are right and dismiss the second appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 791 OF 1912.

May 27, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Rafique.

BALGOBIND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM SARUP AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XLI, r. 22, scope of—Cross-objections by one respondent against another—Practice.

Under Order XLI, rule 22, an Appellate Court can allow a respondent to prefer cross-objections against another respondent.

Jadunandan Prosad Singh v. *Koer Kalyan Singh*, 13 Ind. Cas. 653; 16 C. W. N. 612; 15 C. L. J. 61; *Abdul Ghani* v. *Muhammad Fasih*, 28 A. 95, A. W. N. (1905) 200; 2 A. L. J. 667, referred to.

Second appeal from the decree of the Second Additional Judge of Meerut.

Dr. *Surendra Nath Sen*, for the Appellants.

The Hon'ble Mr. *Motilal Nehru*, Messrs. *J. M. Banerji* and *Lalit Mohan Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the dissolution of a partnership. A decree for dissolution was passed and a Receiver was appointed to make up the accounts of the partnership and submit a report. On receipt of the Receiver's report a decree was passed. The plaintiffs in the suit preferred an appeal to the District Judge, and some of the respondents filed cross-objections. Niadar Mal, one of the respondents to that appeal, in his cross-objections raised a question between himself and another respondent which did not concern the appellants. The learned Judge, after a careful consideration of the objection both on behalf of the appellants and the respondents, modified the decree of the first Court. The present appellants, who were respondents in the Court below, object to the decree of the lower Appellate Court on two grounds. They say that interest should not have been allowed on the sum found due to a partner either for the period prior to dissolution or subsequent thereto. The second objection is that the cross-objection of Niadar Mal that the sum of Rs. 550 had not been paid to him by Niadar Singh respondent in the Court below should not have been entertained in view of the provisions of Order XLI, rule 22, Code of Civil Procedure. We think that neither of the grounds taken in appeal has any force. The lower Appellate Court allowed interest to all the partners to whom any sum of money was found due from other partners. The rate of interest awarded was not high and it is not contended that the lower Court had no power to decree interest. As to the second objection the case of *Jadunandan Prasad Singh* v. *Koer Kalyan Singh* (1) may be referred to, also the case of *Abdul Ghani* v. *Muhammad Fasih* (2). The latter case was decided when the old Code of Civil Procedure was in force. It was held that under special circumstances it was competent to an Appellate Court to allow a respondent to take cross-objections against another respondent. The Calcutta case was decided under the present Code of Civil Procedure. The learned Judges of the Calcutta High Court say that the language of Order XLI, rule 22, of the Code of Civil Procedure is comprehensive enough to admit of cross-objections being preferred by one respondent against another. As accounts were being taken between all the parties, whether plaintiffs or defendants, we think that Niadar Mal was entitled to take objections as to the sum of Rs. 550 against Niadar Singh, who was also a

(1) 13 Ind. Cas. 653; 16 C. W. N. 612; 15 C. L. J 61.
(2) 28 A. 95; A. W. N. (1905) 200; 2 A. L. J. 667.

respondent in the case before the lower Appellate Court. The appeal, therefore, fails and is dismissed with costs. There are cross-objections on behalf of the plaintiffs-respondents which are not pressed and are dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1401 OF 1913.

July 4, 1914.

Present:—Mr. Justice Sunder Lal.

CHIRANJI LAL—PLAINTIFF—APPELLANT

versus

POORNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 68, 69—Illiterate witness—Mark of attesting witness on mortgage-deed—Proof of document—One attesting witness called, effect of.

Section 68 of the Evidence Act requires that at least one attesting witness should be called for the purpose of proving the execution of the document. The witness may or may not be able to prove the document or he may have forgotten all the incidents relating to its execution or may dishonestly deny its execution altogether.

In order to prove a document to have been signed by a witness or to have been in his handwriting, it should be shown to him and he should be questioned directly upon the point.

If a man fixes his mark on a mortgage-deed as a witness, he is an attesting witness within the meaning of section 69 of the Evidence Act.

Pran Krishna Tewary v. *Jadu Nath Trivedi*, 2 C. W. N. 603; *Neel Kanto Pandit* v. *Jaggobundhu Ghose*, 12 B. L. R. App. 18, referred to.

Bakhshi Ram v. *Liladhar*, 21 Ind. Cas. 619; 35 A. 353; 11 A. L. J. 371; *Babu Gunga Persad* v. *Babu Inderjit Singh*, 23 W. R 390 (P. C.), referred to.

Second appeal from the decision of the District Judge of Agra.

Mr. *Benode Behari*, for the Appellant.

JUDGMENT.—This is a suit on a mortgage dated November 7th, 1907, for a sum of Rs. 99, which is said to have been advanced for the payment of a decree in execution of which the property was put up to sale. The defendants denied the mortgage and the plaintiff had, therefore, to prove it. The Court below dismissed the suit on the ground that the execution of the mortgage had not been proved in accordance with the requirements of sections 68 and 69 of the Evidence Act.

The document is one which under section 58 of the Transfer of Property Act is required to be attested by not less than two witnesses. It purports to bear the signature of one Kishori Lal as an attesting witness and the mark of one Kamla, the other attesting witness. Kishori Lal is no longer living, but Kamla was called to prove the bond. The plaintiff himself also went into the witness-box to prove its due execution and the payment of consideration. Kamla is illiterate and he could only make his mark. He has stated that *Musammat* Prano, the mortgagor, executed the mortgage before him, that she put her mark on the document, that he witnessed the said document and put on his mark thereto. The document was not placed in his hands and no question was put to him to ascertain whether the mark which appears under the name of Kamla was made by him or at his instance, nor was the mark put on by *Musammat* Prano similarly shown to have been made by her or at her instance. But the witness did state that the document was marked by Prano in his presence and that his own mark too was put on the document then and there. Chiranji Lal proved the document and also the passing of consideration. The Munsif held that the document was not legally proved. Under section 68 of the Evidence Act if a document is required by law to be attested, it cannot be used in evidence until at least one attesting witness has been called for the purpose of proving its execution. All that the section requires is that the witness should be called for the purpose of proving the execution. The witness may or may not be able to prove the document; he may have forgotten all the incidents relating to the execution or he may dishonestly deny the execution of the document, but the only obligation that section 68 imposes upon the plaintiff is of calling one attesting witness at least, whatever that man may depose to. In calling Kamla, therefore, the plaintiff complied with the condition imposed by section 68. Kamla, however, only made a mark and it may be suggested that he was not an attesting witness who could prove his signature. In the case of *Pran Krishna Tewary* v. *Jadu Nath Trivedy* (1) the question arose whether a marksman is an attesting witness within the meaning of section 69. At page 605 of the report their Lordships ruled as follows: "We are of opinion that this contention is not correct, and that there is no good reason for holding that a marksman cannot be an attesting witness within the meaning of section 59 of the

(1) 2 C. W. N. 603.

CHIRANJI LAL v. POORNA.

Transfer of Property Act and section 68 of the Evidence Act. According to the general policy of our law, a signature includes a mark —[see the General Clauses Acts of 1887 and 1897 (Act I of 1887, section 3, clause 12, and Act X of 1897, section 3, clause 52), Act XIV of 1882, section 2, and Act III of 1877, section 3] and there is no reason why the case of a mortgage deed should form an exception." I think the law is correctly laid down in that case and Kamla was an attesting witness within the meaning of that term as used in section 68 of the Evidence Act. The document also bears the name of another attesting witness named Kishori Lal. The Court of first instance observes that it has not been proved that Kishori Lal's signature was made by him in his own handwriting. It was not necessary to prove the signature of each of the attesting witnesses. The document on the face of it has two attesting witnesses and under section 69 of the Evidence Act it was not necessary to prove the signature of one attesting witness at least to have been in his handwriting, as that condition is required only when no attesting witness can be found or when the document purports to have been executed in the United Kingdom. The conditions of sections 68 and 69 were, therefore, fully complied with.

The only point on which the evidence is defective lies in the fact that the document was not actually put to the witness and the signature neither of the executant nor of the attesting witness actually proved by reference to the document itself. Under section 67 of the Evidence Act when a document is alleged to be signed by a particular person or to have been in his handwriting, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. This can only be done by showing the document to the witness and questioning him directly upon that point. That, no doubt, is the correct method of proving the document. In an earlier case, *Neel Kanto Pandit* v. *Jaggobundhoo Ghose* (2), the execution of the document is said to have been proved in this manner, "It appears that in this case the evidence which was given in support of the document upon which the defendants' case depends, was that of a Qazi before whom the vendor came and admitted the deed to be his, and caused it to be registered, bringing witnesses to his execution thereof, and in fact going pretty much through the same forms as are now in force under the Registration Act. Upon that evidence the lower Appellate Court very naturally came to the conclusion that the deed was proved, and the only question which we have to consider is, whether the Court was precluded from doing so by section 67 of the Evidence Act. Now it is contended that that section renders it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed, must be given by some person who saw the signature affixed. But that is not expressly stated in the section, and it does not appear to me that that was the intention of the Legislature. It seems to me that that section merely states with reference to deeds what is the universal rule in all cases, that the person who makes the allegation must prove it. It lays down no new rule whatever as to the kind of proof which must be given." It may be that the plaintiff's Pleader was misled by this ruling or by the practice prevailing in the Court of first instance, and the document was not placed in the hands of the witness. In a case like this the presiding officer of the Court ought to have himself directed this to be done. In the case of *Bakhshi Ram* v. *Liladhar* (3) a Division Bench of this Court under somewhat similar circumstances considered it desirable to send the case back to give the plaintiff an opportunity of formally proving the document. Their Lordships of the Privy Council in the case of *Babu Gunga Prasad* v. *Babu Inderjit Singh* (4) adopted a somewhat similar course. I think that in this case the ends of justice require that the plaintiff should be given another opportunity of formally proving the document.

The case has not been properly tried in either of the Courts below. I set aside the decree of the Court below and remand the case to the Court of first instance through the District Judge of Agra under Order XLI, rule 23, and direct that Court to restore the suit to its file of pending cases and after recording such evidence as the parties may adduce relevant to the issues before him, to dispose

(2) 12 B. L. R. App. 18.

(3) 21 Ind. Cas. 619; 11 A. L. J. 371; 35 A. 353.

(4) 23 W.-R. 390 (P. C.).

of the case in accordance with law. As the defect in the proof of the document in this case was mainly due to the fault of the plaintiff or his legal adviser, I direct that costs incurred in this Court and in the lower Appellate Court by the appellant shall be borne by him. The costs in the first Court shall be costs in the cause.

Appeal decreed; Cause remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 14 OF 1913-14 OF UNAO DISTRICT.

February 2, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

SANWAL SINGH—PLAINTIFF—APPELLANT

versus

PRAG DAT AND ANOTHER—DEFENDANTS—RESPONDENTS.

Ejectment—Shikmi *tenant, entry as—Civil Court decree finding tenant proprietor and mortgagor of holding and allowing redemption, effect of.*

A person entered in the *patwari's* papers as *shikmi* tenant, but having a Civil Court decree in his favour which says that he is the proprietor of the holding and entitled to redeem it, cannot be ejected from that holding so long as that decree holds good.

Appeal from the decree of the Commissioner, Lucknow, dated 5th September 1913.

JUDGMENT.

TWEEDY, J. M.—(*January 24th*, 1914).—The decision of the Munsif clearly awards proprietary rights to the appellant in part of the respondents' property. The contention of the appellant all along was that he was the mortgagor and not a *shikmi*. We have then the decision of a competent Court that the appellant holds the equity of redemption in this land and he has been allowed to redeem. Upon this evidence the appeal should be decreed. It is open to the respondent to get the Munsif's decision reversed in appeal and if he does so he can eject the appellant. But as things stand the verdict of the Civil Court is in the appellant's favour and his ejectment as a *shikmi* might cause considerable difficulty. I would decree the appeal and setting aside the decision of the Courts below would quash the notice of ejectment. Costs on parties.

BAILLIE, S. M.—I concur.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 481 OF 1913.

May 29, 1914.

Present:—Mr. Justice Piggott.

INAYAT HUSSAIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Possession—Evidence—Possession of one part, whether possession of other part.

Where in a suit for possession of land by the Secretary of State for India it is proved that the plot in dispute is a part of the Nazul lands which are in possession of the Government, it is not necessary to give further evidence of possession.

Second appeal against the decree of the Subordinate Judge of Agra.

Mr. *Benode Behari*, for the Appellants.

Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.—This is a suit for possession of a small plot of unoccupied land situated in the town of Agra. It adjoins on one side a public thoroughfare and is situated at the back of the house of the defendants. The latter have, however, no door opening on to it. The plaintiff is the Secretary of State for India in Council, claiming this lands as part of what is known as Nazul land of the city of Agra, of which the plaintiff is the proprietor. The lower Appellate Court has found in favour of the plaintiff's title. The one substantial point taken in appeal is that the plaintiff should have been put to the proof of actual possession within limitation, the limitation period in this case being sixty years. The contention is based on the ruling of this Court in *Jafar Husain* v. *Mashuq Ali* (1).

The principle that a plaintiff suing in ejectment is bound to prove a subsisting title, that is to say, practically both title and possession within limitation, is undoubtedly correct and has been affirmed in a large number of cases. The question, however, as to what amounts to possession, and what sort of evidence may be required in order to prove possession, is one which must depend on the circumstances of the particular case. Thus in Oudh it was ruled that a Taluqdar, on proving title and proprietary possession in respect of a particular village, would be presumed to have

(1) 14 A. 193; A. W. N. (1892) 55.

been in actual or constructive possession of all the waste lands appertaining to that village, unless and until it were shown that some portion of such lands had been actually occupied by some person otherwise than as his lessee or licensee. In the present case it has been found that the defendants at any rate have not proved their possession over this land prior to the acts of trespass in the year 1909, which have led to the institution of the present suit, nor has it been denied that the plaintiff is in possession of the Nazul lands appertaining to the town of Agra. The issue on which the parties went to trial is whether this land formed part of the Nazul lands. The lower Appellate Court has found that the land in suit was shown as appertaining to the Nazul in certain official records prepared in the year 1879 and that action was taken on behalf of the plaintiff as soon as it was known that the defendants were occupying this land and were claiming possession over it as their own property. It does seem to me that in a case of this sort the plaintiff could not be expected to produce evidence of possession going beyond this. I accordingly dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2110 OF 1913.

August 11, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasawmy Sastri.

DESAYI *alias* ALLAM RAJU NANJUNDIAH—DEFENDANT—APPELLANT

versus

DESAYI *alias* ALLAM RAJU VENKATA-SUBBAYYA—PLAINTIFF—RESPONDENT.

Pensions Act (XXIII of 1871), *s.* 4—*Suit for partition of* inam—*Necessity of certificate—Hindu Law—Joint undivided family*—Desai inam—*Devolution of* inam *on managing member—Right of other members to share* Inam—*Grant of land and not merely of land-revenue—Jurisdiction of Civil Courts.*

The pre-requisite of filing a certificate under section 4 of the Pensions Act has no application where the suit in the Civil Court is for partition of the *inam* among the members of the family to which the grant was made, nor does that section apply where the grant is not merely of land-revenue but of land also.

Panchanada v. *Nilakanda*, 7 M. 191; *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State for India*, 15 Ind. Cas. 871; 23 M. L. J. 687; 12 M. L. T. 541; (1913) M. W. N. 255; 36 M. 591; *Secretary of State* v. *Ikurti Subrayudu*, 16 Ind. Cas. 18; 36 M. 559; (1912) M. W. N. 807; 12 M. L. T. 266; 23 M. L. J. 728; *Ravji Narayan Mandlik* v. *Dadaji Bapuji*, 1 B. 523; *Mannu Lall* v. *Fazal Imam*, 10 Ind. Cas. 353; 33 A. 580; 8 M. L. J. 692, followed.

Where on the date of the grant there was no *kudivaram* interest in the land, the presumption is that the grant is not merely of land-revenue but of land also.

Rama v. *Subba*, 12 M. 98, followed.

Where a *Desai Inam* devolves on the managing member of a joint undivided Hindu family for the time being, the presumption is that the devolution is for the benefit of all the members of the family and not for that of the manager alone. The other members of the family are, therefore, entitled to shares in the *inam*.

Gunnaiyan v. *Kamakchi Ayyar*, 26 M. 339, followed.

Second appeal against the decree of the District Court of Kurnool, in Appeal Suit No. 31 of 1912, preferred against that of the Subordinate Judge of Kurnool, in Original Suit No. 1 of 1908.

Mr. *K. Narain Row*, for the Respondent.

FACTS.—The second appeal arose out of a suit for partition. One of the properties to be partitioned was a personal *inam*, being land held under a *desai* grant. The defence set up the plea that the suit was not maintainable in the Civil Courts without a certificate from the Collector as required by sections 4 and 6 of the Pensions Act, XXIII of 1871. The Courts below were of opinion that the suit was not one in which the validity of a political grant was in question and held, following *Panchanada* v. *Nilakanda* (1), that there was nothing in the Pensions Act to bar the suit. The 1st defendant appealed to the High Court on the ground, *inter alia*, that the suit was not maintainable without the Collector's certificate.

Mr. *N. A. Krishna Iyer* (for Mr. *T. R. Ramachandra Iyer*), for the Appellant:—Suit is not maintainable without Collector's certificate. The Pensions Act applies to the case.

Panchanada v. *Nilakanada* (1), *Rama* v. *Subba*(2), *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State for India*(3), *Kumara Tirumalai Naik* v. *Bangaru Tirumalai Sauri Naik* (4) and *Secretary of State for India* v. *Ikurti Subrayudu* (5).

(1) 7 M. 191.

(2) 12 M. 98.

(3) 15 Ind. Cas. 871; 23 M. L. J. 687; 12 M.L.T. 541; (1913) M. W. N. 255.

(4) 21 M. 310.

(5) 16 Ind. Cas. 18; 36 M. 559 (1912) M. W. N. 07; 12 M. L. T. 266; 23 M. L. J. 728.

NANJUNDIAH v. VENKATA SUBBAYYA.

Mr. *H. Balakrishna Rao*, for the Respondent:—The Act applies only to grant of land-revenue or *melvaram*. Where the grant is of the land itself the Act does not apply.

JUDGMENT.—This second appeal is argued only with reference to items 56 to 58. The Courts below have held that plaintiff was entitled to a share in them.

The first defendant's (appellant's) contentions are two-fold. He says that as the properties came to him from Thimma Raju who was the last holder of this *desai inam*, the other members of his family can have no claim to them. It is found that at the time of the devolution he was the manager of the undivided family of which plaintiff was a junior member. He must, therefore, be deemed to have taken the property for and on behalf of the joint family. The principle of the decision in *Gunnaiyan* v. *Kamakchi Ayyar* (6) applies to this case. We hold that the properties are not 1st defendant's self-acquisition. The more important question relates to the jurisdiction of the Civil Courts to entertain the suit without a certificate under the Pensions Act. The finding of the Courts below we take to be that the grant to Thimma Raju's ancestors was of the land itself. There has been no suggestion that the original grantees had any *kudivaram* right in the soil prior to the grant to them. These considerations have to be borne in mind in deciding whether the Pensions Act applies to this case. Section 4 interdicts the filing of suits relating to *pensions*, grant of land-revenue or grant of money without a certificate. Whether *grant of land* is included in the term pension, has been much debated. It is pointed out by Collins, C. J., and Muttusawmy Aiyar, J., in *Rama* v. *Subba* (2) that the object of the enactment (the Pensions Act) was to prohibit parties from filing suits in Civil Courts in all cases of *inams* without the knowledge of the Government. The learned Judges incline to the view that as the Government is entitled to the reversion, if they choose to exercise their right, the Legislature has made it a condition precedent to the maintainability of these suits that a certificate from them should be filed. These observations are of great value in considering the right of an alienee to recover possession of an *inam*. When applied to a claim among the members of the family for partition, they have not the same significance. The learned Judges also observe at page 103: "These decisions show that in order that a grant of villages may not fall under the Pensions Act, it must be a grant of the free-hold therein or full ownership in the soil, qualified in no way by any reversion suggested by the terms of the grant in regard to future succession or transmission." The import of this passage seems to be that if the grantee was possessed of the *kudivaram* right at the time of the grant and all that the Government did was to transfer to him their right of land-revenue, the Pensions Act will be a bar. It is true that where the *kudivaram* had vested in the family and the Government conferred the *melvaram* right later on, it is unlikely that the two rights would have been kept separate. In the passage already quoted all that the learned Judges intended to lay down was that at the time of the suit, the Courts should apply their minds to the state of affairs which existed at the time of the grant. In the present case, as we prefaced, there is nothing to indicate that the grantees were the owners of the *kudivaram* right and that the grant to them was only of the land-revenue. The authorities to which we shall presently refer lay down that where there has been a grant of land, the Pensions Act is inapplicable. We have referred to *Rama* v. *Subba* (2) at some length having regard to the fact that one of the learned Judges who took part in that decision held the position of Inam Commissioner at one time. Our conclusion is that in cases of partition of the land granted as *inam* among members of the grantee's family the pre-requisite of filing a certificate under the Act has no application. This is supported by a large number of decided cases. *Panchanada* v. *Nilakanada* (1) lays this down in distinct terms. It has been approved and followed in *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State for India* (3) and *Secretary of State for India* v. *Ikurti Subrayudu* (5). The Bombay High Court in *Ravji Narayan Mandlik* v. *Dadaji Bapuji* (7) has taken the same view. *Mannu Lal* v. *Fazal Imam* (8) is to the same effect.

(6) 26 M. 339.

(7) 1 B. 523.

(8) 10 Ind. Cas. 353; 8 A. L. J. 692; 33 A. 580.

Following these decisions we must hold that the Courts below are right in deciding that their jurisdiction was not ousted by the Pensions Act. We dismiss the second appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 157 OF 1912.

October 13, 1914.

Present:—Mr. Justice Chevis.

KIRPA RAM—DEFENDANT—APPELLANT

versus

KIRPA RAM—PLAINTIFF—RESPONDENT.

Jurisdiction of Civil or Revenue Court—Claim by one proprietor against another for establishing occupancy-rights—When decree of Civil Court cannot be registered in Revenue Court—Return of plaint—Punjab Tenancy Act (XVI of 1887), ss. 77, 100.

A suit by one of the proprietary body against another for declaring that the former is the occupancy tenant of land belonging to the latter, falls under section 77 (3) (*a*) and is consequently triable only by a Revenue Court.

When a suit of this nature has been decided by a Munsif having no revenue powers his decree cannot be registered as that of a Revenue Court by the Chief Court. The ordinary course in such a case is to return the plaint for presenting it to a competent Revenue Court.

Ramjas v. *Ralla*, 1 Ind. Cas. 465; 25 P. R. 1909; 39 P. W. R. 1909; 70 P. L. R. 1909, referred to.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 10th November 1911, affirming that of the Munsif, 1st Class, Una, dated the 31st August 1911, decreeing the claim.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *Sundar Das*, for the Respondent.

JUDGMENT.—The plaintiff in this case pleads that he and defendant No. 31 are occupancy tenants of the land in suit, and seeks a declaration of his rights as occupancy tenant.

I am at a loss to understand how the lower Courts have entertained the case, for it appears to me clear that the cognizance of the Civil Courts is barred by section 77 of the Punjab Tenancy Act, this being a suit by a tenant to establish his claim to occupancy rights. The fact that plaintiff is also one of the landlords of the joint *Khata* of which the land in suit forms a part, makes no difference whatever: this suit is brought by plaintiff in his capacity of tenant of the land which is in his possession, and he is clearly seeking to establish his claim to occcupancy rights which has been denied. It is quite incorrect to say (as has been urged before me) that plaintiff is objecting to partition, for reference to the plaint will show clearly that he has no objection to the partition of the proprietary rights, and only wants his possession of the land in suit to be preserved on the ground that he and defendants are occupancy tenants. The case, in my opinion, falls under section 77 (3) (*d*) of the Tenancy Act, and is triable only by a Revenue Court.

The Court of first instance was that of a Munsif who has no powers at all on the revenue side. I do not think that I should order the decree of that Court to be registered as the decree of a Collector of the first grade, for if such a course is improper in the case of a suit being tried by an officer whose powers on the revenue side are too low (vide *Ramjas* v. *Ralla* (1)], it would seem to be still more improper in the case of a suit being tried by an officer who has no powers at all on the revenue side. I accept this appeal, and set aside all the proceedings and direct the plaint to be returned by this Court to the plaintiff for presentation, if so advised, in a Revenue Court of competent jurisdiction.

I leave the parties to bear their own costs in all Civil Courts, for if defendants had raised the question of jurisdiction in the first Court, it is quite possible that that Court would have returned the plaint.

Appeal accepted.

(1) 1 Ind. Cas. 465; 25 P. R. 1909; 39 P. W. R. 1909; 70 P. L. R. 1909.

SUBRAMANIA CHETTY *v.* KULAYAPPAN.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 664 OF 1913.

August 12, 1914.

Present:—Mr. Justice Hannay.

SUBRAMANIA CHETTY—PETITIONER

versus

KULAYAPPAN *alias* MALAYANDI CHETTY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 5, 6, 7—Pauperism inquiry—Jurisdiction of Court to decide questions other than paupersim—Plea of limitation, Court's power to decide.

After a notice is issued, under rule 6, Order XXXIII, of the Code of Civil Procedure the Court, in an inquiry under Order XXXIII, rule 7, is not divested of its jurisdiction to decide whether the applicant has a good cause of action on the merits, and can, therefore, decide questions of limitation arising on the facts alleged in the application.

An application for leave to sue as a pauper presented five years after attaining majority, is clearly barred and the suit cannot be maintained.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Udamalpet, in Original Petition No. 721 of 1912, dated 21st July 1913.

FACTS.—The petitioner filed an application before the District Munsif of Udamalpet for leave to sue in *forma pauperis*. The cause of action seems to have arisen during the minority of the petitioner and he, in consequence, claimed the benefit of section 6 of the Indian Limitation Act. It, however, appeared from the pleadings that he had attained majority five years before suit. The District Munsif held an inquiry, not only as regards the pauperism of the applicant, but also as to whether the suit itself was barred by limitation. He held that the applicant was really a pauper and unable to pay the Court-fee, but found that the cause of action had become barred and dismissed the petition. Against this order a civil revision petition was filed in the High Court.

Mr. *B. Narasimha Row*, for Mr. *T. M. Krishnaswami Iyer*, for the Petitioner:—The District Munsif had acted wholly without jurisdiction in going into the merits of the case. He ought to have confined the inquiry to the pauperism of the petitioner and ought not to have considered the point of limitation. He, having found that the petitioner was really unable to pay the Court-fee, ought to have allowed the application. Once notice had been issued under Order XXXIII, rule 6, the only matter which the Court was competent to inquire into was the pauperism of the applicant, though at an earlier stage before any notice was issued, the Court could reject the application on any of the grounds specified in rule 5 of Order XXXIII.

Mr. *V. Purushottama Iyer*, for Mr. *T. R. Venkatarama Sastri* (with Mr. *T. R. Ramachandra Iyer*), for the Respondent, was not called on.

JUDGMENT.—The District Munsif on inquiry into the petitioner's application for leave to sue as a pauper found that the petitioner had not sufficient means to pay the Court-fee in the suit, but rejected the application on the ground that the petitioner's claim was clearly time-barred and that he had not a *bona fide* case to put forward.

It is contended that the District Munsif had no jurisdiction to inquire into the question of limitation in the inquiry as to pauperism and that the District Munsif having found the petitioner to be a pauper, the application should have been allowed.

The Court may reject an application for permission to sue as a pauper for any of the grounds specified in Order XXXIII, rule 5, of the Code of Civil Procedure before issue of notice to the opposite party under rule 6. When notice is issued under the latter rule, the evidence to be adduced is evidence in proof or disproof of pauperism. It is urged that by the terms of rule 6 the Court could not go into evidence upon any other matter than that of pauperism after notice had gone to the opposite party. I do not think this view is correct. Order XXXIII, rule 7 (1), of the Code of Civil Procedure provides for recording evidence generally and rule 7 (2) requires the Court to hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence, if any, taken by the Court as therein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5. One of the points for consideration under rule 5 is whether the petitioner's allegations do not show a cause of action. And it has been held with reference to section 407 of the last Code (corresponding to Order XXXIII, rule 5, of the present Code) that the petitioner should show that he has a good sub-

sisting cause of action capable of enforcement in Court and not barred by the law of limitation or any other law. The alteration in wording in the present Code (where the words "show a cause of action" have been substituted for the words "show a right to sue in such Courts" occurring in section 407 of the previous Code) does not affect the applicability of those decisions to the present Order and rule. I think, therefore, that the lower Court had power to inquire into a question of limitation affecting the petitioner's cause of action for the suit and for that purpose was entitled to record evidence.

As regards the finding that the petitioner's claim is barred by limitation, I see no reason to differ from the conclusion of the lower Court that the petitioner sued five years after attaining majority and that his claim is, therefore, barred by limitation. The cause of action given by the petitioners is the date of attaining his majority, and his own statement shows that that occurred about five years before the petition for leave to sue as a pauper was filed.

The petition is dismissed with costs.

Petition dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 994 OF 1913.

July 11, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

BALDEO PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE COLLECTOR OF PILIBHIT—DEFENDANT—RESPONDENT.

U. P. Court of Wards Act (III of 1899), s. 48 – Notice to sue—Amendment of plaint—No change in cause of action, whether fresh notice required.

In a suit against a ward of a Court an amendment of the plaint should not be allowed if the effect of the amendment is to introdue a new "cause of action" which was not stated in the notice provided by section 48 to be given to the Collector but where it is sufficiently stated the amendment should be allowed and a fresh notice under the section is not necessary.

The object of section 48 of the Court of Wards Act is to give the Collector time to consider the nature of claim against the ward in order that the manager might investigate the matter and, if necessary, meet the claim without incurring needless cost.

Second appeal from the decision of the District Judge of Bareilly.

Mr. *Kailas Nath Katju*, for the Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed to recover the sum of Rs. 1,990-2-0. As originally framed, this sum was said to be the amount of a promissory note, dated the 20th of November 1909, together with interest thereon. The maker of the promissory note was one Pokhar Singh. The Collector of Pilibhit was sued as manager of the estate of Pokhar Singh in charge of the Court of Wards. The defence was that the promissory note was made after the estate had been taken over by the Court of Wards. On this defence being raised, the plaintiffs applied for an amendment of their plaint so as to enable them to fall back on a previous promissory note, dated the 15th of November 1907. The Court of first instance allowed the amendment and decreed the plaintiffs' suit. The amendment as made was, to say the least of it, inartistic.

The defendant objected to the amendment and in his memorandum of appeal, a ground was taken that the amendment ought not to have been allowed. The lower Appellate Court considered that the amendment ought not to have been allowed and dismissed the plaintiffs' suit. Hence the appeal.

Before the institution of the suit the plaintiffs served a notice on the Court of Wards in order to comply with the provisions of section 48 of the Court of Wards Act, which provides that "no suit relating to the person or property of any ward shall be instituted until after the expiration of two months after notice in writing has been delivered, stating the name and place of abode, the cause of action, and the relief which he claims." The form that the notice took was a copy of the intended plaint. In our opinion

BALDEO PRASAD v. COLLECTOR OF PILIBHIT.

if the amendment which was made by the Court of first instance is allowed to stand, the plaintiffs' claim cannot be dismissed on the ground that the provisions of section 48 were not complied with. The notice required by section 48 was in fact served as provided by the section, and the suit is the same suit notwithstanding that a substantial change has been made as the result of the amendment.

The defendant, however, contends that the amendment ought never to have been allowed and that he was entitled in the lower Appellate Court to challenge the propriety of the amendment under the provisions of section 105 of the Code of Civil Procedure. There is one reason, and one reason only, why the amendment should not have been made subject, of course, to such terms as the Court should think just. The reason would be that the amendment allowed the introduction of a new cause of action, and the defendant was entitled under section 48 of the Court of Wards Act to a two-monthly notice in writing before a suit on foot of the *new* cause of action was instituted [See *McInerny* v. *Secretary of State for India* (1)].

Two questions arise, *first*, whether the amendment ought to have been allowed, and *secondly*, whether the notice which the plaintiffs delivered was a sufficient notice of the suit as set forth in the amended plaint. We think that if the effect of the amendment was to introduce a new "cause of action" which was not stated in the notice, then the amendment should not have been allowed because the defendant would not have received the two months' notice to which he was entitled under the provisions of section 48. If, on the other hand, the cause of action as set forth in the amended plaint was sufficiently stated in the notice which the plaintiffs served, then we think that the amendment was properly allowed.

We now proceed to deal with the case upon the principle which we have mentioned above. We have already stated that the notice which the plaintiffs delivered consisted of a copy of their plaint before the amendment. In this plaint the name and abode of the intending plaintiffs were set forth. So was the relief which they claimed. In paragraph 2 the following statement was made: "for a long time there were money dealings between the shop of the plaintiffs and Kunwar Pokhar Singh. Accordingly on the 20th of November 1909, the said Pokhar Singh, having adjusted his accounts under a former promissory note executed on the 15th November 1907, executed the promissory note sued on." Now suppose that the plaintiffs, after having delivered to the defendant a copy of this plaint as a compliance with section 48 of the Court of Wards Act and suppose that prior to the filing of the plaint, had come to the conclusion that they could not succeed on the basis of the promissory note of the 20th of November 1909 and that they themselves had altered their plaint by alleging that they sued on the note of the 15th of November 1907, using the note of the 20th November 1909 as an acknowledgment. Supposing further that after the filing of their plaint the defendant had pleaded that section 48 of the Court of Wards Act had not been complied with on the ground that the "cause of action" had not been stated as provided by section 48. On the assumptions which we have made, would such a defence have succeeded? If it would, then we think the amendment ought not to have been allowed and that the plaintiffs' suit was rightly dismissed by the lower Appellate Court.

But, on the other hand, it is necessary to see whether or not the plaint which the plaintiffs delivered as a notice under section 48 sufficiently states the "cause of action" as set forth in the amended plaint.

The expression "cause of action" has been defined to be every fact which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of this Court. In paragraph 2 of the unamended plaint the plaintiff set forth that there had been for a long time money dealings, that the account had been adjusted and a former promissory note given, and that on the 20th of November 1909 another promissory note had been given. Bearing in mind that the object of section 48 was to give the Collector time to consider the nature of claim against the ward in order that the manager might investigate the matter and

(1) 13 Ind. Cas. 370; 38 C. 797.

if necessary meet the claim without incurring needless costs, we find it impossible to hold that the "notice" delivered by the plaintiff in the present case was not a sufficient statement of the "cause of action" as set forth in the amended plaint. It gave all the information necessary to enable the Collector to investigate the claim and two promissory notes are practically all the plaintiff need have proved. If we are correct in this then the amendment was properly made and the plaintiff's suit ought not to have been dismissed on the ground that the amendment was improper. It is clear that the plaintiff is not entitled to interest upon the entire amount of the second promissory-note. This document can now only be used as an acknowledgment of the previous debt. We have gone into the account and we find that the sum which the plaintiff is entitled to is the sum of Rs. 1,810, for principal and interest up to the date of the suit. From the date of the suit until payment he will get 6 per cent. simple interest on this amount. Inasmuch as in all probability all the litigation was caused by the plaintiff's in the first instance entering into a contract with Pokhar Singh after the estate had been taken over and bearing in mind also that in order to sustain the suit it was necessary that the plaint should be amended, we think that the parties should pay their own costs in all Courts. We accordingly grant the plaintiff a decree for the sum of Rs. 1,810, principal and interest, up to the date of the suit. From the date of the institution of the suit until payment he will receive interest at the rate of 6 per cent. per annum on the sum of Rs. 1,810, until payment.

Appeal decreed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 225 OF 1910.

August 12, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KATHIRESAN CHETTIAR—PETTITIONER—APPELLANT

versus

RAMASAWMY CHETTIAR AND OTHERS—DEFENDANTS NOS. 1 and 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 90—"*Whose interests are affected by the sale*", *meaning of*—*Attachment before judgment, effect of.*

The words "interests" in rule 90, Order XXI, must be limited to the properties the subject of the application.

Where the applicant, a mere money decree-holder, relies merely upon an attachment before judgment of property other than that sold and applies for an order to set aside the sale, it cannot be said that he has such a present "interest" in the property sold as to entitle him to make the application under that rule.

Jogendra Nath Chatterjee v. *Manmotha Nath Ghose*, 15 Ind. Cas. 668; 16C.L.J. 565; 17 C.W.N. 80, followed.

Appeal against the order of the Court of the Subordinate Judge of Madura East, in Execution Application No. 22 of 1910 (Original Suit No. 64 of 1909) on the file of the District Court of Madura.

Mr. *T. Rangaramanujachariar*, for the Appellant.

Mr. *S. Varadachariar*, for Mr. *S. Gopalasawmy Aiyangar*, for the Respondents.

JUDGMENT.

NAPIER, J.—This is an appeal arising out of an execution application in the Court of the Subordinate Judge of Madura (East) under Order XXI, rule 90, of the Civil Procedure Code, in Original Suit No. 64 of 1909. The decree-holder in another suit, Original Suit No. 167 of 1908, had attached certain properties of the defendants and brought them to sale. The sale was held and the purchase-money paid and received by the Court. Fourteen days after this payment, the petitioner herein presented an application for execution of the decree, which he had obtained some time previously, by the attachment and sale of the properties above referred to with an application to set aside that sale and a further application for rateable distribution in the assets already realized by the sale. The Subordinate Judge dismissed his application for rateable distribution, on the ground that he was not entitled to it not having applied to the

Court for execution of his decree before the receipt of the assets by the Court, and for the same reason dismissed his application to set aside the sale. This appeal is from that order.

In this Court the appellant does not ask for rateable distribution of the realized assets, as he wishes the sale to be set aside on the ground of fraud. He does not claim to be a "person entitled to share in a rateable distribution of the assets," but he contends that he is a person "whose interests are affected by the sale" and is, therefore, entitled to apply. These words are newly inserted in the Civil Procedure Code of 1908 and are also to be found in rule 72 of the order. The language could certainly be read as wide enough to include a person in the appellant's position if taken by itself, and it is no answer that these words were inserted to set at rest doubts existing on the language of the old Code as to the meaning of the words "whose immoveable property has been sold." It may be that the Legislature intended by these words to describe persons claiming in the judgment-debtor's interest and it may also be that this is the true construction of the rule, but it cannot be so held for the mere reason that these wider words were substituted for the very narrow words in the previous Code, what we have to look to being the words themselves and not the intentions of the Legislature. It is sufficient, however, for the purpose of this case to decide, as we do, that the applicant is not a person "whose interests are affected by the sale" within the meaning of the rule. This conclusion can be arrived at by two methods. The first is that adopted in *Jogendra Nath Chatterjee* v. *Manmotha Nath Ghose* (1). There the Court held that the word "interests" must be limited to the property, the subject of the application and that, as the subject-matter of the sale sought to be set aside was the immoveable property sold, the interests that must have been affected by the sale must have reference to the same property. Taking that view the Court held that the applicant had no present interest in the property an attachment before judgment not giving him such interest. We agree that it is a necessary limitation of the word "interests" to confine it to the property concerned, as any other construction would open up an inquiry as to whether the applicant's pecuniary interests required satisfaction out of the property sold or whether there was other property available to him. It would further be difficult to draw a line between a decree-holder and a person claiming to be a creditor and if a creditor was a person whose interests were affected, it would necessitate the trial of his suit in the execution proceedings, a procedure which could never have been contemplated. There is another process leading to the same result, which is this: The rule specifically gives power to apply to a person "entitled to share in a rateable distribution of the assets." These words are added in the present Code, the old Code providing simply for the decree-holder. The words, therefore, extend the right to a person other than a party to the suit or his representative, but confine it to a certain narrow class of persons. If a person of the class of the applicant, namely, another decree-holder not entitled to share is to be considered as covered by the relative words "whose interests are affected by the sale," we have this extraordinary result, that the Legislature after inserting the words to extend the right and then confining it by very limited language, has nullified the effect of those words by words of wider application in the next sentence. In our opinion this is not an interpretation which can be properly put on the language of the rule were any other construction possible, and we hold that any decree-holder who has not obtained the right to share in a rateable distribution is not entitled to apply under the wider words of the succeeding sentence. This appeal, therefore, fails and is dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree.

Appeal dismissed

(1) 15 Ind. Cas. 668; 16 C. L. J. 565 17 C. W. N. 80.

ABBAS BANDI BIBI *v.* SARJU PANDE.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 19 OF 1913-14 OF FYZABAD DISTRICT.

March 26, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Musammat ABBAS BANDI BIBI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SARJU PANDE—PLAINTIFF—RESPONDENT.

Ejectment, notice of—Co-sharers, several, in one tenancy—Patwari's *papers, entry in, showing one co-sharer's name only—Notice against one co-sharer alone, whether valid.*

Where besides the person whose name is recorded in the *Patwari's* papers, there are several other co-sharers in the tenancy as tenants-in-chief, a notice of ejectment must be issued against all the co-sharers, so that in a suit to contest that notice all of them may appear before the Court as parties and the questions raised in the suit be properly decided.

Appeal from the decree of the Commissioner, Fyzabad, dated 10th October 1913, upholding that of the Assistant Collector, Fyzabad.

Chowdhry *Niammat Ullah*, for the Appellants.

Babu *Har Gobind Das*, for the Respondent.

FACTS.—The defendants-landlords issued a notice of ejectment against the plaintiff whose name alone was recorded as tenant-in-chief in the *Patwari's* papers. The plaintiff brought a suit against the defendants to contest the notice of ejectment on several grounds, one of them being that besides the plaintiff there were several other persons as well who were co-sharers in the tenancy as tenants-in-chief.

The Court of first instance found that there were several other co-sharers with the plaintiff and the notice issued against one co-sharer alone was invalid. The Commissioner on appeal upheld the decision of the first Court, and the matter was further brought in appeal to the Board.

JUDGMENT.—I entirely agree with the Commissioner and the Court of first instance. It appears that besides the respondent there are several other persons who are co-sharers in this tenancy as tenants-in-chief. The questions raised cannot possibly be decided until they are made parties. I find no ground for interference and dismiss the appeal with costs on the appellants.

Appeal dismissed.

DAMBAR SINGH *v.* MURARI LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1684 OF 1913.

July 16, 1914.

Present:—Mr. Justice Chamier.

DAMBAR SINGH—PLAINTIFF—APPELLANT

versus

MURARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 88 *– Pre-emption—Co-sharer—Vendee, whether complete stranger.*

The object of Order XXI, rule 88, is to enable a co-sharer in a *mahal* to keep out strangers. It provides for only one class of pre-emptors and lays down one simple rule, namely, that any one who is a co-sharer of the undivided property of which a share is sold, is entitled to pre-empt that share when the highest bid is made by a person who is not a co-sharer. Hence no pre-emption suit could be maintained as against the vendee who was a co-sharer in a different *patti* but in the same *mahal*.

Second appeal from the decision of the Subordinate Judge of Budaun.

Mr. *B. E. O'Conor* (with him Mr. *Nehal Chand*), for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—A share in a *patti* was put up for sale in execution of a decree passed by a Civil Court. The defendants were the highest bidders and the property was about to be knocked down to them, when the plaintiff bid the same sum for it and claimed to be entitled to take the property as a co-sharer within the meaning of Order XXI, rule 88. His claim was rejected and he then brought the present suit. Having failed in both the Courts below he has filed this second appeal. Several questions were discussed by the Courts below, but in the view which I take of the case the only question for decision is whether he is entitled to the property under Order XXI, rule 88.

The tenure of the village is *pattidari*. The plaintiff has a share in the same *patti* as that in which the share sold lies. The defendants have a share in a different *patti* in the same *mahal*. The village was recently the subject of an imperfect partition. The different *pattis* are jointly responsible for the revenue assessed on the whole *mahal*. The plaintiff contends that as each *patti* bears a separate revenue, he and the holder of the share sold were co-sharers in undivided immoveable property within the meaning

of Order XXI, rule 88, and the defendants are not co-sharers. This question arose but was not decided in *Abdul Ghafoor* v. *Ghulam Husain*(1). In my opinion the plaintiff's claim should be rejected. If the highest bidder had been a complete stranger to the village, there can, I think, be no doubt that defendants would have been co-sharers within the meaning of Order XXI, rule 88, and entitled to take the property if they bid the same sum as the stranger. The words "undivided immoveable property" must have the same meaning whether the highest bidder holds a share in the village or is a complete stranger. The object of the rule is, I think, to enable co-sharers in a *mahal* to keep out strangers, if they so desire. We are all familiar with the kind of *Wajib-ul-arz* which gives the preference to co-sharers of the whole *mahal* against strangers and gives the preference to co-sharers of the same sub-division of the *mahal* against co-sharers of the whole *mahal* and such provisions are to be found in the Acts relating to pre-emption in the Punjab and Oudh. But it is, I think, impossible to read all this into Order XXI, rule 88, which appears to me to provide for only one class of pre-emptors, and to lay down one simple rule, namely, that any one who is a co-sharer of the undivided property of which a share is sold, is entitled to pre-empt that share when the highest bid is made by a person who is not a co-sharer. Inasmuch as every part of each *patti* in the *mahal* now in question is responsible for the revenue assessed on the whole *mahal*, I am of opinion that the whole *mahal* is undivided property for the purposes of the rule. The appeal is dismissed with costs.

Appeal dismissed.

(1) 18 Ind. Cas. 959; 35 A. 296; 11 A. L. J. 297.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2607 OF 1912.

July 13, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

THE MUNICIPAL COUNCIL OF TIRUPATI BY THE CHAIRMAN AT TIRUPATI—DEFENDANT—APPELLANT

versus

Sree Mahant PRAYAG DOSSJEE VARU—PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (IV of 1884), s. 53, Sch. A, cl. (3)—"Money-lender," meaning of—Occasional money-lender—Public purposes—Capacity of "owner and occupier."

The term "money-lender" as used in section 53 of the District Municipalities Act, read with Schedule A, clause(3) of the Act, implies a continuous and systematic lending almost amounting to a trade or business.

Where, therefore, a person casually or intermittently invests his surplus funds in mortgage or in personal security he is not to be considered a "money-lender" within the meaning of that section.

Jennings v. *President Municipal Commission Madras*, 11 M. 253, distinguished.

Kunmetta Chinnarappa v. *Kona Thimma Reddi*, 8 Ind. Cas. 677: (1911) 2 M. W. N. 111 at p. 113; 9 M. L. T 55; 21 M. L. J. 559, followed.

Where a person has a dual capacity of the trustee of a temple and the head of a *Mutt*, and in the former capacity occupies a building owned by him in the latter capacity, he is still an "occupier" for refund of money paid by him in that capacity.

Where the suit is simply to recover a tax illegally levied no declaration as to future rights and liabilities should be given.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 97 of 1912, preferred against that of the Court of the District Munsif of Tirupati, in Original Suit No. 3 of 1911.

FACTS.– Suit was by the *Mahant* of Tirupati, as the Vicharanakarta of the Tirupati temple, for a declaration that he was not liable to pay certain taxes and to recover from the Municipal Council of Tirupati certain taxes which had been illegally collected from him. It would appear that the defendant Municipality assessed the *Mahant* with tax for being a money-lender and for keeping horses and vehicles. The plaintiff contended that he was not a systematic money-lender but only used occasionally to invest his surplus cash on personal security or in mortgage of immoveables and as such was not a money-lender within the meaning of the Act. As regards the horses and vehicles, he contended that they were exempt from tax as they were used for public purposes. The defendant Council contended that the *Mahant* was a money-lender, that as some of the horses kept by the *Mahant* were used by pilgrims they were liable to be taxed and that the suit itself was not maintainable, as the plaintiff was the owner of the buildings in respect of which the tax had been paid and which he was bound to pay. The lower Courts decreed the plaintiff's claim. The

defendant Council thereupon appealed to the High Court.

Mr. *L. A. Venkataraghava Aiyar*, for the Appellant:—Lending out moneys even occasionally is following the calling of a money-lender. *Jennings* v. *President, Municipal Commission, Madras* (1). The building used for stabling Devastanam horses and vehicles is not exempt from liability to pay tax as some only of the horses and vehicles are used for temple processions and the rest are used by pilgrims. Such a use is not for a public purpose. The plaintiff being the owner of the buildings is not entitled to a refund of the tax.

Mr. *K. Srinivasa Iyengar*, for the Respondent:—Mere occasional lending does not make a person a 'money-lender' within the meaning of the Madras District Municipalities Act. There must be a systematic and continuous lending so as to amount to a trade or business. *Kunmetta Chinnarappa* v. *Kona Thimma Reddi* (2). The District Judge has found that there was no such systematic lending. The mere fact that some of the horses and vehicles are used by respectable pilgrims does not make the user any the less a user for a public purpose, as such pilgrims are allowed the use only as an honour by the Vicharanakarta. To constitute a public use it is not necessary that the use must be by persons belonging indiscriminately to all castes and creeds. The Vicharanakarta has a discretion in such matters. The plaintiff having paid the tax from the Devastanam funds and as occupier of the buildings and he having sued for its recovery as the trustee and occupier, is clearly entitled to recover.

JUDGMENT.—The first question for decision in this second appeal is whether the plaintiff (the Tirupati *Mahant*) is liable to be taxed under section 53 of the District Municipalities Act, read with Schedule A, clause (3), as a "person who exercises" the "calling" of a "money-lender." The learned Vakil, Mr. Venkataraghava Aiyar, who appears for the appellant, the Tirupati Municipality argues that lending out moneys even occasionally is following a "calling" and that that "calling" is the "calling" of a money-lender. He relies for this contention on certain observations in *Jennings* v. *President, Municipal Commission, Madras* (1). That case was decided on the interpretation of section 103 of the City of Madras Municipal Act of 1884, read with Schedule A of that Act. The whole arrangement of the classes of persons liable to pay Municipal taxes in Schedule A of the City of Madras Municipal Act of 1884 is different from the arrangement of the classes of persons made liable in Schedule A of the District Municipalities Act. The term "money-lender" does not occur in Schedule A of the City of Madras Municipal Act, whereas it occurs specifically in the District Municipalities Act. The case in *Jennings* v. *President, Municipal Commission, Madras* (1) only decided that a 'Benefit Society' was a person carrying on a calling (that is the calling or business of a Benefit Society) when it invested funds for profit. That case did not decide that such a Benefit Society carried on the calling or profession of a "money-lender." The word "money-lender" is not expressly defined in the District Municipalities Act, but we do not think that any person who casually or intermittently invests his surplus funds in mortgage or in personal security must necessarily be considered to follow the calling of a money-lender. As indicated in the case of *Kunmetta Chinnarappa* v. *Kona Timma Reddi* (2), "the money-lending transactions" must be so "numerous, continuous and systematic" that it might appropriately be called the "trade or business of money-lending." The facts found in the present case do not prove the transactions of loan entered into by plaintiff's predecessors to have been so continuous, numerous and systematic, and the learned District Judge was right in his conclusion that the plaintiff is not liable to be taxed as coming under the class of "money-lender" mentioned in Schedule A of the District Municipalities Act.

The next question is whether the building used for stabling the Devastanam coaches and horses is entitled to be exempted as used for a public purpose, the finding being that some of the horses are used to carry drums in the temple processions and others are used by respectable pilgrims to whom

(1) 11 M. 253.

(2) 8 Ind. Cas. 677; (1911) 2 M. W. N. 111 at p. 113; 9 M. L. T. 55; 21 M. L. J. 559.

such an honour is shown by the *Mahant*. We think that such uses are uses for public purposes, notwithstanding that the persons who make such use of the vehicles and horses do not belong indiscriminately to all castes and creeds, and that a discretion is vested in the temple Vicharanakarta as to the members of the general public to whom such use is permitted of the said vehicles and horses.

Then it is contended that the plaintiff suing as the Temple Trustee is not entitled to recover the tax levied on the stable building which belongs to him in a different capacity, that is, as head of a *Mutt* to which the building belongs. But the facts show that plaintiff paid the tax as occupier and not as owner of the building. As he occupied the building by stabling the Devastanam horses and carriages there and paid the tax out of the Devastanam funds and not the *Muttam* funds, he was entitled to sue for the refund in his capacity as occupier, that is, in his capacity as Temple Trustee.

Lastly it is contended that the declaration granted to plaintiff (besides the refund of the illegally collected tax) is worded too widely and that this is not a case in which, in the discretion of the Court, any declaratory relief need be given. We agree with the contention and we direct that the declaration as to the future rights and liabilities of the parties be omitted from the decree.

With this small modification the lower Court's decree is confirmed with costs on the appellant.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 24 OF 1912.

August 11, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

Thakur SURAJ BAKHSH, *alias* MAHARAJ BAKHSH, MINOR THROUGH HIS NEXT FRIEND, *Thakur* JAGDEO BAKHSH —PLAINTIFF—APPELLANT

versus

Thakurain CHHAB KUAR—DEFENDANT—RESPONDENT.

Statement made by party or his Pleader—Admissibility in evidence—Estoppel—Wajib-ul-arz, *construction and value of—Proof of custom—Custom recorded in* Wajib-ul-arz *at variance with* Mitakshara *Law, weight of—Court, duty of.*

The statements regarding a certain point made in a previous case by a party or his Pleader are admissible in evidence to prove or disprove that point again arising in a subsequent case and can be relied upon by the Court in considering that point. But the party or the person claiming through him in the subsequent case is at liberty to prove that the admissions appearing in those statements were mistaken or untrue, and is not estopped or concluded by them unless some other person has been induced by them to alter his condition.

Chandra Kunwar v. Chaudhri Narpat Singh, 29 A. 184 (P. C.); 4 A. L. J. 102; 11 C. W. N. 321; 5 C. L. J. 115; 17 M. L. J. 102; 2 M. L. T. 109; 9 Bom. L. R. 267, referred to.

A *Wajib-ul-arz* is properly admissible to prove a custom set out therein; and suits on the basis of custom may be decreed on entries in a *Wajib-ul-arz* alone. But where it appears that the entries connote the views of individuals as to the practice which they wish to see prevailing rather than the ascertained fact of a well-established custom, the *wajib-ul-arz* is of little value.

Lekraj Kuar v. Mahpal Singh, 5 C. 744 (P. C.); 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's (P. C.) No. 61; 4 Ind. Jur. 423; *Anant Singh v. Durga Singh*, 32 A. 363; 6 Ind. Cas. 787; 14 C. W. N. 770; 7 A. L. J. 704; 12 C. L. J. 36; 13 O. C. 163; 37 I. A. 191; 12 Bom. L. R. 79; 20 M. L. J. 604; *Muhammad Imam Ali Khan v. Husain Khan*, 26 C. 81 (P. C.); 25 I. A. 161; 2 C. W. N. 737; *Parbati Kunwar v. Chandarpal Kunwar*, 4 Ind. Cas. 25; 10 C. L. J. 216; 6 A. L. J. 767; 13 C. W. N. 1073; 11 Bom. L. R. 890; 12 O. C. 304; 5 M. L. T. 427; 19 M. L. J. 605; 36 I. A. 125 (P. C.); 31 A. 457; *Uman Parshad v. Gandharp Singh*, 15 C. 20 (P. C.); 14 I. A. 127; 11 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique and Jackson's (P. C.) No. 98 and *Bajrang Singh v. Daulat Singh*, 7 O. C. 134 at p. 135, referred to.

When a custom is startlingly at variance with the *Mitakshara* Law among Hindus following that law, a Court is entitled to look for substantial corroborations.

Appeal against the order of the Subordinate Judge, Sitapur, dated 22nd December 1911.

The Hon'ble Rai *Sri Ram Bahadur*, for the Appellant.

Babus *Basudev Lal* and *Chhote Lal*, for the Respondent.

JUDGMENT.—Bisram Singh who owned *zemindari* property in villages Bhima, Surjanpur, Sair, Korta, Parwarbhari, Mowaiya, Samaia and Hararmau, died childless in 1901, leaving two widows, *Musammat* Lagan Kuar, the senior, and *Musammat* Chhab Kuar, the junior widow. Mutation was effected in the name of both the widows. *Musammat* Lagan Kuar died

in November 1907 and mutation was then effected on 22nd April 1908 in favour of *Musammat* Chhab Kuar, the surviving widow. The plaintiff-appellant, Thakur Suraj Bakhsh Singh *alias* Maharaj Bakhsh, brought this present suit against *Musammat* Chhab Kuar on the allegation that during his life-time Thakur Bisram Singh had given to *Musammat* Lagan Kuar authority to adopt, and that according to the custom of the family also a widow had power of transfer and of adoption without any formal permission or authority from her husband. He alleged that accordingly *Musammat* Lagan Kuar adopted him on the 7th June 1907, with the usual religious ceremonies, and executed and caused to be registered a deed of adoption in his favour on that same date. He pleaded further that she executed a Will in respect of all her property in favour of him and of her brother, who is also named Suraj Bakhsh. One week later, he pleaded, owing to the defendant having put obstacles in the way of his taking possession, a serious riot took place as a result of which the plaintiff's real father and some servants were convicted in December 1907. He dated his cause of action from the 22nd April 1908 when mutation of names was effected in favour of the defendant. He, therefore, prayed for possession as owner of the entire property. As an alternative he prayed that, if his adoption were not deemed to be proved, a decree for possession of a half share should be passed in his favour on the basis of the Will, which was also dated the 7th June 1907. As a second alternative he prayed that, if adoption were deemed to be proved but that he were found not entitled to possession in the life-time of the defendant, a declaratory decree might be passed to the effect that he will be owner of the property after the defendant's death.

The defendant in reply denied the *factum* of adoption or that any Will had been made; she denied that any permission to adopt had been given by Bisram Singh, and denied the existence of any custom allowing a widow either to adopt or to transfer the family property, in which she had, she (defendant) alleged, only a life-interest.

The lower Court has entirely dismissed the plaintiff's claim. It found that Bisram Singh did not give permission to *Musammat* Lagan Kuar to adopt a son to him. It found that no family custom existed entitling her to adopt a son without his permission, or giving her power to transfer the share she was holding as a Hindu widow. Finding as above, it proceeded to record that no finding was necessary on the issues as to whether *Musammat* Lagan Kuar did or did not adopt the plaintiff and did or did not execute the Will; but it noted that if it were necessary to consider these issues it would have held them in the affirmative.

The plaintiff has brought his present appeal on the ground that permission to adopt the son is proved to have been given to *Musammat* Lagan Kuar by Bisram Singh and that the lower Court has improperly discredited the evidence on this point. It is also pleaded that on the evidence the lower Court should have held that *Musammat* Lagan Kuar had power to adopt a son without her husband's permission. It is also vaguely claimed that the lower Court ought to have given the alternative relief asked for by the plaintiff. This latter ground, however, was expressly not argued in this Court.

The two points which arise for our decision are (1), did Bisram Singh give *Musammat* Lagan Kuar authority to adopt? and (2) if not, had she, by family custom, power to do so without such authority? On both these points we unhesitatingly find against the plaintiff.

The reasons which the lower Court has given for disbelieving the oral evidence on the first point are cogent and convincing.

Evidence was led in a former suit on behalf of *Musammat* Lagan Kuar to prove that on the morning he died, Bisram Singh gave authority to his wife to adopt a son to him. Some of those same witnesses have been produced in this present case. We have no doubt that the lower Court is quite correct where it says: "My conclusion is that this case of the husband's authority to adopt was not thought much of at that time and, therefore, the witnesses were not tutored sufficiently on this point. It was enough that they made some mention of it in that case. Now that this point has been urged with some earnestness, the necessity of some changed statements has arisen." It

transpired that Bisram Singh died under suspicious circumstances, having suddenly been taken ill and having lain unconscious for a few hours before his death; and it is admitted that his body was ordered to be taken into headquarters for *post mortem* examination for this reason. That being so, it must have become evident to the persons responsible for the prosecution of the present suit that it was hopeless to set up the case which they set up on the former occasion, that on the date Bisram Singh died he had of his own accord said to certain persons that his wife should adopt some one to perpetuate his name. It has been sought to prove now that some days before his death Bisram Singh stated that he had given permission to his senior widow to adopt a son to him from some of the boys of the Dikoli family. The instance has been put back two or three days and a specification has been introduced as to the family from which adoption was to be made. Several witnesses now pretend that they were summoned from Sair by Auseri Pasi, Sair being about one mile distant from Bhima, some time before Bisram's death and at the time when Bisram was about to marry *Musammat* Chhab Kuar it is pretended that *Musammat* Lagan Kuar was not consenting to the marriage by her husband of a second wife, and that Bisram Singh, therefore, called them, though they were persons of a different caste, in order that they might bring their influence to bear upon *Musammat* Lagan Kuar to persuade her to remove her objections. According to them *Musammat* Lagan Kuar stated that she objected to a second marriage because she would not be treated with as much consideration as at present. Upon this, according to the witnesses, Bisram Singh replied: "you will remain *malik*; and if I have a son by my second wife that will be called your son; and if that son died, you have power under the *Wajib-ul-arz* of Bhima to adopt a son, and you may adopt a son."

These are explanations which Bisram Singh, if *Musammat* Lagan Kuar had been objecting, would have given to her in the privacy of his own *zenana*; yet it is pretended that the moment he made this statement Lagan Kuar at once said, "very well, marry again." As to the fear of *Musammat* Lagan Kuar as to her future treatment, it is in evidence that Bisram Singh was not living with *Musammat* Lagan Kuar, but kept a low class woman in the house.

It is further to be noted that in September 1907, three months, that is to say, after the deed of adoption is said to have been executed, *Musammat* Chhab Kuar brought a suit in the Civil Court for a declaration that *Musammat* Lagan Kuar had no authority to adopt or to make a Will. That suit was dismissed not, however, on the merits, but on the ground that at the time no cause of action existed. In that case *Musammat* Lagan Kuar and the plaintiff by his guardian *ad litem* had raised the same pleas as are raised for the plaintiff in this case, namely, that she had received permission to adopt and that she had by family custom authority to do so even without such permission. The learned Pleader who appeared for the defendants in that case, admitted on the 18th of February 1908 that the Will executed by *Musammat* Lagan Kuar in favour of Suraj Bakhsh, her brother, was invalid as far as it purported to be in his favour, that he relied on the deed of adoption alone and that if the adoption failed he had no case. He further stated on the same date (apparently the learned Subordinate Judge did not consider the above statement sufficient) that *Musammat* Lagan Kuar was competent to adopt under the *Wajib-ul-arz* and the custom of the family, that Bisram's family and the family that owned Dikoli and Surjanpur were descended from the same common stock and that he did not rely on any permission of the husband to his widow to adopt. The above statements were made formally on behalf of *Musammat* Lagan Kuar and the present plaintiff as defendants in that suit admittedly by a Pleader who was engaged on their behalf. The lower Court has, and we consider rightly, placed certain reliance on these statements in considering the first of the two points which are now before us. It is objected in the grounds of appeal that these statements are inadmissible in evidence now; but this we cannot accept. It is also proved that in the case of *Thakur Kalka Bakhsh Singh* v. *Musammat Lagan Kuar*, *Musammat* Lagan Kuar on the 9th November 1907 stated that she had adopted this boy, but that neither had the boy come into her hands, nor had she given him any property, that she had adopted the boy to herself and

not to her husband and that she had not obtained any permission from her husband to adopt, because at the time of his death she was not present. *Musammat* Lagan Kuar, or the plaintiff who claims through her, is certainly at liberty to prove that these admissions were mistaken, or were untrue, and is not estopped or concluded by them unless some other person has been induced by them to alter his condition. The above principle was cited and followed by their Lordships of the Privy Council in the ruling reported as *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1), which follows a number of English precedents and which are all based on the dictum that what a person himself says to be true, or authorizes any person to say to be true, may reasonably be supposed to be so. Nothing, however, has been proved or even suggested in this case which can explain away these admissions: and we have no doubt that the lower Court was right, considering them along with the very imperfect evidence on the point, in finding that it was not proved that the husband gave any permission to *Musammat* Lagan Kuar to adopt a son to him.

The second point for consideration is whether by family custom *Musammat* Lagan Kuar as a widow had any power to adopt a son. The plaintiff has produced copies of six *Wajib-ul-araiz* of villages in which members of this tribe have shares, while the defendant has produced the *Wajib-ul-araiz* of Dikoli and Surjanpur which are also admittedly owned by members of this tribe. In the *Wajib-ul-araiz* of villages Surjanpur, Exhibit 4, Sair, Exhibit 5, Korla, Exhibit 6, Parwarbhari, Exhibit 7 and Samaia, Exhibit 8, it is set out in paragraph 4 that as for that portion of these villages which belongs to the Raja of Mahmudabad section 22 of Act I of 1869 applies, and for the others the custom set out in the *Wajib-ul-arz* of *Mauza* Bhima applies. The *Wajib-ul-arz* of *Mauza* Bhima on which the plaintiff particularly relies, has a record to the following effect:—"That daughters and their issue do not inherit, that in the absence of sons, widows inherit and that they have in such a case a power of transfer"; and further on it reads "that a custom of adopting a child from another Thakur family with whom the adoptor can sit at meals is recognised, and a widow too, without reference to any express desire of her husband, has power to adopt." Now it is to be noticed that in all these cases the co-sharers, who are recorded as stating the custom which is set out in the *Wajib-ul-arz*, are widows only: *Musammats* Soubha and Ram Kuar, wives of Bakhtawar Singh Thakur. Now it has been repeatedly held that a *Wajib-ul-arz* is properly admissible to prove a custom which is set out therein; and in some case suits on the basis of custom have been decreed on entries in the *Wajib-ul-arz* alone. Such a case was that of *Lekraj Kuar* v. *Mahpal Singh* (2). In that case the law has been carefully discussed under which such *Wajib-ul-ariaz* are legally admissible in evidence. But it has been repeatedly recognised that no class of evidence is more likely to vary in value than that of a *Wajib-ul-arz*. Their Lordships of the Privy Council in *Anant Singh* v. *Durga Singh* (3) expressly discounted the value which was to be attached to a *Wajib-ul-arz*, where it seemed probable that the entries recorded connoted the views of individuals as to the practice which they wish to see prevailing rather than the ascertained fact of a well-established custom; and in this ruling they referred with approval to two somewhat earlier rulings of the same Board reported as *Muhammad Imam Ali Khan* v. *Husain Khan* (4) and *Parbati Kunwar* v. *Chandarpal Kunwar* (5). A *Wajib-ul-arz* of this nature came before them in *Uman Parshad* v. *Gandharp Singh* (6) as long ago as 1887. Having remarked in this latter case that the *Wajib-ul-arz* has always been considered to be an official record of more or less weight according to the circumstances or the local custom of the District in which it is recorded, they go on to say that "this *Wajib-ul-arz* was the concoction of Fateh

(1) 29 A. 184 (P. C.); 4 A. L. J. 102; 11 C. W. N. 321; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267.

(2) 5 C. 744 (P. C.); 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's (P. C.) No. 61; 4 Ind. Jur. 423.

(3) 6 Ind. Cas. 787; 14 C. W. N. 770; 7 A. L. J. 704; 12 C. L. J. 36; 13 O. C. 163; 37 I. A. 191; 12 Bom. L. R. 79; 20 M. L. J. 604; 32 A. 363 (P. C.).

(4) 26 C. 81 (P. C.); 25 I. A. 161; 2 C. W. N. 737.

(5) 4 Ind. Cas. 25; 31 A. 457 (P. C.); 10 C. L. J. 216; 6 A. L. J. 767; 13 C. W. N. 1073; 11 Bom. L. R. 890; 12 O. C. 304; 5 M. L. T. 427; 19 M. L. J. 605; 36 I. A. 125.

(6) 15 C. 20 (P. C.); 14 I. A. 127; 11 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique and Jackson's (P.C.) No. 98

Kuar herself received by the Settlement Officer as an expression of her views; but they are not entered as her views; they are entered as the official record of a custom. This does not only render these records useless but they are worse than useless, they are absolutely misleading, because they are evidence concocted by one party in his own interest." It will be better, remembering the above principle, to consider the *Wajib-ul-arz* on which the plaintiff has relied, together with those two which have been filed for the defendant, Exhibits A 2 and A1. In these two *Wajib-ul-araiz* customs are set out in one by Umrao Singh *Lambardar* and other co-sharers, male and female, and in the other by Kalka Bakhsh Singh and Umrao Singh *Lambardars* and other co-sharers, male and female. In both these it is set out that widows, if they succeed, will have no right of transfer and that no custom prevails either of *haq jethansi* or of adoption. It is perfectly clear, when we consider the principles which have been laid down as above by their Lordships of the Privy Council with reference to the construction of these *Wajib-ul-araiz*, that great value must be attached to *Wajib-ul-araiz* in which the co-sharers had met together and agreed upon the existence of custom by which they were all equally affected, or which were of general interest, or which imported rights and liabilities to which all would equally be subject. As observed by Chamier, A. J. C., in *Bajrang Singh* v. *Daulat Singh* (7): "The paragraph of the *Wajib-ul-arz* which dealt with customs regarding inheritance and succession was as a rule prepared upon information supplied by the proprietors of the Mouzah. The extent to which the accuracy of such information was tested depended largely upon the energy of the Settlement Officials. In a large number of instances in other districts if not in Fyzabad district also the information so acquired was I believe accepted as correct and recorded without further inquiry." An entry in a *Wajib-ul-arz*, *e.g.*, made at the instance of women alone, that widows have a complete right of transfer or a power of adoption without previous authority would thus be of little value. Such *Wajib-ul-arz* as the latter will be open at once to the suspicion of being merely opinions recorded of what the co-sharers at the time thought better for themselves and will be open to the criticism which is so strongly expressed in the case of *Uman Parshad* v. *Gandharp Singh* (6) to which reference has been made above. And again where a *Wajib-ul-arz* sets out a custom, which is startlingly at variance with the *Mitakshara* Law among Hindus who follow that law, a Court will be entitled to look for substantial corroboration. For the above reasons we can attach but little value to these *Wajib-ul-araiz* on which the plaintiff bases his claim; particularly so when it is considered that entries to the contrary are to be found in the two *Wajib-ul-araiz* referring admittedly (see *Musammat* Lagan Kuar's Pleader's statement referred to above) to the same tribe to which *Musammat* Lagan Kuar belonged, where persons recording that statement were not only females, but comprised *lambardars* and a number of male and female co-parceners. No evidence worth the name of any instance in which this so-called custom was followed is on record.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

(7) 7 O. C. 134 at p. 135.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 124 OF 1912.

July 30, 1914.

Present:—Mr. Justice Parlett and Mr. Justice Twomey.

Captain ABDUL RAHMAN KHAN LAUDIE, BY HIS AGENT, FAZAL RAHMAN KHAN—PLAINTIFF—APPELLANT

versus

MA KYE—DEFENDANT—RESPONDENT.

Muhammadan Law—Khula divorce—Agent—Benami transaction—Source of purchase-money—Principle of "advancement"—Father purchasing property in son's name, whether gift—Presumption.

A *Khula* divorce is a divorce where the wife alone is [illegible] of having the marriage dissolved and in such a [illegible] the wife may reserve an option to revoke it.

Once a transaction is found to be *benami*, it becomes a question of evidence as to who is the real purchaser. The mere fact of one man posing at the time of purchase as agent for the *benamidar* is not conclusive proof that the purchase-money belonged entirely to the *benamidar*. The English principle of advancement is not applicable in this country.

When a Mussalman father purchases property in the name of his son, no presumption arises in India that a gift of the property was intended to be made to the son.

Where the plaintiff has never been in actual possession of the lands and has exercised no control

over them, though they were bought in his name, the best criterion is to consider from what source the purchase-money came.

Gopeekrist Gosain v. *Gungapersaud Gosain*, 6 M. I. A. 53; 4 W. R. 46 (P. C.); 1 Sar. P. C. J. 493; 19 Eng. Rep. 20, followed.

Mr. *Villa*, for the Appellant.

Mr. *May Oung*, for the Respondent.

JUDGMENT.—The plaintiff-appellant, Abdul Rahman Khan Laudie, is a Captain in the I. M. S., now employed as a Civil Surgeon in the Punjab. He is the son of Karim Khan, who was for many years a Hospital Assistant on the Burma Railways and who died at Kyebwe in the Toungoo District in 1907.

Karim Khan at the time of his death was possessed of 14 holdings of paddy land. The defendant-respondent, Ma Kye, a Burmese woman who claims to have been Karim Khan's wife, is now in possession and the plaintiff sues her for the lands, alleging that they belong absolutely to him and that his father Karim Khan held them for him as his agent. He also contends that Ma Kye was not his father's legal wife or if she was his wife, that they were divorced in 1898. He alleges that he began a business of paddy trading and money-lending with his father about 1894 when he was a schoolboy of 17. His father was then receiving a salary of about Rs. 75 a month and had some private practice. In 1897 after passing the F. A. Examination the plaintiff went to England to study medicine. After that he took no part in the paddy trading and money-lending business, but he alleges that it was carried on by his father as his agent. It was out of the proceeds of this business that the heavy expenses of his medical training in England were defrayed and the lands in suit were bought by his father. The plaintiff states that he at first gave a power-of-attorney in 1896 to Ma Kye, but subsequently when he heard that Ma Kye and his father had quarrelled and separated he revoked it and sent his father a power-of-attorney from Edinburgh. After his father's death he came to Burma and obtained all the title-deeds of the lands from Ma Kye. He then appointed his brother Fazal Rahman Khan as his agent. Then followed a period of disputed possession. Ma Kye claimed that the lands belonged to her and let them out to tenants, while Fazal Rahman claimed the right to let the lands and receive the rents as his brother's agent. The District Magistrate at length took action under the Code of Criminal Procedure in 1911 and declared that Ma Kye was in lawful possession and that she should not be disturbed except by order of the Civil Court. Hence this suit by Captain Abdul Rahman Khan Laudie for possession of the lands in question.

These lands were bought in the last ten years of Karim Khan's life and were all bought in the name of his son Abdul Rahman Khan, the plaintiff. In the three of title-deeds filed by the plaintiff, Abdul Rahman is mentioned as the actual purchaser. In one, Exhibit A, Ma Kye is shown as the purchaser as agent for Abdul Rahman. But the unattested interlineations on this document render it extremely doubtful whether Ma Kye took any part in the conveyance or knew that she was being described in it as the agent of Abdul Rahman. In another, Exhibit E, Fazal Rahman is the purchaser as agent for Abdul Rahman. But Fazal Rahman states that he was merely a sub-agent of his father, Karim Khan. In the remainder of the title-deeds Karim Khan is the purchaser as agent for Abdul Rahman.

It appears that most if not all of the lands stood in the maps and the registers of the Revenue Department in Abdul Rahman's name at the time of Karim's death. But we note that the Revenue Surveyor, Tun Baw (D. W. No. 7), states that three of the holdings were still in the names of the original sellers at that time and the Revenue Surveyor at Ma Kye's request changed the lands to Ma Kye's name on the original sellers saying that she was the purchaser.

The defendant Ma Kye's case is that the money-lending and paddy trading business was hers alone. She was married to Karim Khan according to Mussalman rites when she was a young girl and lived with him up to the time of his death in 1907, a period of over 27 years. He lent her Rs. 1,000 to start business on her own account. It was out of the proceeds of this business that the various lands were bought and she, moreover, gave about Rs. 20,000 for Abdul Rahman's education in Toungoo and Rangoon and afterwards in England. She has four children by Karim Khan still surviving. She denies that

Abdul Rahman ever took any part in the trading business. He was fully engaged with his studies for various examinations up to the time he went to England to qualify as a doctor. She denies that she ever received a power-of-attorney from him or acted as his agent. She is entirely illiterate and allowed her husband to arrange the various conveyances of the lands. She was ignorant of his action in putting the land in his son's name. She was in possession of the lands up to the time of her husband's death, letting them out to tenants and receiving the rents. But all the accounts were kept by her husband. She denies that they were ever divorced.

Much light is thrown on the case by a previous suit of 1899 in which Ma Kye sued Karim Khan for the cancellation of a document which she said she had been forced to execute. This document recited that she was appointed agent of Abdul Rahman in 1896 and that Abdul Rahman revoked the appointment in 1898, and by it she purported to resign all her rights "to all effects and chattels of what kind soever, real or personal, in which my name may appear as mortgagee, payee or claimant in law or in equity." She said in that case that Karim Khan told her to make over all her property, consisting of mortgaged lands and paddy, to his son and that when she refused he beat her. Karim Khan in that case said: "I trusted my wife and let her trade in her own name."

After hearing evidence the District Judge decided in September 1899 that Ma Kye had been coerced into signing the document of release and ordered its cancellation. Karim Khan did not appeal against the decision. In the plaint in that case Ma Kye stated that she had acquired property to the value of Rs. 13,642, consisting mostly of money lent out, and she furnished a list of the debtors. We find that several of the persons who afterwards conveyed the lands now in suit to Abdul Rahman or to Karim Khan as his agent are among the debtors in Ma Kye's schedule of 1899 and it appears from the evidence in the present suit, that they made over their lands in satisfaction of debts for which the lands had been given as security.

Among the exhibits in the suit of 1899 was a document purporting to be a copy of the power-of-attorney to Ma Kye in 1896, and it has an endorsement from which it would appear that it was put in by Ma Kye's Advocate in a still earlier suit in 1898 brought by her against some person unspecified. This endorsement is greatly relied on by the plaintiff as showing that Ma Kye was consciously acting as an agent in the year 1898. But we agree with the District Judge that this document should be excluded altogether from consideration. The original was filed in the suit of 1899 by the defendant, Karim Khan, and was presumably withdrawn when the case was finished. No reason is given for not producing the original in the present case, and though the copy is marked as a "True Copy" no explanation appears of the confusion of dates in the endorsement as noted by the District Judge. Besides, it would be necessary before deciding that Ma Kye acted consciously as the plaintiff's agent in 1896 to have the proceedings of the suit of 1898 put in evidence, and this has not been done. It may well be that the suit of 1898 was conducted for her by her husband Karim Khan and that the power-of-attorney was given by him to the Advocate for the plaintiff in the suit. In the suit of 1899 Karim Khan admitted that Ma Kye was his wife, but said he had divorced her for misconduct. This appears inconsistent with his next statement which is that "it was a *khula* divorce and she demanded the divorce." A *khula* divorce according to the text-books is a divorce where the wife alone is desirous of having the marriage dissolved, and it appears that in such a divorce the wife may reserve an option to revoke it. (Paragraphs 162 and 173, Principles of Muhammadan Law, Tyabji.) My Kye said that they had separated six months before. But the evidence in the present case shows that they resumed marital relations after the suit of 1899 was decided and lived together amicably up to the time of Karim Khan's death. Ma Kye became fully aware in 1898 of Karim Khan's design to oust her from the property and it is no doubt remarkable that when she re-united with him after

the suit was decided, she took no steps to safe guard her interests. But it is possible, as the District Judge suggests, that having frustrated his scheme of 1898 she thought it unnecessary to do anything more. She had publicly asserted her rights in Court and may well have thought they were fully assured. As she was illiterate, it was easy enough for Karim Khan to keep her in ignorance of the actual terms of the various conveyances he arranged from time to time.

We agree with the District Judge in thinking it highly improbable that the plaintiff took part in the money-lending and paddy trading business. He was too young and too engrossed in his studies to have time for anything else before he went to Europe. He had no money to put into business, but on the contrary wanted as much as he could get for his education. Karim Khan had nothing but his pay and the small receipts from his private practice. The trading business was started with money borrowed from a Chetty. The greater part of the work fell to Ma Kye, but Karim Khan kept the accounts and gave such help as he could consistent with his medical duties on the Railway line. There can be no doubt that the business thus started was very successful and that it provided the funds required for the plaintiff's education as well as the money with which the various lands in suit were purchased.

Though Karim Khan was ostensibly acting merely as his son's agent, it is not shown that he was an agent except in the name. He rendered no accounts to his son, who did not presume to interfere with the management of the property until after Karim Khan's death. The evidence shows clearly that Ma Kye took an active part in the management and that she at one time worked some of the lands herself. The title-deeds remained with Karim Khan and Ma Kye until after the former's death when Ma Kye handed them over to Abdul Rahman. She says that she handed them over because Abdul Rahman and his brother assured her that "they would be straight over the matter," which may be cited as another example of Ma Kye's unsuspicious nature. Even the plaintiff does not allege that she made over the documents by way of admitting that the lands belonged to him and not to her.

The learned Judge found that the plaintiff failed to prove his title to the lands, as he could not show that they were bought with his money and on his behalf.

In our opinion this decision is right. The lands were bought by Karim Khan in the plaintiff's name but it is clear that the purchase-money was provided by Karim Khan himself or by Karim Khan and Ma Kye jointly. In a case of this nature where the plaintiff has never been in actual possession of the lands and has exercised no control over them though they were bought in his name, the best criterion is to consider from what source the money comes with which the purchase-money is paid [*Cf. Gopeekrist Gosain* v. *Gungapersaud Gosain* (1)]. In this case there can be no question but that all the money was provided from the paddy anw money-lending business which was carried on by Ma Kye and Karim Khan and in which the plaintiff had no part.

Karim Khan had a double motive for putting the lands in his son's name. In the *first* place, he was a Government servant and was not allowed to trade and, in the *second* place, his conduct in 1898 towards Ma Kye shows that he was ready to take advantage of her illiteracy and deprive her of all share in the proceeds of her industry.

It has been argued that as Ma Kye was not present at the execution of the actual conveyances (except indeed the highly suspicious document, Exhibit A, which purports to treat her as Abdul Rahman's agent), he cannot benefit under them, that if the transactions were *benami* it should be held at any rate that Karim Khan who actually effected the purchases, provided the whole of the moneys and, that by putting the lands in his son's name he manifested his intention of making a gift of them to his son for his son's "advancement."

But once the transactions are found to be *benami* it becomes a question of evidence as to who was the real purchaser. The mere fact that Karim Khan posed at the time of purchase as agent for the *benamidar* is not conclusive proof that the purchase-money

(1) 6 M. I. A. 53; 4 W. R. 46 (P. C.); 1 Sar. P. C. J. 493; 19 Eng. Rep. 20.

belonged entirely to Karim Khan. Moreover, the English principle of advancement is not applicable in this country [see *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1) already cited], and it would clearly be inequitable to apply it in favour of the plaintiff who is only one of six or more children of Karim Khan and who has already been raised to a position of affluence by means of funds derived from his father. We note also that there is ample authority for the proposition that "When a Mussalman father purchases property in the name of his son, no presumption arises in India, that a gift of the property was intended to be made to the son." Tyabji's Principles of Muhammadan Law, section 405. The plaintiff could succeed in this suit only by establishing the absolute title which he set up. He may be entitled to an interest in the property as one of his father's sons, but it is not necessary for us now to consider what that interest is. It is sufficient to find that he has not established the case on which he claimed to oust the respondent who is in lawful possession of the property.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 141 OF 1913.

July 21, 1914.

Present:—Mr. Justice Oldfield.

VENKATACHALLAM PATTAR—PLAINTIFF—PETITIONER

versus

K. PARASU PATTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, cl. 15—Perverse decision on facts—Erroneous admission of evidence—Perversity—High Courts Act (24 & 25 Vic. c. 104), s. 15—High Court in revision, interference by.

A decision which is perverse in law or facts can be set aside in revision.

A decision is perverse where it is a conscious deviation from some rule of law or procedure.

The test of perversity will be applicable also, when the error is of fact and the decision has been reached in defiance of facts which have been recognised by the lower Court as established or must be presumed to have been so, or when the decision is based on or involves material assumptions or inferences which there is nothing in fact or probability to support.

The decision of an arbitrator, who in the admission of evidence commits errors which do not materially affect his decision, cannot be said to be "perverse" and should not be set aside under section 115 of the Code.

Nagaraja Pillai v. *Vythinatha Iyer*, 9 Ind. Cas. 672; 21 M. L. J. 484; 9 M. L. T. 273; (1911) 2 M. W. N. 369; *Amir Hassan Khan* v. *Sheo Bakhsh Singh*, 11 C. 6 (P. C.); 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's (P. C.) No. 83; *Kali Charan Sirdar* v. *Sarat Chunder Chowdhry*, 30 C. 397; 7 C. W. N. 545; *Kristamma Naidu* v. *Chapa Naidu*, 17 M. 410 (F. B.), followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Subordinate Judge of South Malabar at Palghat, in Miscellaneous Petitions Nos. 1581 and 1586 of 1912, in Original Suit No. 23 of 1909.

Messrs. *J. L. Rosario* and *A. Sundaram*, for the Petitioner.

Messrs. *T. R. Ramachandra Aiyar*, *A. Narayana Sarma* and *T. R. Narayana Ayyar*, for the Respondents.

JUDGMENT.—The Court is asked by petitioner, the plaintiff, to exercise its powers of revision by setting aside an order under section 15, Schedule II, Civil Procedure Code. The petition is presented under section 115 (*c*), Civil Procedure Code, and section 15 of the Charter Act. *Nagaraja Pillai* v. *Vythinatha Iyer* (1) has been cited with regard to the latter; but I do not think that the reference to the Act extends the Court's powers in any material way in the present case. No doubt the occurrence of mere errors of fact or law in an order cannot justify interference with it. *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (2) and *Kali Charan Sirdar* v. *Sarat Chunder Chowdhry* (3). But as was held in *Kristamma Naidu* v. *Chapa Naidu* (4), the case contemplated is that of a perverse decision on law or procedure, a decision being perverse where it is a conscious deviation from some rule of law or procedure. And I conceive that the test of perversity will be appliceble also, when the error is of fact and the decision has been reached in defiance of facts which have been recognised by the lower Court as established or must be presumed to have been so, or when the decision is based on or involves material assumptions or inferences which

(1) 9 Ind. Cas. 672; 21 M. L. J. 484; 9 M. L. T. 273; (1911) 2 M. W. N. 369.

(2) 11 C. 6 (P. C.); 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's (P. C.) No. 83.

(3) 30 C. 397; 7 C. W. N. 545.

(4) 17 M. 410 (F. B.).

there is nothing in fact or probability to support.

The first objection taken to the order is one of law, that the parties having agreed in Exhibit A to a particular distribution of the properties in dispute, the award should have been accepted so far as it is in accordance with that agreement. Here there is no question of perversity. For the lower Court's action in rejecting the award as a whole was perfectly correct, since the agreement in Exhibit A was clearly conditional on a valid award being made.

Of the conclusions on which the lower Court based its order, two at least seem to me unassailable in revision and to afford sufficient justification for its decision. *Firstly*, it held that the arbitrator was guilty of misconduct in acting on Exhibit E series, abstracts of accounts, as though they had been produced by and bound respondents, when they were really produced by some person in plaintiff's interest, probably one Tharavanar, after the date of Exhibit B when the filing of documents closed. The arbitrator's evidence makes it clear that he did in fact proceed on Exhibit E series without any sufficient independent verification of items, and the lower Court was entitled to assume that he did so under the impression stated in his evidence, that the respondents filed them. The reasons it gave for holding this untrue and for its other conclusions mentioned above are largely based on inference and probability. But they cannot be treated as perverse on that account. *Secondly*, there is a finding that Exhibit JJ was produced by petitioner after the date of Exhibit B and that its acceptance by the arbitrator amounted to misconduct. No doubt the argument for an earlier date, based here on Exhibit C, is strong. But it is not alleged that this argument was put forward in the lower Court; and, if it was not, the date of the Court-fee label and the other facts referred to in the order afforded a legitimate basis for the conclusion reached.

It is argued that the lower Court's treatment of these portions of the case cannot be considered fairly apart from the remainder of its order and the disposition to decide against the petitioner in any event evinced therein. It is true that elsewhere in its order it was guilty of inconsequence and of failure to apply the law as it stated it, which would have justified criticism and might even have been described as perverse, if other grounds for a decision had not been available. But the two findings I have specified, especially that regarding Exhibit JJ., rest mainly on independent reasoning, in which the acceptance of other more objectionable portions of the judgment is not involved. My conclusion is, therefore, that they must stand. It is not disputed that they justify the order made.

The petition is, therefore, dismissed with costs.

Petition dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 767 OF 1913.

July 7, 1914.

Present:—Mr. Justice Piggott.

CHATTAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NAND KISHORE—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 106—Landlord and tenant—Lease—Tenancy from year to year and for fixed period—Holding over—Determination of tenancy—Notice—Breach of condition—Acceptance of rent—Waiver.

Where a lease is forfeited for an act done in contravention of the terms of the lease, an acceptance of rent subsequent to forfeiture would amount to waiver.

Where a tenancy is from year to year and for a fixed term and the tenant holds over after the expiration of the term, the tenancy would still continue to retain the character of an yearly tenancy and would determine by a six months' notice terminating with the year of tenancy.

Second appeal from a decision of the Additional Judge of Agra, modifiying that of the Munsif of Agra.

Messrs. *D. R. Sawhny* and *S. K. Dar*, for the Appellant.

Mr. *S. N. Mushran* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the Respondent.

JUDGMENT.—This is a simple case. The plaintiffs are the owners of certain land, in respect of which they entered into a contract of tenancy with the defendant in the year 1897. The contract was for nine years certain, and at a yearly rent. On July the 9th, 1912,

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the plaintiffs served the defendant with a month's notice to quit, and on his failure to comply brought the present suit. The plaintiffs have fallen between two stools, because they were not quite clear in their own minds whether they were suing for ejectment after forfeiture of the lease for breach of express conditions, or whether they were suing in virtue of their intrinsic right as lessors to get rid of a tenant with whom they were no longer satisfied.

The question of the alleged forfeiture has been considered by the Courts below and I agree with them that the plaintiffs were not entitled to eject on the ground of forfeiture. Apparently some buildings had been constructed on the land in suit in contravention of the terms of the lease, but the forfeiture has been waived by a subsequent acceptance of rent. There is no reason to suppose that rent was accepted in ignorance of what the tenant had been doing. Nor can I accede to the contention that the plaintiffs are entitled, without obtaining the ejectment of the defendant, to obtain an order for the removal of the constructions complained of. Their remedy is to get rid of the defendant. The important point argued before me is that the possession of the defendant from the year 1906 onward has been that of a tenant holding on after the expiration of the term of his lease. It is contended that the nature of the tenancy would then be determined by section 106 of the Transfer of Property Act, and that under the circumstances of this particular case the defendant would become a lessee holding from month to month and the contract of lease would be terminable on 15 days' notice expiring with the end of a month of the tenancy. I think this contention is not fairly open to the plaintiffs. They expressly described the defendant as holding on from year to year under the terms of the original contract of lease, after the period prescribed by that lease had expired. I hold that the tenancy is a tenancy from year to year and is terminable only by six months' notice expiring with the end of a year of the tenancy. This remedy is still open to the plaintiffs; but the present suit has been misconceived and brought upon an inadequate cause of action. This appeal must, therefore, fail and is dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 11 OF 1914.

April 6, 1914.

Present:—Mr. Stuart, A. J. C.

Baba ANGAD DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat GHASITI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Public charities, suit in respect of—Relief against strangers not contemplated—Trespasser, whether to be made defendant—Possession, recovery of, suit for.

A relief against strangers for recovery of possession of property in their hands cannot be granted under the provisions of section 92, Civil Procedure Code; and the names of such strangers-defendants ought to be struck off the record.

Imami v. *Mohammad Yusaf*, 10 Ind. Cas. 712; 14 O. C. 65, referred to.

Appeal against the order of the District Judge, Lucknow, dated 15th December 1913.

Babu *Lachman Parshad Varma*, for the Appellants.

Shaikh *Farzand Ali*, for the Respondents.

JUDGMENT.—In this case Angad Das and others having obtained permission from the Legal Remembrancer in accordance with the provisions of section 92, Act V of 1908, instituted a suit against Baba Gyan Das and others in which they asked that Baba Gyan Das should be removed from the office of the *Mahant* of the *Sangat* of Shah Ganj, Luchnow city, that Angad Das should be appointed in his place, that a certain *Musammat* Muni *tambolin* should be dispossessed from certain property alleged to belong to the *sangat*, that *Musammat* Ghasiti should be ejected from certain other property alleged to belong to the *sangat*, that Darogha Mir Yahia Ali should be ejected from another property alleged to belong to the *sangat*, and further that Baba Gyan Das should be made to deliver up the entire property of the *sangat* and be ordered to file accounts. The learned Judge struck the names of *Musammat* Ghasiti and Darogha Mir Yahia Ali off the record on the ground that the relief sought against them was not a relief that could be granted under the provisions of section 92. I agree with the learned District Judge that the relief sought against

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them does not fall within the provisions of that section. I am supported in this view by the decision in *Imami* v. *Mohammad Yusuf* (1). I, therefore, dismiss this appeal. The appellants will pay their own costs and those of the contesting respondents.

Appeal dismissed.

(1) 10 Ind. Cas. 712; 14 O. C. 65.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1221 OF 1913.

July 6, 1914.

Present:—Mr. Justice Piggott.

MOHAMMAD HUSAIN—DEFENDANT—APPELLANT

versus

BASHIRAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Widow in possession of her husband's estate in lieu of dower—Transfer of such possession, how effective.

The right of a Muhammadan widow to remain in possession of her husband's estate in lieu of unpaid arrears of her dower-debt is a right of a peculiar nature and can only be transferred along with the dower-debt itself.

Ali Bakhsh v. *Allahdad Khan*, 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567; *Ali Muhammad* v. *Aziz-ul-lah Khan*, 6 A. 50; A. W. N. (1883) 204; *Mahomed Ussudoollah Khan* v. *Ghasheea Beebee*, 1 Agra H. C. R. 150, referred to.

Second appeal from the decision of the Additional Judge of Moradabad.

Mr. *Agha Haidar*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The point raised in this appeal is a simple one. *Musammat* Wali-un-nissa was in possession of her late husband's estate as security for her unpaid dower-debt at the time when her husband died. She has executed a deed of gift, which purports to be a gift of the estate left by her late husband, in favour of the defendant-appellant, Mohammad Husain, who is her son. The plaintiffs-respondents are sisters of the defendant. *Musammat* Wali-un-nissa having died since, the plaintiffs sue to recover possession of their shares by inheritance in the estate of their late father, together with the cancellation of the transfer in favour of the defendant in so far as that transfer affects their shares. The claim has been decreed by both the Courts below.

In second appeal to this Court three points are raised by the memorandum of appeal, but the first and third of these have not been pressed. The plea on which the appeal is pressed is that the right of *Musammat* Wali-un-nissa to continue in possession until her dower-debt was satisfied was a transferable right, and must be presumed to have been transferred by her to the defendant. From this it is contended that, though the plaintiffs may be entitled to a declaration of the invalidity of the transfer in so far as it affects their shares, they are not entitled to possession as against Mohammad Husain, the transferee of *Musammat* Wali-un-nissa. The argument is based principally upon the case of *Ali Bakhsh* v. *Allahdad Khan* (1), and upon certain older cases reported in the 1st and 2nd Volumes of the Agra Law Reports, one or two of which are referred to in the judgment in *Ali Bakhsh* v. *Allahdad Khan*(1).

With regard to these Agra cases, I am content to say that they are all cases in which the widow who had made the transfer complained of was still alive. The Courts held that the husband's heirs were entitled to a decree declaring the nullity of any transfer purporting to be made by the widow while in possession in lieu of her unpaid dower-debt, but they could not recover possession of the estate itself, or of any share therein, during the life-time of the widow without first paying the balance of her dower-debt. I think this is undoubtedly the effect of the rulings in question, and I have noticed the point more particularly because of a plea which was taken in argument with regard to a certain expression used in the case of *Mahomed Ussudoollah Khan* v. *Ghasheea Beebee* (2). It was there noted that what the widow had alienated was, not her dower with its security, but the property itself and that the heirs were only entitled to recover possession by payment of the debt during her life-time *or on her death*. The interpretation sought to be put upon these words is that the learned Judges who decided that case

(1) 6 Ind. Cas. 367; 7 A. L. J. 567; 32 A. 551.

(2) 1 Agra H. C. R. 150.

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intended to hold that the heirs could only recover possession on payment of the dower-debt, either to the widow during her life-time, or to the heirs of the widow after her death. It would almost seem as if some such meaning had been put on this expression by the learned Judge who delivered the judgment of the Court in *Ali Bakhsh* v. *Allahdad Khan*(1), but I do not think that there can be any real doubt as to the meaning of the context in which they occur. The learned Judges intended to say that the heirs could not in any case get possession against the widow during her life-time, without paying the arrears of the dower-debt. They went on to say that the said heirs "may be entitled" (the expression is hypothetical because they were discussing a point which was not strictly before them for decision) to recover possession during the life-time of the widow by payment of the dower-debt, or they might have a good claim to re-enter into possession without such payment on the death of the widow. However this may be, I do not think the older cases relied on by the appellant really help him.

I should be content, moreover, to base my decision entirely upon the language used in various parts of the judgment in the case of *Ali Bakhsh* v. *Allahdad Khan* (1) by the learned Judge who delivered the judgment of the Court in that case. The whole point of the appeal is that the appellant claims to be the transferee of *Musammat* Wali-un-nissa's right to hold possession of the entire estate of her late husband until her dower-debt is satisfied. The answer to this plea is simply that he holds no deed transferring to him any such right. The deed in his favour is simply a transfer of the estate as such. It was pointed out in more than one case that such a deed does not operate as a transfer of whatever rights the widow may herself possess, for the simple reason that her right to possession over the property depends upon her right to the dower-debt and she must transfer this debt along with the security held by her for the said debt in order to make any effective transfer. This is pointed out in the case of *Ali Bakhsh* v. *Allahdad Khan* (1). Even in the case of *Ali Muhammad Khan* v. *Aziz-ul-lah Khan* (3), in a passage which is quoted with approval at page 574 of the ruling in *Ali Bakhsh* v. *Allahdad Khan* (1) it is pointed out that a deed which on the face of it purports to be an out-and-out transfer of a portion of her late husband's estate by a widow in possession of the same in lieu of arrears of her dower, contains on the face of it nothing to show that she had also conveyed to the vendee her right to the dower. It is sought to rest this appeal on the general principle that a person transferring certain property must be deemed to transfer whatever interests he has therein on the date of the transfer, but there seems to me to be abundant authority for the proposition that this doctrine does not cover the particluar case now under consideration. The right of a Muhammadan widow to remain in possession of her husband's estate in lieu of unpaid arrears of her dower-debt is a right of a peculiar nature, and it has been laid down that it can only be transferred along with the dower-debt itself. There has been, in my opinion, no such transfer in the present case. This appeal, therefore, fails and I dismiss it with costs.

Appeal dismissed.

(3) 6 A. 50; A. W. N. (1883) 204.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 676 OF 1913.

October 9, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

RAMAKRISHNA AIYAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHINNA VENGAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 32 (5), 50—Relationship—"Conduct," meaning of.

In order to make a statement of a witness admissible in evidence under section 32 (5) of the Evidence Act it is not necessary that the special means of knowledge of the witness should be of a particular character: it is for the Court to decide whether the witness had such special means of knowledge or not.

Where the question is whether one person is related to another in any degree, the fact that according to the religious usage of the party the names of particular persons are usually recited or omitted during the performance of ceremonies, and the observance of pollution, are instances of conduct within

the meaning of section 50 of the Evidence Act and are admissible in evidence.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suits Nos. 370 and 387 of 1912, preferred against that of the Court of the District Munsif of Kulitalai, in Original Suit No. 103 of 1911.

Mr. *A. Anantarama Aiyar*, for Mr. *T. V. Muthukrishna Aiyar*, for the Appellants.

Mr. *S. Parthasaradhi Aiyar*, for the Respondents.

JUDGMENT.—We cannot accept the District Judge's treatment of the evidence, mainly because he has not considered it fully with reference to sections 32 (5) and 50 of the Indian Evidence Act.

Section 32 (5) was material with reference to the evidence of the 1st plaintiff's witness and that of the 3rd plaintiff's witness regarding the 1st plaintiff's witnesses' statements to him. Section 32 (5) makes statements by persons not called admissible if (1) they were made before the beginning of the dispute and (2) they were made by a person having special means of knowledge. The first condition was apparently fulfilled here. As regards the second it is not essential that the special means of knowledge should be of any particular kind. It is for the Court to decide whether the maker of the statement can be supposed to have possessed them. The District Judge has not approached this evidence from this point of view.

Then as regards section 50, the District Judge has not referred to several pieces of evidence as to conduct. There are for instance the statement of the 3rd plaintiff's witness that he and his brother omitted names from the list recited at Shrarddas in accordance with the 1st plaintiff's instructions, and the statements by other witnesses that they observed pollution in each case consistently with the relationship alleged by the plaintiff. All this was admissible evidence under section 50 and should have been considered.

The District Judge has not referred to the evidence of the 7th plaintiff's witness, the family *purohit*, and has given no reason for the omission, stating however that there is no evidence in support of the plaintiff's case.

In these circumstances we must set aside the decision under appeal and remand the case to the lower Appellate Court for re-admission and re-hearing in the light of the foregoing. The costs here and in the lower Appellate Court up to date will be costs in the cause.

Appeal allowed; Suit remanded.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 92 OF 1912.

August 3, 1914.

Present:—Justice Sir Henry Hartnoll and Mr. Justice Ormond.

MA SHWE LA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MG KYIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 33, 92—Proof of fraudulent dealing with third person's property—Purchaser of equity of redemption—Representative-in-interest.

Section 92 of the Evidence Act does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. For the purposes of section 33, Evidence Act, a purchaser of the equity of redemption is a representative-in-interest of the mortgagor.

Maung Bin v. *Ma Hlaing*, 3 L. B. R. 100 (F. B.), referred to.

Mr. *J. R. Das*, for the Appellant.

Mr. *Coltman*, for the Respondents.

JUDGMENT.

ORMOND, J.—The documents Exhibits A and B purport to be deeds of sale of certain lands and are executed by the defendants in favour of U Shwe Po deceased and his wife. The plaintiffs are the widow and the legal representatives of U Shwe Po. The question in this appeal is whether the plaintiffs are entitled to the lands comprised in Exhibits A and B as owners, or whether they merely have a mortgage on those lands. The defendants' case is that, at the time of the execution of Exhibits A and B, they (the defendants) were merely mortgagees from one U Myaing, the owner, although their documents of title, Exhibits C and D, were in the form of absolute sales; that Exhibits A and B were intended merely to transfer to U Shwe Po and his wife the defendants' mortgages, and that all the parties concerned have in fact treated the transaction as such. Subsequently to the execution of Exhibits A and B the defendants have acquired the equity of redemption in these lands from U Myaing.

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The case came before the original side of this Court on a former occasion when it was held that the defendants were precluded under a Full Bench decision of this Court [*Maung Bin* v. *Ma Hlaing* (1)] from showing that these documents, Exhibits A and B, were not absolute conveyances. That decision was upheld in this Court on appeal; and on appeal to the Privy Council their Lordships remanded the case back to this Court for the question to be re-tried; and they directed that the rejected evidence should be heard subject to any objections that might be taken. Their Lordships refrained from expressing any opinion on the construction or application of section 92 of the Indian Evidence Act in relation to these documents; but they were of opinion that the case for the defendants disclosed a charge of fraud against the plaintiffs in relation to matters antecedent to these documents; *i.e.*, that the plaintiffs took absolute conveyances of property from the defendants with notice, that they in fact belonged to a third person, namely, the defendants' mortgagor. Their Lordships point out that section 92 does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed, in fact belonged to a third person who was not a party to the conveyance. The matter has been re-tried; and the learned Judge on the original side has found (*i*) that, at the time when these documents, Exhibits A and B, were executed, the defendants to the knowledge of U Shwe Po and his wife were merely mortgagees, (*ii*) that it was intended by the parties *i. e.*, by U Shwe Po, the defendants and U Myaing that the mortgages held by the defendants should be transferred to U Shwe Po and his wife, (*iii*) that it was unlikely that U Myaing knew in what form the mortgages were so transferred and that if U Shwe Po deliberately got deeds of sale executed, it was a fraud on U Myaing. And the learned Judge held that the plaintiffs are mortgagees only. The defendants now appeal.

Apparently the learned Judge found that U Shwe Po perpetrated a fraud upon U Myaing at the time of the execution of the documents, Exhibits A and B, and that U Myaing did not know the nature or contents of those documents. I do not think such finding is justified by the evidence, for Maung Kyin, the defendant, himself says :—"I transferred the land to Shwe Po with the full knowledge and consent of Shwe Myaing and at his request, because to Shwe Po he had to pay less interest. It was only a transfer from my name to U Shwe Po's name at U Myaing's request. Interest was not specified on that document. U Shwe Myaing knew that the document by which I was transferring the lands to U Shwe Po was a deed of sale", and he says that the transfer was made in the presence of U Myaing. In my opinion it would be only natural for U Myaing, who had given mortgages to Maung Kyin in the form of sales, to have the transfer of those mortgages also effected in the form of sales. The defendants' case, as I understand it, is not that U Shwe Po fraudulently caused the transaction to be effected in the form of a sale or that any fraud was intended against U Myaing at the time of the transaction; but that U Shwe Po having taken a transfer of a mortgage in the form of a sale with concurrence of U Myaing, the owner and mortgagor, and the defendants, the transferors, and U Shwe Po having treated the transaction as a mortgage, it is fraudulent now on the part of his widow and representatives to come to Court and assert that the transaction was a sale. The fraud would be subsequent to the document.

Now, inasmuch as the defendants do not allege fraud or mistake, etc., at the time of the execution of Exhibits A and B, evidence as to the fact of their not being the owners of the property at that time would be tendered in order to show that it was not intended to sell the property to U Shwe Po, and such evidence would be inadmissible under the Full Bench ruling.

And it would not be sufficient for the defendants to show that at the time of the execution of these documents they were only mortgagees; for they have since acquired the equity of redemption from their mortgagor. The doctrine enunciated in section 43 of the Transfer of Property Act would apply; and U Shwe Po would be deemed to have acquired the full proprietary interest in the property under those documents, unless the defendants are allowed to show apart from fraud, mistake etc., that it was not so intended. Mr. Coltman for the defendants contends that

(1) 3 L. B. R. 100 (F. B.).

their Lordships of the Privy Council hold that because the defendants were not the owners at the time of the execution of Exhibits A and B, they are at liberty to show apart from fraud, mistake, etc., that a different transaction was intended than what is expressed in those documents. But their Lordships do not discuss the correctness of the Full Bench ruling; and under that ruling, if the defendants had been the owners of the property, they would have been precluded from showing, apart from fraud, mistake, etc., at the time of the execution of the documents, that a different transaction was intended. If the Privy Council judgment is to be read in this manner, different rules as to the admissibility of evidence would be applicable to a defendant who executes a conveyance, according as he had a good or bad title at the time of such conveyance.

According to the decisions, as they now stand, I think the defendants in this case are precluded from showing that the transaction was other than a sale.

In view, however, of the directions given by their Lordships I will deal with the first two findings of the learned Judge upon the assumption that evidence relevant to such findings was admissible. The findings are:—that when the documents Exhibits A and B were executed, the defendants, to the knowledge of U Shwe Po and his wife, were merely mortgagees, and that it was intended by all the parties concerned that the defendant's mortgages only should be transferred to U Shwe Po and his wife. Putting aside the evidence which has been admitted under section 33 of the Evidence Act and which, in my opinion, is inadmissible, I think these findings are correct. There is the defendant's evidence referred to above. His evidence also shows that it was because U Shwe Po was willing to take interest at Re. 1 per mensem from U Myaing, whereas the defendant was taking interest at the rate of Re. 1-8 per mensem, that the transfer was made, and this is corroborated by Exhibit 7, U Myaing's letter to defendant. U Myaing remained in possession of most of the property until he transferred the equity of redemption to the defendant. The amount paid by defendant (in November 1901) in respect of the land *viz.*, Rs. 20,065-12, is said to be less than its then value, and the amount paid by U Shwe Po in February and March 1902, *viz.*, Rs. 16,120. was still less, and there is no evidence that there was any fall in the value of land during these three months. Defendant says that Rs. 3,500 had been paid off by U Myaing.

U Shwe Po's two letters to defendant, Exhibits 8 and 9. and defendant's letter to U Shwe Po (which does not seem to be marked as an Exhibit but is next to Exhibit 9 in the record) show, I think clearly, that both parties treated the land as U Myaing's and that U Shwe Po was merely taking over defendant's mortgages in the land when he took the two receipts Exhibits 10 and 11.

The evidence which has been admitted under section 33 of the Evidence Act are the depositions in a former suit of U Myaing (who died four or five years ago) and of his daughter Ma Pwa U, which were put in by Mr. Giles for the defendants but objected to by Mr. Das, and the deposition of U Shwe Po in the same suit, which was put in by Mr. Das for the purpose of contradicting the other two depositions. The former suit was brought by Munnee on 5th February 1904 against U Myaing, Morrison, U Shwe Po and others for specific performance of a contract made by Morrison (U Myaing's attorney and mortgagee) with Munnee for the sale of land which comprised some of the land in this suit. Defendant was not a party to that suit. U Myaing alleged that the transactions evidenced by the documents, Exhibits A, B, C and D, were in fact mortgages and U Shwe Po alleged that they were sales. An issue was raised as to whether they were mortgages or sales, and it was decided that they were mortgages. On appeal it was held that the contract was not binding on U Myaing and that the above issue was, therefore, superfluous. It is unnecessary, I think, to decide whether the words "questions in issue" in section 33 would include a question raised in a wholly superfluous or irrelevant issue. But it was the common case of U Shwe Po and U Myaing that U Shwe Po acquired the defendant's title as at the time of the execution of Exhibits A and B and no more; it was an issue, therefore, between the defendant's predecessor-in-title and the defendant's suc-

cessor-in-title and both may equally be said to be the representatives of defendant in interest. The same question was raised in both suits *viz.*, what was the interest in the land which defendant acquired under Exhibits C and D from U Myaing and transferred to U Shwe Po under Exhibits A and B? U Myaing in the previous suit set up the same against U Shwe Po that the defendant does in this suit; but that would not make U Myaing the defendant's representative-in-interest. The defendant, having transferred his interest to U Shwe Po, admittedly had no interest in the land at the time of the previous suit; and so far as the present suit is concerned, he has not acquired any interest in the land since. The fact that he has subsequently acquired the equity of redemption from U Myaing forms no part of the plaintiff's or defendant's case. The plaintiff rests his case upon the documents Exhibits A and B. And if the defendant is allowed to adduce evidence to show, and succeeds in showing, that those documents were intended to effect a transfer of mortgages only, section 43 of the Transfer of Property Act would not avail the plaintiff. The plaintiff brings this suit against the defendant simply because the defendant happens to be in possession of the greater portion of those lands. The issue between U Myaing and U Shwe Po in the former suit must, therefore, be taken to be an issue either between two representatives-in-interest of the defendant or an issue between persons neither of whom represented any interest of defendant. And section 33 of the Evidence Act does not apply.

Mr. Coltman for the defendant urged before us that there was evidence on the record to show that U Shwe Po subsequently, in execution of a decree against U Myaing, attached a portion of the land which had been conveyed to him under Exhibit B. This evidence is to be found in the deposition of U Shwe Po in Munnee's case in which he denies having attached land which he had already bought, but reference is made to a plot of land marked E in a plan marked P in that suit as the land attached, and Mr. Coltman refers us to the execution proceedings under which that attachment was made. Those execution proceedings were not put in evidence in that case, though they were referred to by the Judge in his notes of the evidence as Civil Regular No. 78 of 1912, Civil Execution No. 64 of 1903, and they have not been put in evidence in this case. At the hearing, the fact that U Shwe Po attached part of the land which he alleges he had previously bought, formed no part of the defendant's case. In my opinion there is no evidence of that fact even if U Shwe Po's deposition was rightly admitted in evidence. And we should not be justified at this stage to refer to these execution proceedings in order to ascertain the boundaries of the land which was attached.

My view of the case then is shortly this: The defendants do not allege any fraud on the part of U Shwe Po at the time of or antecedent to the execution of Exhibits A and B, either against U Myaing or against the defendants. That being so, the defendants are precluded by the Full Bench ruling from showing that the transaction evidenced by Exhibits A and B was a transfer of mortgages and not outright sales. And they are precluded from showing that at the time of these documents they (the defendants) were in fact only mortgagees; because such evidence would be relevant only for the purpose of showing that at the time of the execution of Exhibits A and B it was intended that the transaction should be a transfer of the defendant's mortgages. If, however, evidence is admissible for the purpose of showing what was the real transaction the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act) would clearly show that the parties concerned *viz.*, U Myaing, defendant Maung Kyin and U Shwe Po, all intended that U Shwe Po and his wife should take a transfer of the defendant's mortgages in the form of outright sales.

I would, therefore, allow this appeal and decree the plaintiff's claim for possession and mesne profits which should be ascertained in the ordinary way. The plaintiffs-appellants should have their costs in all the proceedings in this Court both on the original and appellate sides.

HARTNOLL, J.—As ordered by their Lordships of the Privy Council, evidence has now been recorded as to what happened prior to the execution of the deeds Exhibits A and B and with the same object, certain evidence taken in Civil Regular No. 4 of

1904 of this Court has been admitted under the provisions of section 33 of the Evidence Act. It has been objected that evidence of the latter class has been wrongly admitted. In that suit an issue was fixed as to whether the conveyances of the 30th November 1901 and the 4th March 1903 were merely by way of mortgage, and evidence was recorded on the point. U Myaing in that suit asserted that they were only intended to operate as mortgages, while it was U Shwe Po's and Ma Shwe La's case that they were intended to be outright sales. On appeal it was held that the issue was superfluous. Mg. Kyin was not a party to that suit. The first point is whether the earlier proceeding was between the same parties or their representatives-in-interest as the parties in the present suit. The issue was between U Myaing on the one side and Mg. Shwe Po and Ma Shwe La on the other. In this suit the same issue is raised between Mg. Kyin on the one side and Ma Shwe La and the legal representatives of Mg. Shwe Po on the other. For the purpose of section 33 of the Evidence Act should it be held that U Myaing was a representative-in-interest of Mg. Kyin in the earlier suit? U Myaing at the time of the former suit was the owner of the lands. Mg. Kyin became their owner in U Myaing's place on the 20th November 1905 as by Exhibit 6, which has been admitted in evidence, he then purchased the equity of redemption. In such circumstances, as U Myaing was his predecessor-in-title, I think it is reasonable to hold that he was his representative-in-interest for the purpose of section 33 of the Evidence Act. It was also objected that the words "questions in issue" in the third proviso to section 33 of the Evidence Act do not include superfluous issues. The words themselves do not say so, and having regard to the principle underlying section 33 I would not uphold the objection. I would hold, therefore, that the evidence admitted under the provisions of section 33 was rightly admitted.

Looking at the evidence as a whole I see no reason to differ from the conclusions, arrived at by my learned colleague who is hearing this appeal with me and by the learned Judge in the original side, that the conveyances of the 30th November 1901 and 4th March 1903 and the sale certificate Exhibit D were intended to operate as mortgages. It is unnecessary for me to go into the evidence again in detail. I would, however, mention that in Exhibit 10 the receipt given by U Kyin to Mg. Shwe Po, the *pucca* building and its site is stated as belonging to U Myaing. If the sale certificate was not meant to operate as a mortgage why were these words put in? I would also say that the witness Shircore's evidence seems to me to be to the effect that the properties in dispute were not worth more in his opinion than the sums entered in Exhibits C and D. The correct area of the garden land seems to be 2·57 acres and not 4 acres 1 anna. Some of the garden land seems to have been taken by the railway. He, however, says that there was no deterioration in the value of land between November 1901 and 1903 and if so, it is difficult to understand why what was bought by Mg. Kyin in November 1901 for Rs. 8,500 should have been sold by him a few months later for Rs. 5,000. The difference in the consideration between that stated in Exhibits C and B strongly supports Mg. Kyin's case. Again there is the fact that Mg. Shwe Po's representatives did not have possession of the lands except as to one parcel between about February 1902, when the transaction took place, and December 1905, when this suit was brought, and in the *interim* took no steps to enforce possession. It must be remembered that according to Shircore the boom began in 1904, and it may be that it was the enhancement in the price of the lands that led to this claim. The earlier suit was launched in February 1904 and Shircore says that Courts have held that the boom began in 1903. The boom may have led to the line of defence taken by Mg. Shwe Po and Ma Shwe La in the earlier suit.

As regards the contention that Mg. Shwe Po attached a portion of the land he claims to have purchased, I am unable to find this proved from his deposition and the execution proceedings in which it was attached not having been put into evidence, cannot, in my opinion, be referred on.

The next point for consideration is whether there has been proved to have been any fraudulent dealings by Mg. Shwe Po and Ma Shwe La antecedent to the execution of the conveyances of the 4th March 1903. The burden of proof lies on Mg. Kyin to prove such, and I am unable to see that he has done so. If it could be proved that without Mg. Myaing's knowledge and in order

to cause him loss the conveyances were made in the form of outright sales instead of in the form of mortgages, then it might be held that a fraud was perpetrated on Mg. Myaing, but Mg. Kyin's own evidence does not support such a conclusion. His story is that conveyances were taken in the form of sales so that Mg. Myaing could not mortgage the lands to others, and that the transfers were made to Mg Shwe Po as he was satisfied with a lesser rate of interest. At page 15 of his evidence he said that U Myaing knew that the document by which he was transferring the lands to U Shwe Po was a deed of sale and he says the same thing again at page 19 of his evidence. U Myaing had agreed to the same procedure before when he transferred the lands to Mg. Kyin. Again at page 18 of his evidence U Kyin says that when he agreed with U Shwe Myaing and Shwe Po to take his money and transfer the property to U Shwe Po, the understanding was that the document was to be of the same nature as his document. It is true that at page 19 of his evidence he endeavours to make out that U Shwe Myaing did not know what form the document took, but it is clear that on a full consideration of U Kyin's evidence that Mg. Myaing agreed to the conveyance to Mg. Shwe Po being in the form of sale, and the reason seems to have been in order to prevent him mortgaging the lands to others. It cannot, therefore, be said that the conveyances were drawn as absolute sales without his concurrence and knowledge and behind his back. The only way in which it could be said that Mg. Shwe Po and Ma Shwe La had a fraudulent intention would be if it could be held to be proved that they had it in their minds at the time they took the conveyances to misuse them and to use them to support a fraudulent claim in due course. If they had a dishonest mind at the time, U Myaing and Mg. Kyin could not possibly know that they had if they kept their thoughts and intentions to themselves. Bearing in mind that the burden of proof lies on Mg. Kyin, can it be inferred from the evidence that Mg. Shwe Po and Ma Shwe La had such a wrongful intention when they took the conveyances? Mg. Kyin explains how they could have taken them without any such dishonest and concerted intention at the time. The reason was that U Myaing should not be able to mortgage the lands to others. The intention to misuse the conveyances may have come to their minds long after execution and may have been due to the boom in land that occurred. I am, therefore, unable to hold proved that there was any fraudulent intention on the part of Mg. Shwe Po and Ma Shwe La at the time of, or prior to, the execution of the conveyances, Exhibits A and B.

Therefore, according to the provisions of section 92 of the Evidence Act as interpreted by the decision of this Court in the Full Bench ruling of *Maung Bin* v. *Ma Hlaing* (1), oral evidence is not admissible to vary their contents. Their Lordships have expressly not considered as yet the correctness or otherwise of this ruling.

With regard to the claim of Mg. Kyin that redemption should not be allowed without first paying the sum due on the mortgage of the 21st May 1895, Mg. Kyin allows that when he conveyed the lands to Mg. Shwe Po and Ma Shwe La he knew of the mortgage to Morrison. It is true that in portions of his evidence U Kyin endeavours to make out that the land mortgaged to Morrison was other than that mortgaged to him, but looking at his evidence as a whole it is proved to my mind that he knew that the land mortgaged to Morrison was a portion of that mortgaged to him before his transactions with U Shwe Po. I would especially refer to pages 17 and 18 of his evidence. The principle enunciated in section 43 of the Transfer of Property Act, therefore, comes into operation.

I, therefore, concur in the order proposed by my learned colleague.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2248 TO 2254 OF 1912.

July 30, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

Sriman Satakopa Sri PARANKUSA ZATINDRA MAHADESIKASWAMI —PLAINTIFF—APPELLANT

versus

P. SUBRAMANIA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Presumption—Genuineness of document 30 years old—Question of law or fact —Second appeal—Zemindar, *grant by*—Ashtabogam *and* Sarvamaniam, *meanings of.*

Where the question is whether the grant made by a *zemindar* was only of land with the occupancy rights therein or of land revenue merely, the fact that in the *inam* grant the terms "Ashtabogam" and "Sarvamaniam" are used, merely means that there is no superior holder and that all the rights of the grantor are conveyed without reservation. Such rights as communal rights, are not conveyed by such words and rights of occupancy also can be presumed to have been excluded, if there were tenants already on the land. The grant should be construed as one of land revenue, and not of the land itself.

Sankaran Nair, J.—The presumption which the Court has to raise under section 90 of the Indian Evidence Act as to the genuineness of a document 30 years old, is one of fact and stands on the same footing as any other piece of evidence and the question being one of fact, the High Court in second appeal will not interfere with a finding given on it by the lower Court.

Tyabji, J. (dissenting)—Such a presumption is one of law and the High Court can in second appeal interfere and see if the findings of the lower Court are correct.

Shafiq-un-nissa v. *Shaban Ali Khan*, 26 A. 581 at p. 587; 9 C. W. N. 105; 6 Bom. L. R. 750; 7 O. C. 290; 30 I. A. 217, *Imrit Chamar* v. *Sridhar Panday*, 13 Ind. Cas. 120; 17 C. W. N. 108, 15 C. L. J. 7, followed.

Second appeals against the decrees of the District Court of Tinnevelly, in Appeal Suits Nos. 447 to 453 of 1911 respectively, presented against those of the District Munsif of Ambasamudram, in Original Suits Nos. 519 to 525 of 1910 respectively.

Mr. *S. Srinivasa Aiyanger* (with him Mr. *K. Raja Aiyar*), for the Appellants.

Mr. *M. D. Devadoss*, for the Respondents.

JUDGMENT.

SANKARAN NAIR, J.—The question is whether the land itself, *i. e.*, both the *melvaram* and the *kudivaram*, constitute the *inam*. or only the *melvaram* as contended by the defendants-tenants who claim the *kudivaram*, the occupancy right in the land. The District Judge has upheld the defendants' contention. In second appeals it is argued that certain documents place the question of the plaintiff's right to the *kudivaram* beyond all reasonable doubts. Exhibit E is alleged to be the original *inam* grant and it is contended on behalf of the appellants that it is not open to the District Judge to hold it is a forgery after the District Munsif had accepted it as genuine under section 90 of the Evidence Act. I think the District Judge is entitled to and bound to form his conclusion and if he refuses to accept it as genuine, his finding is one of fact and stands on the same footing as any other finding on evidence on the genuineness of documents. I am also satisfied that the District Judge had good reasons for his conclusion which it is not open to us in second appeal to set aside. But even assuming it to be genuine, I am of opinion it does not support the plaintiff's contention. The grant made by the *zemindar*, is no doubt, of the land itself with the Ashtabogam incidents. But this form of conveyancing only implies that there is no superior holder and that all rights of the grantor are conveyed by it without any reservation. Thus it has been repeatedly pointed out that such grants do not convey communal property, temples, public paths, etc. Similarly it does not interfere with the rights of the *ryots* who might then be in occupation. This has been pointed out long ago, (see the report of the Tanjore Collector, page 91, papers on the *mirasi* right) and express reservation of the rights of the *ryots* is not often made; where there were no *ryots* on the land, for instance when it was Pannai or home farm land, the grant was of the complete ownership: so was it when the ancient Rajas, as they often did, purchased the *kudivaram* rights before making the grant. But in the absence of any such proof the grant by itself does not imply the conveyance of *kudivaram* interest.

Mr. Srinivasa Aiyanger next contends that the term "Sarvamaniam" implies that the *kudivaram* also is vested in him. Wilson's Glossary lends some support to this contention. But the term is also used in contradistinction to Ardhamaniam to imply that the entire Government revenue and not a share alone has been granted in *inam*.

That the Government assessed the *inam*-

dar with the second crop assessment is no doubt a point in his favour, as it shows *prima facie* that he was treated as the owner of the *kudivaram* if, as contended by Mr. Srinivasa Aiyangar, the assessment was imposed on the *inamdar* as tenant. But this is not clear, and apart from it this is in conflict with the rest of the plaintiff's case, which is that the full interest in the land including the claim of the Government to revenue was conveyed to the *inamdar*.

As to the next contention that it is proved that the lands were in possession of certain *ryots* who were not of the plaintiff's family, it is enough to say that there is no evidence that they surrendered possession to the *inamdar* and there is nothing to rebut the presumption that they were not the defendants' predecessors-in-title.

The other arguments do not require any notice. The question is one of fact. It does not depend on the construction of documents which may be a question of law, but on inferences from documents. I am unable to say that the District Judge was not entitled to arrive at the conclusion he has arrived at; but as my learned brother differs, the second appeals are dismissed with costs under section 98 of the Civil Procedure Code.

TYABJI, J.—The first point taken before us is that Exhibit E having been presumed to be genuine by the District Munsif under section 90 of the Evidence Act, it was not open to the District Judge in appeal to disturb that finding. The appellant does not complain that owing to the District Munsif's presuming the genuineness of the document, evidence was not adduced that the appellant desired to adduce as to the genuineness of the document. It was argued that the question depended upon the sufficiency of the evidence tending to show that Exhibit E is genuine. For section 90 of the Evidence Act lays down that, where a document is 30 years old and it is produced from proper custody, these circumstances in themselves may be considered sufficient for proof of the genuineness and the execution of the document. It is laid down in section 90 that the Court "may presume" certain facts. It was argued that that expression permits the Court not to regard the facts as proved, and to call for further proof, that in the absence of such further proof the Court may hold that the document was "not proved." So understood the section does not preclude the Court from holding that these circumstances are insufficient in themselves to prove the said facts.

The question whether the Courts had erred in not raising the presumption was before the Privy Council in *Shaliq-un-nissa* v. *Shaban Ali Khan* (1), where both the Courts in India had refused to act on the presumption. In dealing with that question their Lordships did not proceed on the basis that it was a question of fact on which there were concurrent findings. It would, therefore, seem that their Lordships were of opinion that the question before them was one of law. The same view is supported by the decision in *Imrit Chamar* v. *Sirdhar Panday* (2).

It seems to me, therefore, that in accordance with the authorities above referred to (I express no opinion of my own on this point) we must proceed on the basis that the question whether Exhibit E should have been presumed to be genuine (on which the lower Courts have taken different views), is a question which it is incumbent on us to decide as a point of law.

If this is so, then, though I greatly regret having to express an opinion which is opposed to that of the learned District Judge and of my learned brother, I feel constrained to say that the District Munsif's view seems to me to be the correct one. I think that there were no sufficient reasons for the District Judge to have reversed the District Munsif's decision on this point, especially as the District Munsif had acted in accordance with what I believe to be the usual practice. It is usual, I believe, to act on the presumption laid down in section 90 unless there are reasons indicating that it would be unsafe or improper to do so. In this case there were documents and other circumstances strongly corroborating the presumption that Exhibit E was genuine. Exhibit E is no doubt a very important piece of evidence.

But it is not necessarily conclusive of the appeal, and I, therefore, think it necessary to deal shortly with the argument for the appel-

(1) 26 A. 581 at p. 587 (P. C.); 9 C. W. N. 105; 6 Bom. L. R. 750; 7 O. C. 290; 30 I. A. 217.

(2) 13 Ind. 120; 17 C. W. N. 108; 15 C. L. J. 7.

lant that, even if the decision of the District Judge as to Exhibit E must stand, the decision of the District Munsif in favour of the appellant on the result of the rest of the evidence should not have been disturbed by the learned District Judge. This is a question which at first sight appears to have reference to the appreciation of evidence. But I must confess to having been convinced by the able argument on behalf of the appellant that the question depends upon the interpretation of documents and upon the inference to be drawn from facts which are found by the learned District Judge and it seems to me, therefore, that from this aspect also the case is capable of review in a Court of second appeal. On examining the basis of the learned District Judge's decision I think with great deference that he has proceeded on assumptions and views of the effect of the documentary evidence which seem to me to be erroneous. It is unnecessary to set out elaborately this argument on behalf of the appellant, as my view on these questions will not affect the order that we shall now pass. I will only state that in my view the documentary evidence points in favour of the appellant if read in the light of the Standing Orders of the Board of Revenue and the other authorities showing the practice relating to second crop assessment and to the matters which are the subject of the appeal.

If my opinion had to prevail, I would consequently allow the appeal, and restore the District Munsif's decree with costs in all Courts. As my learned brother's opinion is, however, that the appeal should be dismissed with costs, that will be the order of the Court under section 98 of the Civil Procedure Code.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1110 OF 1913.

June 26, 1914.

Present:—Mr. Justice Sundar Lal.

SHAMBHU—DEFENDANT—APPELLANT

versus

CHETRAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 110, 111, 233 (k)—*Co-sharer not recorded as such, whether bound by partition proceedings—Prohibition under s.* 233 (k), *applicability of.*

In a partition proceeding before a Revenue Court it is not necessary for a person who is not a recorded co-sharer to come forward to assert his right and to claim proprietary interest in the plots, inasmuch as it is only a recorded co-sharer to whom notice is given and who alone is competent to object to the partition.

Therefore, a co-sharer who is not a recorded co-sharer is not precluded under section 233 (*k*) of the U. P. Land Revenue Act, III of 1901, from setting up his title in a Civil Court.

The prohibition under section 233 (*k*) of the U. P. Land Revenue Act, III of 1901, refers to the case of persons who were parties to the partition proceedings, or who should have been made parties thereto, and whose claims could have been heard under sections 111 and 112 of that Act.

Second appeal from the decree of the Subordinate Judge of Meerut.

Mr. *Sital Parsad Ghosh*, for the Appellant.

Mr. *A. H. C. Hamilton*, for the Respondents.

JUDGMENT.—This is a suit to obtain a declaration that certain plots of land (Nos. 1042 and 1044) were the property of the plaintiffs. It appears that the defendants alleging that the plaintiffs were their tenants, brought a suit for ejectment in the Revenue Court. The present plaintiffs in answer to that suit pleaded that they were proprietors and under section 202 of the Tenancy Act the then defendants were directed to establish their right in the Civil Court by a regular suit. Hence the present suit by the plaintiffs. It may be noted that originally the plaint covered a claim to plots other than 1042 and 1044 also, but by a subsequent amendment to avoid the plea of misjoinder, the claim was limited to these two plots, and both parties are agreed that whatever declarations are to be made in this case may be limited to those plots and that the decree of the Court below which erroneously included other plots should be amended accordingly.

In the present suit the defendants in the Revenue Court now claim a declaration of their right to these plots. Both the Courts below have found that their title has been fully made out and have granted them a decree. In appeal, however, the point pressed for consideration is that the matter is barred under section 233 (*k*) of Act III of 1901,

SHAMBHU v. CHETRAM.

It appears that the names of the plaintiffs were recorded as tenants only of plots Nos. 1042 and 1044. One Mohan Lal, a purchaser of a share of the village, applied for the partition of his share. To that proceeding all the recorded co-sharers were made parties, but as the present plaintiffs were not the recorded co-sharers in the *mahal* they were not made parties to these proceedings. The Revenue Court, therefore, behind their back proceeded to make the partition and assigned these plots to one of the parties in the partition proceeding. It is urged that the plaintiffs, though not the recorded co-sharers, should have come forward to assert their right and to have claimed a proprietary interest in these plots and having failed to do so, they are now precluded from setting up their title under section 233 (*k*) of Act III of 1901. Under section 110 of the Land Revenue Act, on an application being made for partition by a recorded co-sharer, the Collector is required to issue a proclamation calling on such of the recorded co-sharers of the *mahal* as have not joined the application to appear before him and to state their objections, if any, to the partition. Under section 111 of the same Act any recorded co-sharer may object to the partition and if the objections of such recorded co-sharer raise a question of proprietary title, the Collector is authorized to try the question himself as a Civil Court or to require any party to have the question determined by a competent Civil Court. It may be noted that it is only a recorded co-sharer to whom notice is given and who alone is competent to come in the Revenue Court to object to the partition. In this case the present plaintiffs were not recorded co-sharers; no notices, therefore, of the proceeding were given to them: they could not be made parties to the proceeding and they could not be heard by that Court in support of their objections. That being so, in my opinion, they were not bound by the result of the partition proceedings. They could not be affected by a judgment in a case between other parties. It is, however, urged that the present plaintiffs ought to have still gone up to the partition Court and asked that Court to stay partition pending an application by them for the entry of their names, which ought to have been made by them in the Revenue Court. I am not aware under what provision of law these defendants could restrain the Revenue Court from going on with the partition proceeding. The Court was not bound to stay its hands. It is not certain whether the Revenue Court would have recorded their names even if an application for that purpose had been made, and the chances are that they would have been referred to a Civil Court to establish their rights. If the contention of the learned Vakil for the appellants is correct, even if these men had gone and brought a suit in the Civil Court and finally established their rights, the partition made in the Revenue Court behind their back would still have been binding on them. Reliance has been placed upon the provisions of section 233 (*k*) of the Land Revenue Act of 1901. Under that section no person can institute any suit or other proceeding in the Civil Court with respect to matters specified in that section. Among the matters so specified is the following in clause (*k*), *viz.*, "partition or union of *mahals* except as provided in sections 111 and 112." This is not a suit or any matter which could have been adjudicated upon under these two sections and I think the prohibition refers to the case of persons who were parties to the partition proceedings, or who should have been made parties thereto, and whose claims could have been heard under sections 111 and 112 of that Act. It would be reading the section much more widely if the prohibition was read so as to include cases of persons who were not and could not be made parties to those proceedings. An unreported* case, Second Appeal No. 211 of 1912 decided on June 22nd, 1912, by Chamier, J., has been relied upon in support of the contention. So far as I am able to consider the judgment in that case, it seems to proceed upon the special circumstances of that particular case. I think the decision in the case of *Khasay* v. *Jugla* (1) applies to the circumstances of this case. The same view was taken in the case of *Awadh Bihari Lal* v. *Ishri Prasad* (2). I am unable to follow the ruling in Second Appeal No. 211 of 1912* already referred to, as,

(1) 28 A. 432; A. W. N. (1906) 79.
(2) 4 A. L. J. 662; A. W. N. (1907) 172.

*But reported in *Musammat Tarifan* v. *Fateh Din*, 15 Ind. Cas. 685 and not elsewhere.—*Ed.*

n my opinion, the facts of the two cases are not parellel and in any case the ruling is contrary to the cases cited by me and is not based upon a correct interpretation of the provisions of section 233 (*k*).

I dismiss the appeal with costs, subject to this order that the decree will be amended in the manner indicated by me, and limited to plots Nos. 1042 and 1044.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 823 OF 1912.

July 20, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

RAM CHARAN LAL—PLAINTIFF—APPELLANT

versus

KARIM-UN-NISSA BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 95—Power to fix rent.

In proceedings under section 95 of the Agra Tenancy Act the Court has no power to fix the amount of rent, it can only ascertain what in fact the rent payable is.

Second appeal from the decree of the District Judge of Allahabad.

Dr. *Satish Chandra Banerji*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—The history of this unfortunate case is told in the judgment of the lower Appellate Court. The litigation which was really of a very simple nature commenced in the year 1906. After various vicissitudes it came before Mr. Holme, District Judge of Allahabad. He decided in his judgment all the questions between the parties, and all that can be taken exception to is the last line of his decree dated the 30th of March 1912. The proceedings originally were brought under section 95 of the Tenancy Act, which provides that at any time during the continuance of a tenancy either the land-holder or the tenant may sue for a declaration as to any of the matters therein set forth, clause(*d*), "the rent payable in respect of the holding and whether payable in cash or kind."

The learned District Judge was unable to say what the rent payable in respect of certain lands was, because no rent had ever in fact been fixed either by agreement of the parties or by the Court. It seems to us quite clear that it was never intended that the Court in proceedings under section 95 was to fix the amount of rent. Under section 95 it was intended that the Court should ascertian what in fact was the rent payable, that is to say, if there was a dispute between the land-holder and tenant as to what the amount was it would be the duty of the Court to say which side was right, but it was not intended that the Court should receive evidence and consider circumstances where no rent had ever been agreed upon or fixed by the parties. It is quite clear from the judgment of the learned District Judge that he never intended to make a declaration that no rent was ever to be payable for the land. It is quite clear that rent must be paid after it has been fixed either by agreement between the parties or through the Court. We are quite sure that if an application had been made to the learned District Judge, he would have made his decree quite clear on this point. In order to avoid any future confusion, we direct that the decree of the Court below shall be modified so as to read as a declaration that no rent had heretofore been paid or fixed in respect of the said lands, in lieu of the words "that no rent is payable in respect of the said lands."

As, in our opinion, the amendment could have been obtained without an appeal, we direct that each party do pay their own costs in this appeal.

We modify the decree of the Court below as indicated above.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1264 OF 1913.

September 16, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MULPURI VEERAYYA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SANAGAVARAPU SIVAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific performance - Contract to sell land—Contract Act (IX of 1872), s. 55—Time

RAJAB ALI v. RAJJOO KHAN.

not of essence of contract—Presumption, whether rebuttable—Default in payment—Offer by post to tender expenses—Abandonment—Earnest money, forfeiture of.

The equitable presumption that time is not of the essence of a contract to sell landed property is rebuttable in certain circumstances, as when the sale is arranged in order to meet the expenses of a marriage taking place on a certain date.

Where the vendee undertakes to bear the expenses of the sale and registration, his failure to tender them sufficiently early is a strong piece of evidence of default on his part. A mere offer by postal letter to tender such expenses is not a legal tender.

A suit for specific performance of a contract to sell land instituted 20 months after the date of the contract during which time other circumstances have intervened, cannot be decreed on the ground of waiver.

Earnest money forfeited to the vendor under the terms of the contract cannot be recovered.

Natesa Aiyar v. *Appava Padayachi*, 19 Ind. Cas 462; (1913) M. W. N. 341; 13 M L. T. 391; 24 M. L. J. 488, followed.

Second appeal against the decree of the District Court of Kistna, in Appeal Suit No. 13 of 1912, preferred against that of the Court of the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 17 of 1909.

FACTS.—By an agreement dated 5th June 1907, defendants undertook to register within a week a sale-deed in favour of plaintiffs and to put them in possession of 8 acres of land on the plaintiffs' paying the sum of Rs. 2,656 at the time of registration of the sale-deed, and the plaintiffs undertook to pay the expenses of the execution and registration of the sale-deed and agreed to forfeit the earnest money in case of their failure to pay. Within a week from the date of the agreement the defendants informed the plaintiffs of their intention to cancel the contract as the purchase-money urgently required for a marriage was not paid by the plaintiffs. The plaintiffs did not take any notice of this for 20 months. Meanwhile the defendants mortgaged the land elsewhere. The plaintiffs then immediately sued for specific performance of the contract the defendants had made with them, alleging that they were willing to perform their part and that they offered the money to the defendants but that the latter could not execute a sale-deed. The Sub-Judge decreed the suit on the ground that both parties were at fault and that there was no evidence of acquiesence or abandonment on the part of the plaintiffs. On appeal the District Judge held that time was of the essence of the contract and that the failure of the plaintiffs to do anything for such a long period of time was sufficient evidence of abandonment. The case then came up to the High Court in second appeal.

Mr. *N. S. Narasimha Chariar*, for Mr. *V. Ramadoss*, for the Appellants.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—We cannot assume that the lower Appellate Court ignored the equitable presumption that time is not of the essence of the contract in cases of contracts for sale and purchase of landed property. Its finding of fact, after a consideration of the evidence and the circumstances, that both parties intended time to be of the essence of the contract cannot, therefore, be interfered with in second appeal.

We must also accept the finding of the lower Appellate Court that the plaintiffs failed to perform that portion of the contract which they had to perform first, (namely), the tender of the expenses of the execution and registration of the sale-deed to defendants before the plaintiffs could call upon the defendants to execute the sale-deed. A mere offer by postal letter to tender such expenses is not a legal tender.

The question, again, of the right of the defendants (respondents) to a forfeit of the earnest money on plaintiffs' failure must be decided in the defendants' favour on the strength of the recent Full Bench ruling in *Natesa Aiyar* v. *Appavu Padayachi* (1).

The second appeal fails and is dismiseed with costs.

Appeal dismissed.

(1) 19 Ind. Cas. 462; 24 M. L. J. 488; (1913) M. W. N. 341; 13 M. L. T. 391.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 749 OF 1913.

June 17, 1914.

Present:—Mr. Justice Sundar Lal.

RAJAB ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAJJOO KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 18—Landlord and tenant—Customary easement.

RAJAB ALI *v.* RAJJOO KHAN.

The right to crush sugarcane and to express, boil and concentrate the juice on a piece of land in the *abadi*, is incidental to the cultivation of sugarcane and is of the nature of a customary easement referred to in section 18 of the Easements Act, and can be acquired by a tenant against his landlord.

Mounsey v. *Ismay*, (1865) 34 L. J. Ex. 52; 3 H. & C. 486; 11 Jur. (N. S.) 141; 12 L. T. 27; 13 W. R. 521; 140 R. R. 567, *Ashraf Ali* v. *Jagan Nath*, 6 A. 497; A. W. N. (1884) 186, *Mercer* v. *Denne*, (1905) 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 3 L. G. R. 1293; 21 T. L. R. 763; 70 J. P. 65; 54 W. R. 303; *Ilahi Bakhsh Khan* v. *Din Muhammad*, 14 P. R. 1897, referred to.

Second appeal from a decree of the District Judge of Azamgarh.

Mr. *Abdul Raoof*, for the Appellants.

Mr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—Sheikh Rajab Ali and others, the plaintiffs in this case, are co-sharers and lessees in the village of Mir Ahmadpur. They represent thus altogether (*i. e.*, in their capacity as co-sharers and as lessees from other co-sharers) a ten-annas interest in the village. The co-sharers of the remaining six-annas interest in the village, nor their lessors in respect of the interest held by them as lessees are parties to this suit. The defendants are old occupancy tenants of the village which is joint and undivided. They are thus the tenants of the entire body of co-sharers owning the full sixteen-annas interest in the village.

In the *abadi* of the village there is a plot of waste land bearing No. 637, which, of course, is the common property of all the co-sharers. The plaintiffs' case is that in this plot of land a portion (the boundaries of which are set out in the plaint) has been in the exclusive possession of the plaintiffs. They allege that the defendants have recently entered upon this portion of land, and constructed certain temporary structures. They have put up certain cattle troughs, sheds, sugarcane presses, and the usual machinery for expressing, boiling and concentrating sugarcane juice on the said land, and are using it for the said purpose. As these acts have been done without the consent of the plaintiffs, they sue for the possession of the land, the removal of the said constructions, etc., and for the injunctions set out in the plaint.

The defence to the suit is that by village custom the defendants, who are old sugarcane cultivators of the village, are entitled to use this plot of land for the purpose of expressing and boiling the sugarcane juice and cognate purposes. These operations follow the reaping of the sugarcane harvest, and the tenants are entitled to use this plot of land for the said purpose. The only other defence that calls for notice here is the plea that the plaintiffs cannot maintain this suit without impleading the other *zemindars* of the village.

The Court of first instance held that the defendants had not proved the alleged customary right claimed by them, and their act of entering upon the said land was an act of trespass, which any of the co-sharers of the village could sue to prevent. It decreed the claim in full. On appeal the learned District Judge after carefully examining the evidence on the record came to the conclusion "that the defendants have established a customary right of using the land in suit for pressing and boiling sugarcane by erecting temporary buildings for several years past." He also was of opinion that the plaintiffs could not maintain this suit without joining the other co-sharers of the village and that the suit was, therefore, bad for non-joinder of parties. He, therefore, set aside the decree of the Munsif and dismissed the plaintiffs' claim.

The plaintiffs have preferred this appeal against the said decree. It has been argued on their behalf that the customary right claimed by the defendants has not been made out, and cannot be given effect to in law, and that the plaintiffs alone were entitled to maintain this suit, which was for the ejectment of trespassers from their lands, without impleading the other co-owners. It was also urged that the tenants could not acquire the right claimed which was of the nature of an easement as against their landlords, the *zemindars*.

The right claimed by the defendants in this case is not a right of easement claimed by the owner of a dominant tenement against a servient tenement. It is a claim of the nature of a customary easement of the class referred to in section 18 of the Indian Easements Act, 1882, and recognized in numerous cases, both in this country and in England [see *Mounsey* v. *Ismay* (1), *Ashraf Ali* v. *Jagan Nath* (2), *Mercer* v. *Denne* (3)]. It is very similar to

(1) (1865) 34 L. J. Ex. 52; 3 H. & C. 486; 11 Jur. (N. S.) 141; 12 L. T. 27; 13 W. R. 521; 140 R. R. 567.

(2) 6 A. 497; A. W. N. (1884) 186.

(3) (1905) 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 3 L. G. R. 1293; 21 T. L. R. 763; 70 J. P. 65; 54 W. R. 303.

the right claimed in the case of *Ilahi Bakhsh Khan* v. *Din Muhammad* (4). In that case the defendants claimed a right to dry tobacco on certain lands adjacent to the place where they had set up mills for grinding snuff. It was found that the land had been used for that purpose for more than twenty years by the defendants, and that a drying ground in the immediate proximity of the mills was essential to their use. The Court held that such user conferred on the defendants a right to use the land for the said purpose. On the findings of the learned Judge, the defendants have made out the claim to the customary easement set up by them, and the suit was rightly dismissed on that ground.

In the view that I have taken of the first point it is unnecessary to decide the second point, *viz.*, whether the plaintiffs have a right to sue without joining the other *zemindars* as parties to this suit. The question is one on which the decisions are by no means uniform. The only effect of accepting this plea is to relegate the plaintiffs to another suit with the necessary array of parties. Now that the matter has been tried out between the plaintiffs and the defendants, the parties to the suit will at any rate be bound by this decision. I, therefore, prefer to rest my judgment on the first ground alone. It has not been urged that the customary right claimed is unreasonable or that the use, that the defendants are making of the land, is excessive or unreasonable or unnecessary and not essential to the cultivation of the sugarcane crop. The crushing of the sugarcane and the expression and boiling of the juice is the last of the agricultural operations incidental to the cultivation of sugarcane; and the right claimed here is enjoyed by the tenants unopposed wherever the relations between the landlords and the tenants are on the usual footing of cordiality.

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

(4) 14 P. R. 1897.

MADRAS HIGH COURT.

CIVIL APPEAL No. 270 OF 1911.

September 9, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

THAITHOTTATHIL POKKAR—DEFENDANT No. 5—APPELLANT

versus

RAMACHANDRA SHENOY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage-debt—Compound interest payable until default—No provision after that date—Interest—Presumption.

While a person owing money must be deemed to have borrowed it on the understanding that he would pay some compensation for its use, either as simple interest or damages, there is no presumption that he agrees to pay compound interest, as that is not an ordinary incident of the borrowing.

Therefore where a bond provides for compound interest till a certain period but there is no provision for the payment of any interest after that date the creditor is not entitled to compound interest after that date but only to simple interest upon the amount of the principal and interest due on that date.

Chajmal Das v. *Bhukan Lal*, 17 A. 511; 22 I. A. 199; followed.

Appeal against the decree of the District Court of North Malabar, in Original Suit No. 19 of 1910.

Mr. *C. Madhavan Nair*, for Mr. *J. L. Rosario*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—We think that the provision for compound interest in the document sued on relates only to the period during which the principal remains unpaid, that is, the four years from the date of the document providing for its payment. After that date there is no provision in the document for the payment of any interest. It has been held by the Privy Council in *Chajmal Das* v. *Brij Bhukan Lal* (1) that in such cases the mortgagee will be entitled only to simple interest by way of damages, not to compound interest. The principle of this decision we take to be that while a person owing money must be deemed to have borrowed it on the understanding that he would pay some compensation for its use, either as simple interest or damages, there is no presumption that he agrees to pay compound interest, as that is not an ordinary incident of the borrowing.

(1) 17 A. 511; 22 I. A. 199.

Following this decision we hold that plaintiff is not entitled to compound interest after the expiry of the four years, but only to simple interest at 8 per cent. upon the amount of principal and interest due on that date as provided in Exhibit A. Subject to this modification this appeal is dismissed. The plaintiff and the 5th defendant will pay and receive proportionate costs. The appellant will pay the 7th respondent's costs. Time for payment is extended to three months from this date.

Appeal dismissed with modification.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3056 OF 1912.

March 10, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

KAILASH CHANDRA PODDAR—DEFENDANT—APPELLANT

versus

GOPAL CHANDRA PODDAR—PLAINTIFF—RESPONDENT.

Compromise decree—Suit to set aside—Previous application for review on same ground dismissed—Suit, whether maintainable.

A party whose application for review of a compromise decree on the ground that he had not consented was dismissed, cannot sue to set aside that decree on the same ground.

Ram Gopal v. *Prasanna Kumar*, 2 C. L. J. 508; 10 C. W. N. 529, followed.

Gulab Koer v. *Badshah Bahadur*, 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197, distinguished.

Appeal against the decree of the Subordinate Judge of Faridpur, dated the 23rd July 1914, reversing that of the Munsif, Bhanga, dated the 8th May 1911.

Babu *Brojendra Nath Chatterjee*, for the Appellant.

Babu *Brojo Lal Chakravarty*, for the Respondent.

JUDGMENT.—The present plaintiff sued the defendants and a compromise was alleged to have been effected. A decree was passed in accordance with that compromise, and it is not suggested that there was any failure to observe the provisions of Order XXIII. The present plaintiff No. 1 subsequently came to Court, not by way of appeal from an order made under Order XXIII, but for a review of the decree, and his application was based upon the allegation that he had not consented. He

adopted the proper procedure in so applying. The result of his application, however, was unfavourable to him and it was dismissed. Subsequently this suit was brought, and the applicant for review as well as his co-plaintiff in the former suit are the plaintiffs in this suit. There is the same allegation of *no consent*, and it is further suggested that there was fraud. Fraud has been negatived, so that the only ground of relief is the absence of consent. In these circumstances, it appears to me that this suit should have been dismissed; for, I think, the only question on which a decision has been given in the suit in favour of the plaintiffs was one which was decided adversely in the former litigation.

This view is in accordance with the decision in *Ram Gopal* v. *Prasanna Kumar* (1), which we treat as a decision entitled to respect and we, therefore, follow that decision notwithstanding what has been said in *Gulab Koer* v. *Badshah Bahadur* (2). We may point out that in this last named case the relief sought was based on fraud, and so it has no application to the present case.

The result is that the appeal must be allowed and the suit dismissed with costs throughout.

Appeal allowed; Suit dismissed.

(1) 2 C. L. J. 508; 10 C. W. N. 529.
(2) 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C.W.N. 1197.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 305 OF 1913.

October 23, 1914.

Present:—Mr. Justice Kumarasawmy Sastri.

K. VENKATA RAO—COUNTER-PETITIONER—PETITIONER

versus

MARWADI MOTIRAM—PETITIONER—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), s. 14—Proceedings initiated in District Court—Reference to High Court - Power of District Judge to award costs of proceedings before him.

A District Judge has no power to award costs in a matter referred by him to the High Court under the Legal Practitioners Act. The High Court alone has power to give directions as to the award of costs incurred between the date of the petition and the date of reference to the High Court.

RAJANI BALA DASI v. BHAJA HARI KOLEY.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Bellary, in Original Petition No. 313 of 1911.

FACTS.—The respondent filed a petition before the District Judge of Bellary complaining of the conduct of the present petitioner. The Judge thereupon referred the matter to the High Court and the reference was duly disposed of. The order of the High Court provided for the costs of the present respondent in the matter of the said reference, but was silent as to the costs incurred before the District Judge. The respondent then applied to the District Judge for the said costs and had the same granted to him. Against the said order granting costs the petitioner preferred this civil revision petition under section 115 of the Civil Procedure Code.

Mr. *S. Ranganadha Iyer*, for the Petitioner:—The order of the District Judge as to costs is entirely without jurisdiction, as he has no power to grant the same and the High Court alone can grant it.

Mr. *M. Govindarajulu Naidu*, for the respondent:—The District Judge, having been moved by the respondent on his petition and having conducted an inquiry thereon, had power to award costs incurred before him in respect of such inquiry.

JUDGMENT.—The District Judge had no power to award costs in a matter referred by him to the High Court under the Legal Practitioners Act. The High Court in disposing of the reference provided for costs and if the counter-petitioner wanted to get any costs incurred by him in the lower Court, he should have got directions from the High Court as to the costs incurred by him between the date of his petition against the legal practitioner and the date when the Judge referred matters to the High Court. The Legal Practitioners Act does not authorise the District Court to award any costs. I set aside the order of the District Judge with costs in this and the lower Court.

Petition allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3182 OF 1912.

May 28, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

Srimati RAJANI BALA DASI—PLAINTIFF—APPELLANT

versus

BHAJA HARI KOLEY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Cess Act (IX of 1880, B. C.), s. 95—Returns, whether admissible in evidence in favour of the person filing them—Words as to address, directory.

Under section 95 of the Cess Act, 1880, the returns filed by or on behalf of any person in pursuance of the Cess Act are not admissible in evidence in his favour.

The words as to the return bearing the signature and address of the person or his authorized agent in section 95 of the Cess Act are only directory and the fact that a wrong address is given, does not make the return admissible in evidence in favour of the person by or on whose behalf it was filed.

Appeal against the decree of the Additional Subordinate Judge of Hooghly, dated the 19th July 1912, modifying that of the Munsif, second Court, Hooghly, dated the 6th September 1911.

Babu *Nagendra Nath Ghosh*, for the Appellant.

Babu *Bepin Behari Ghosh*, Senior, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal against the judgment of the Additional Subordinate Judge of Hooghly, dated the 19th of July 1912, modifying the decree passed by the Munsif.

The suit was brought by the plaintiff as heir of her deceased husband, Sarat Chandra Ghosh, to recover against the defendant No. 1 an 8-annas share of the rent for certain holdings. The defendant No. 2 is the uncle of the late husband of the plaintiff and owns the other 8-annas share in the holding.

The only point that has been argued before us is, whether the learned Judge in the lower Appellate Court rightly rejected certain road-cess returns which had been given in evidence by the plaintiff in the Court of first instance.

The defendant No. 2 is a formal defendant to this suit, and no relief was asked against him.

MUHAMMADE *v.* MAYI KUNHI HAJI.

The road-cess returns in question were filed by the defendant No. 2 during the minority of the late husband of the plaintiff as his certificated guardian.

Section 95 of the Cess Act, 1880, provides that "every return filed by or on behalf of any person in pursuance of the provisions of this part shall bear the signature and address of such person, or his authorised agent, and shall be admissible against such person, but shall not be admissible in his favour."

It has been argued before us that as the returns in question were not signed by Sarat Chandra owing to his minority and as the defendant No. 2 as his certificated guardian was not his authorised agent, the section allows the returns to be used as evidence in favour of the plaintiffs. But this argument is not borne out by the language of the section.

The section provides that the returns filed by or on behalf of any person in pursuance of the Act are admissible in evidence against him, but not admissible in his favour.

The words as to the return bearing the signature and address of the person or his authorised agent appear to me to be directory only.

I can see nothing in the section that provides that if, for instance, a wrong address is given, the return would be admissible in evidence in favour of the person by or on whose behalf it was filed.

I think the learned Judge in the lower Appellate Court was right in refusing to accept these returns in favour of the plaintiff.

The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 50 OF 1912.

October, 6, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

MUHAMMADE AND OTHERS—PLAINTIFFS Nos. 1 TO 4—APPELLANTS

versus

MAYI KUNHI HAJI AND OTHERS—PLAINTIFF No. 5 AND DEFENDANTS Nos. 1 TO 19—RESPONDENTS.

Malabar Law—Anandravan, *whether can acknowledge mortgage by* karnavan—*Right to acknowledge mortgage right - Limitation Act (XIV of* 1859*), s.* 1 (15)—*Limitation Act (IX of* 1871*), Sch. II, Art.* 148.

An *anandravan* cannot be said to be a person claiming under a *karnavan* within the meaning of section 1 (15) of Act XIV of 1859 or Article 148, Schedule II, of Act IX of 1871, and has, therefore, no right to save from limitation a mortgage by acknowledgment, nor can such acknowledgment be effective even if construed as one by a co-mortgagee.

Bhogilal v. *Amritlal*, 17 B. 173; *Vaikunta Bhakta* v. *Kunni Pakki Beari*, 1 Ind. Cas. 203; 5 M.L.T. 208; 19 M. L. J. 288; *Ganapathi Naika* v. *Makki Keyi*, 1 Ind. Cas. 204; 5 M. L. T. 261, followed.

Appeal against the decree of the Court of the Subordinate Judge of South Canara, in Original Suit No. 17 of 1911.

Messrs. *T. Rangachariar* and *K. Sundara Row*, for Mr. *K. Naraina Row*, for the Appellants.

Mr. *K. Kutti Krishna Menon*, for Mr. *J. L. Rosario*, for the Respondents.

JUDGMENT.—The mortgagee in this case was the *karnavan* and the alleged acknowledgments were made while the Acts of 1859 and 1871 were in force by an *anandravan*. We agree with the Subordinate Judge that the *anandravan* was not a person claiming under the mortgagee within the meaning of section 1 (15) of Act XIV of 1859 and Article 148 of the Act of 1871 so as to make an acknowledgment by him save limitation. Regarding him as a co-mortgagee, we agree with *Bhogilal* v. *Amritlal* (1), which has been followed in *Vaikunta Bhakta* v. *Kunni Pakki Beari* (2) and *Ganapathi Naika* v. *Makki Keyi* (3), that an acknowledgment by one co-mortgagee alone was ineffective for the purpose of saving limitation under these Acts.

Lastly, Mr. Rangachari's contention that the person making the acknowledgment was in fact the *karnavan* at the time does not appear to have been raised before the Court

(1) 17 B. 173.
(2) 1 Ind. Cas. 203; 5 M. L. T. 208; 19 M. L. J. 288.
(3) 1 Ind. Cas. 204; 5 M. L. T. 261.

of the Subordinate Judge. Nor is it taken in the grounds of appeal.

The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1539 OF 1913.

July 8, 1914.

Present:—Mr. Justice Sundar Lal.

LALA RAM—PLAINTIFF—APPELLANT

versus

MAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction—Small Cause Court suit—Defendant pleading proprietary title, whether nature of suit altered.

Whether or not a suit is of the nature triable by a Court of Small Causes depends upon the frame of the suit itself, and not upon the defence that the defendant may set up.

Therefore, a suit for the recovery of Rs. 15 being the value of certain trees cut down by the defendant, although filed in the Munsif's Court, is of the nature cognizable by a Small Cause Court and its nature is not altered even if a question of proprietary title is raised by the defendant.

Sada Shankar v. *Brij Mohan Das*, 20 A. 480; A. W. N. (1898) 129, followed.

Sitab Rai v. *Dubal*, 6 C. L. J. 218, not followed.

Churaman v. *Balli* 9 A. 591; A. W. N. (1887) 121, referred to.

Second appeal from a decree of the Additional Subordinate Judge of Mainpuri.

Mr. *Vishun Nath*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—On this appeal being called on for hearing Mr. Agarwala on behalf of the respondents raised a preliminary objection that no appeal lay to this Court under section 102 of the Code of Civil Procedure as the suit was of the nature cognizable by a Court of Small Causes. It was a suit for the recovery of Rs. 15 being the value of certain trees cut down by the defendants. On the plaint as framed the suit was a suit for money which lay in the Court of Small Causes. It was, however, filed in the Court of the Munsif and under the law one appeal only is given to the lower Appellate Court, the right of second appeal being taken away by the Code. Mr. Vishun Nath on behalf of the plaintiff-appellant has urged that the suit is not a Small Cause Court suit as a question of title had arisen, and he has relied upon two cases. The first is that of *Churaman* v. *Balli* (1). That was a suit for *malikana* and it was found in that case, that the *malikana* was a charge upon immoveable property. The suit in that case, therefore, was not a Small Cause Court suit. The second case relied upon is a ruling of the Calcutta High Court, *Sitab Rai* v. *Dubal Nagesia* (2). That was a suit by a *jotdar* for the value of trees cut down by the defendants. The defendants, who were tenants of other lands in the village, claimed a customary right to cut down trees outside their holdings for certain purposes. In view of the defence the Calcutta High Court held that a question of proprietary or customary right was raised and that, therefore, the suit was not a Small Cause Court suit. In my opinion, whether or not a suit is of the nature triable by a Court of Small Causes depends upon the frame of the suit itself and not upon the defence that the defendant may set up. I am unable to agree with the view taken by the Calcutta High Court. It is not the defence that determines the nature of the suit, but it is the plaint. I find that in a case in this Court, *Sada Shankar* v. *Brij Mohan Das* (3), a Bench of this Court has held that although a question of proprietary title had arisen in the case, yet as the suit was upon the plaint a suit of the nature cognizable by a Court of Small Causes and even though the plaint was returned under section 23 of the Provincial Small Cause Courts Act for institution in the Munsif's Court, the suit still retained the character ascribable to it according to the plaint. The fact that a question of proprietary title arose did not alter its nature. I think, sitting as a single Judge, I am bound by the ruling of this Court. I hold that no second appeal lies and I dismiss the appeal with costs.

Appeal dismissed.

(1) 9 A. 591; A. W. N. (1887) 121.
(2) 6 C. L. J. 218.
(3) 20 A. 480; A. W. N. (1898) 129.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 768 OF 1914.

November 23, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, aud Mr. Justice Parlett.

NGA KYA THIN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 24—Murder—Confession to Thugyi *on inducement to confess, whether admissible—Questions and answers based on such confession, admissibility of.*

The *thugyi* or headman of a village is a person in authority within the meaning of section 24 of the Evidence Act. Therefore, the confession made by an accused to the *thugyi* on being sent for by him after he was told that he would not be punished if he had not taken part in the offence, is irrelevant and inadmissible in evidence, as what the *thugyi* told the accused was an inducement to make a statement.

Other questions and answers in the examination of the accused based on this inadmissible statement are also inadmissible.

Appeal from the order of the Sessions Judge of Prome, dated the 28th September 1914, passed in Sessions Trial No. 63 of 1914.

JUDGMENT.

Fox, C. J.—The appellant, Kya Thein, was tried with Lu Po and Po U for the murder of Pan Bu. Lu Po and Po U were acquitted. Kya Thein was convicted and sentenced to death.

None of the witnesses saw the murder committed. Two of them say they saw Kya Thein following Pan Bu who was going in the direction of the spot where Pan Bu was assaulted. One witness said that on the morning of the day on which the murder was committed, he saw the *dah* which was subsequently found near where Pan Bu's corpse had lain, in Kya Thein's hand. His father said he fell in with him returning to the village as he (the father) was driving back his cattle, presumably sometime in the forenoon of the day.

There is also evidence that in the afternoon of the day, Kya Thein openly made some enigmatic remarks about what would happen if one man killed another without any one else being present and what would happen if two men murdered a man. Some of this evidence appears doubtful, but even if it was all true, it would not warrant the conviction of Kya Thein. He has been convicted on the conclusions which the Judge drew from statements he himself made. The first of those was made to the headman of a village close to Kya Thein's village four days after the murder. The others were made to the Committing Magistrate and Sessions Judge. The later ones are not entirely the same as the first; where they differ from it the later ones show an attempt to offer explanation of his conduct more favourable to himself, but in the main they followed up the first statement. None were confessions in the ordinary sense of the word, but all contained incriminating statements from which the Judge and assessors drew the conclusion that he took part in the murder even if he alone did not commit it. The circumstances under which the village headman came to question Kya Thein and what he exactly said to him have not been gone into as fully as they might have been. In the Magistrate's Court Maung Aung said he questioned him for about two hours in the presence of a ten-house *gaung*, Maung Pu. He had sent for him: he did this because he had been told that the Township Officer had ordered him to investigate the case. The Police Inspector, however, stated that whilst he was making inquiries suspecting Kya Thein, the *thugyi* Maung Aung intervened and asked to be allowed to question him.

In the Sessions Court Mg. Aung stated what took place in the first instance at the protracted interview in the following words: he spoke from memory having taken nothing down in writing:—

"I questioned him. He said, 'I know the facts. I want to speak out. I am afraid of the *thugyi* Lu Po's brother (referring to the *thugyi* of his own village) and I am also afraid of Lu Po.' I told him not to be afraid of the *thugyi*. He said 'Shall I be punished, if I speak out.' I told him, 'if you took part, you will be punished. If not, you will not.' (This last word was evidently omitted by the Sessions Judge by inadvertence). He said, 'In that case as I did not take part, I will speak out' ".

Kya Thei then proceeded to state his story which certainly could not have taken two hours or anything like so long a time to relate. In the Magistrate's Court Maung Aung said that at the beginning he questioned the accused as to whether he did not know

anything about the case. Kya Thein said if nothing would happen to him he would reveal the facts of the case, and then he (Maung Aung) said that if he was not concerned nothing would happen to him. There can, I think, be little doubt that whatever the actual expressions used were, the impression conveyed to Kya Thein's mind must have been that if he had not taken part in the actual murder, he would not be punished. He made a statement according to which he did not take part in the actual murder, which he said was committed by Po U and Lu Po without any assistance from him. His subsequent statements were to the same effect and his defence was that he should not be convicted as he had brought the case against his fellow-accused to light. The other two accused escaped conviction because there was no trustworthy evidence against them. The main facts stated by Kya Thein, however, have the ring of truth. Although it is possible that the murder of Pan Bu and the dragging or carrying of his body from the place where he was first struck to where his corpse was found may have been done by one man and that that man was Kya Thein, it appears far more probable that those things were done by two men and there does not appear to be any reason why Kya Thein should have said they were done by Po U and Lu Po, if they did not do them.

The first question, however, which arises in the case is whether Kya Thein's first statement amounting in law to a confession was admissible in evidence. Maung Aung, the *thugyi*, was a person in authority within the meaning of section 24 of the Indian Evidence Act, and the question is whether it should be held that the incriminating statement and confession appears to have been caused by any inducement, threat or promise proceeding from him sufficient in the opinion of the Court to give Kya Thein ground which appears to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. In the first place it is to be noted that Kya Thein did not go to the *thugyi* of his own motion. He was sent for and must have gone to him because he was sent for by a person in authority. He did not at once offer to make a statement. He made one only after the *thugyi* had told him he would not be punished if he had not taken part in the murder. The question then is whether what the *thugyi* said to him constituted an inducement to make a statement, for I do not think there can be any doubt that the statement was caused by what the *thugyi* said to him. The object of the *thugyi* must have been to induce him to make a statement about the murder. His assurance that the man he was talking to about it would not be punished if he had not taken part in it, brought out the statement.

In Ameer Ali and Woodroffe's notes to section 24 of the Evidence Act are given examples of expressions which have been held to constitute inducements, threats or promises. Some are weaker than those which the *thugyi* said he used to Kya Thein. It is evident that the Courts jealously guard against every attempt by a person in authority to obtain self-incriminating statements from suspected or accused persons.

In my opinion what the *thugyi* said to Kya Thein was an inducement and as Kya Thein's confession was caused by it, what was said gave him reasonable grounds for supposing that by making it he would escape all punishment, the confession was irrelevant and inadmissible in evidence. Excluding this as evidence against him there remains the fact that he pointed out the place or the proximity of the place where the *dah* with which the murder was in all probability committed was found. This was consistent with his story that he was a witness of the murder and saw what took place afterwards, and amongst other things saw Lu Po put the *dah* behind a tree. There are also his statements in examination by the Magistrate and Judge to be considered. In those he omitted, except when questioned by the Judge upon what he had stated to the *thugyi*, all reference to his having heard Lu Po and Po U conspiring together to rob and kill Pan Bu. He said he left the village to look for a bullock and saw his two co-accused at the edge of some jungle and thinking that they were hunting wild cats, he followed them from a distance and whilst doing so, he saw Po U strike Pan Bu and Po U and Lu Po drag him off into the water-course where Po U cut his neck. He thus represented himself as having been a spectator of the occurrence by chance and not by design, whereas in his

statement to the *thugyi* the fact that he was on the spot by design is scarcely concealed.

The Sessions Judge in his memorandum of what the accused stated to him makes him say "Yes" to the question, "Did you cut Mg. Pan Bu with a *dah*?" This is an obvious mistake and must again be due to inadvertence. The actual answer according to the record in Burmese was "No" and from the subsequent questions this must have been the actual answer. If there had not been a record in Burmese as well as one in English, the mistake might have led to serious results. The Sessions Judge questioned Kya Thein as to whether he had not told the *thugyi* that he had heard Lu Po and Po U conspire to kill Pan Bu and Kya. Thein admitted he had done so, and on this were founded other questions which could only have been asked by the Judge if the statement made to the *thugyi* was properly in evidence. All these questions and answers must, in my opinion, be left out of consideration, since the basis of them was inadmissible. The result is that, in my opinion, this is not sufficient to support the conviction of the accused and I would reverse the conviction and sentence and acquit him.

PARLETT, J.—I concur.

Sentence reversed.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 1076 OF 1913.

February 4, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

C. BALTHASAR—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 405, 409—Criminal breach of trust—Misappropriation of sale-proceeds—Intention at time of sale—Auctioneer not carrying out terms of contract, liability of.

Section 405, Indian Penal Code, does not cover misappropriation of the sale-proceeds of property entrusted to a person.

A person cannot be said to have disposed of the sale-proceeds of property entrusted to him in violation of his contract dishonestly, unless it is shown that he had the intention of dishonestly appropriating the sale-proceeds at the time of the sale.

An auctioneer cannot be said to be liable for criminal breach of trust if he does not punctually carry out every term in the agreement.

A person charged with criminal breach of trust of property entrusted to him cannot be convicted of embezzling the amount obtained by dealing with the property.

Criminal appeal against the order of the Fifth Presidency Magistrate, Calcutta, dated 6th December 1913.

Mr. *Bagram* (with him Babu *Tarkessur Pal Chowdhury*), for the Appellant.

Babu *Manmatha Nath Mukerjee*, for the Crown.

JUDGMENT.—This is an appeal from the judgment and sentence of the learned Presidency Magistrate, Fifth Court, convicting the appellant C. Balthasar, of an offence under section 409 of the Indian Penal Code and sentencing him to pay a fine of Rs. 500 or in default to be rigorously imprisoned for four months on the first count of the charge, no separate sentence being passed on the other two counts of the charge.

The first objection raised to this conviction is that the charge is defective and misleading and that no conviction can be held upon that charge for the alleged misappropriation of the sale-proceeds of the furniture. The second objection is that there is no finding of when and how the appellant misappropriated the sale-proceeds and nothing to show dishonest intention.

The charge is a curious one and runs as follows:—"That you on or about the 24th November 1912, in Calcutta, being a public auctioneer, committed criminal breach of trust in respect of three articles of household furniture, almirah, etc., worth Rs. 109, given to you by Mr. W. J. O'Grady for sale and remittance of the sale-proceeds to him, and you thereby committed an offence under section 409 of the Indian Penal Code;" and the other two charges are similar with regard to sales of furniture on the 5th December 1912 and on the 22nd December 1912.

It is argued, and in our opinion very forcibly argued, that this charge cannot possibly relate to the alleged misappropriation of the sale-proceeds. Section 405 says: "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly

misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law,.....or of any legal contract, expressed or implied, which he has made touching the discharge of such trust,.....is guilty of criminal breach of trust." Now, substituting the word "furniture" for the word "property," it would be clear that the section does not cover misappropriation of the sale-proceeds. But even assuming, as we think it ought to be assumed, that the word "property" includes furniture or the value thereof, even then it could not be said that the appellant had disposed of the furniture or the value thereof, namely, the sale-proceeds, in violation of his contract dishonestly, unless it were shown that he had the intention of dishonestly appropriating the sale-proceeds at the time of the sale; and the dates given in the charge clench this contention which is admitted by the learned Vakil for the prosecution. He says that it is incumbent on the prosecution to prove that on the date of sale the accused intended to misappropriate the sale-proceeds. There is absolutely no evidence for that, and indeed all the evidence goes to the contrary. There was a regular business going on and all moneys received were paid into the account of that business and the ordinary practice of the business was to pay the sale-proceeds out to the owners of the goods sold one month after the sale, and it is put forward as evidence of the dishonest intention of the appellant, that not having been able to pay the money due on the 23rd December in connection with the sale of the 24th November, he still went on selling the furniture for Mr. O'Grady on the 29th December and took the sale-proceeds. But this apparently was with Mr. O'Grady's knowledge and consent, and it was not till January or February that Mr. O'Grady removed the remainder of his furniture from the appellant's hand. It cannot be said that the auctioneer is liable for criminal breach of trust if he does not punctually carry out every term in the agreement. For instance, if he did not hold the sale on the agreed date, the 24th November, it could not be said that he committed criminal breach of trust. In the same way if there was delay in payment, that is not in itself a breach of trust. On the dates in the charge it is clear that the wider sense which is sought to be given to the charge cannot possibly be accepted. The offence having been said to have been committed on the 24th November, it cannot be applied to misappropriation of money on or after the 23rd December. It is conceivable that a charge might have been framed to cover the whole circumstances of the transaction, but this is not such a charge; and it seems to us to fall within the rule laid down in the case of *Bipra Das Giri* v. *Niradamoni Bewa* (1), to which one of us was a party, that where the charge against the accused is to the effect that he committed breach of trust in respect of some property which he took from the complainant and was, therefore, guilty of an offence punishable under section 406, but at the trial he was convicted of embezzling not the property but the amount obtained by dealing with the property, the conviction was bad and must be set aside. We are, therefore, of opinion that, on the first point, this appeal must succeed and the conviction and sentence must be set aside.

But as that might render a re-trial necessary, we must also proceed to deal with the second point, namely, whether there is any finding or any evidence of dishonest intention referable to the 24th November, 5th December and 22nd December, respectively, in respect of these three charges. We are unable to find any such finding or any such evidence, and none has been shown to us. It is not pretended that on the dates of the auction sales the appellant had the slightest dishonest intention or did not mean to make good the money to the complainant.

It is admitted that, owing to terrible domestic misfortune in which the complainant himself deeply sympathised, he was unable to attend to his business and fell into grave pecuniary difficulties. Under these circumstances, he has been unable to satisfy his creditors of whom the complainant is one. But that he has been endeavouring to do so is clear from the evidence of Mrs. Brennan who, although she comes forward

(1) 12 C. W. N. 577; 7 Cr. L. J. 372.

with the allegation that she has been cheated by the appellant, admits that she has been paid every penny of her money except Rs. 2-13. Then again it is sought to show dishonesty from the evidence of one Mr. Salt, a Civil Engineer, who says that he instituted a case on the same ground as the present case against the appellant in the Second Presidency Magistrate's Court, but withdrew it on getting a *hundi* which subsequently turned out to be a bogus one on a forged Bank (whatever that may be), and it was dishonoured. He was cross-examined to show that he had received a notice from the Court prohibiting the accused from paying the money on the *hundi*. This he denied, but the learned Counsel who appears for the appellant has very rightly laid before us the actual order of this Court prohibiting the appellant from paying the money due on that *hundi* to Mr. Salt on the ground that it was attached by one of Mr. Salt's creditors. There is, therefore, absolutely no evidence of dishonesty in this incident, nor, had it been shown that the appellant acted dishonestly towards Mr. Salt, could we have accepted that as any evidence of intention in the present case: for we are not aware when these transactions took place with Mr. Salt, and there is nothing in the evidence to show it. We are, therefore, on the second point also of opinion that the conviction is bad, there being no evidence and no finding of dishonest intention within the meaning of section 405 of the Indian Penal Code.

The conviction and sentence are, therefore, set aside and the accused acquitted. The fine, if paid, will be refunded and the appellant will be discharged from his bail.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 422 OF 1914.

November 4, 1914.

Present:—Mr. Lindsay, J. C.

GAJJA—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Arms Act (XI of 1878), *ss.* 4, 20—"*Arms*," *definition of—Weapon, dangerous and probably to cause death if used—Pole-axe.*

The definition of "arms" in the Arms Act is neither exhaustive nor altogether happy.

Emperor v. *Satish Chandra Roy*, 34 C. 749; 11 C. W. N. 971; 6 Cr. L. J. 227; 6 C. L. J. 751, referred to.

The mere fact that a weapon is dangerous and, if used, may probably cause death, does not make it "arms" within the meaning of section 4 of the Arms Act.

A weapon consisting of a plain *lathi*, a blade and two moveable screws and so contrived that by loosing the screws the blade may be detached from the shaft made up of the *lathi*, is not "arms" as defined in section 4 of the Arms Act, although the weapon may be described as a pole-axe.

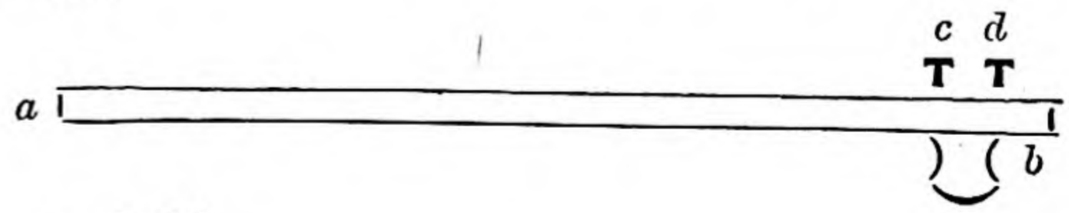
Appeal against the order of the Sessions Judge, Hardoi, dated 4th September 1914.

Mr. *St. G. Jackson*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.—The appellant, Gajja, has been convicted under section 20 of the Arms Act and sentenced to rigorous imprisonment for two years. The charge against him was that he was in possession of a weapon which the learned Judge describes in his judgment as a pole-axe.* This weapon is of a somewhat curious construction. It consists of a plain *lathi*, a blade and two moveable screws. The weapon has been so contrived that by loosing the screws the blade may be detached from the shaft which is made up of the *lathi*. The learned Judge has called this weapon, as I have said, a pole-axe or a *kanta*, and the principal point taken

*The weapon in question was constructed as below —*Ed.*



a—lathi.
b—blade.
c and *d*—moveable screws.

in appeal is that the weapon is not "arms" within the meaning of that expression as defined in section 4 of the Arms Act (XI of 1878). As has been remarked in the Calcutta case reported as *Emperor* v. *Satish Chandra Roy* (1), the definition of "arms" in the Arms Act is neither exhaustive nor altogether happy. I have had this weapon sent for and I have examined it and so far as I can see, it cannot be said to be either fire-arms, a bayonet, a sword, a dagger, a spear, a spear-head, a bow or an arrow. I am not aware of any authority for the proposition that an instrument which might be described as a pole-axe is "arms" within the meaning of this definition; on the contrary, I should be rather inclined to suppose that it is not. The only pole-axe which is known to me is an implement which is used by butchers for killing cattle. Altogether this weapon, although of a somewhat ingenious construction, seems to me to more closely resemble an implement which is very commonly seen in villages and in which a blade is fastened to a long *lathi* for the purpose of cutting branches of trees for the purpose of feeding goats and other animals. It may be, of course, as the learned Judge remarks, that the weapon is a dangerous weapon and if used might probably cause death, but this description might be applied to any kind of domestic utensil, such for example as a carving knife or the *gandasa* which is to be found in every Indian hut. It cannot be said that because the weapon is a dangerous one, it is "arms." I am unable to satisfy myself after inspection of this implement that it is "arms" within the meaning of the Act and I think, therefore, that this appeal must be allowed. I accept the appeal, set aside the conviction and sentence and direct that the accused, Gajja, be acquitted and released.

Appeal allowed.

(1) 34 C. 749; 11 C. W. N. 971; 6 Cr. L. J. 227; 6 C. L. J. 751.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 808 OF 1914.

June 18, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

KANCHAN MALLIK AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Appeal (Criminal)—Appellate Court, duty of.

In an appeal from a conviction and sentence it is for the Appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellant has been established beyond all reasonable doubt.

Criminal revision against an order of the Sessions Judge, Khulna, dated 25th March 1914, modifying on appeal the order of the Deputy Magistrate, Khulna, dated 13th March 1914.

Maulvi *Fazlul Huq*, for the Petitioners.

JUDGMENT.—In this case the petitioners were convicted under sections 186 and 144, Indian Penal Code, and sentenced, petitioners Nos. 1 and 3 to three months' rigorous imprisonment and to pay a fine of Rs. 50 under each section, and petitioner No. 2, Harmuz Ali, who is said to be a boy of 13 or 14 years of age, to pay a fine of Rs. 25 under each section. The sentences of imprisonment on the petitioners Nos. 1 and 3 were to run concurrently. They obtained a Rule from this Court calling upon the District Magistrate of Khulna to show cause why the order complained of should not be set aside and such other or further order made as to this Court might seem fit and proper, on the ground that at the hearing of the appeal by the learned Sessions Judge the learned Sessions Judge approached the consideration of the case from a wrong standpoint. On turning to his judgment we find that he opens his judgment as follows:—"The prosecution has examined nine witnesses and the defence two (out of five in all) to prove the rival occurrences. The lower Court with the witnesses before it has believed the former, and unless reasonable ground is given me for differing, I must accept that finding of fact." That is to say, he has practically called upon the appellants before him to establish to his satisfaction that the first Court has come to a wrong

finding. This is not the standpoint from which an appeal in a criminal case is to be approached. In an appeal from a conviction and sentence it is for the Appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellants has been established beyond all reasonable doubt.

We are, therefore, of opinion that the order of the Appellate Court must be set aside, and we accordingly set it aside and direct that the appeal be re-heard. At the re-hearing of the appeal it will be for the consideration of the Sessions Judge whether the cumulative sentences in the case of Harmuz Ali ought or ought not to be affirmed. In these terms we make the Rule absolute.

Rule made absolute.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISIONS NO. 176 AND 294B OF 1914.

September 29, 1914.

Present:—Sir Charles Fox, KT., Chief Judge.

ELIAS AND ANOTHER—ACCUSED—PETITIONERS

versus

EZAKIEL—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 350, 544—Transfer of Magistrate pending trial—Expenses of prosecution witnesses recalled, whether to be paid by accused.

Where on the transfer of the trying Magistrate the accused claims under section 350, Criminal Procedure Code, to have the witnesses re-examined by the succeeding Magistrate, the witnesses should be re-summoned without payment of any fees.

Review of the order of the Township Magistrate of Bassein, dated the 2nd of September 1914, passed in Criminal Trial No. 50 of 1914.

FACTS.—The facts appear from the following order of reference made by the Sessions Judge of Bassein :—

In this case the petitioners are under trial in the Court of the Township Magistrate of Bassein on the complaint of one Ezakiel. After the whole of the prosecution evidence had been taken the Magistrate framed charges under section 323, Indian Penal Code. At this stage the Magistrate was transferred and was succeeded by Mg. U Gyaw. The petitioners then claimed under section 350, Criminal Procedure Code, to have the witnesses re-examined by the new Magistrate. The Township Magistrate then passed the following order: "Summon prosecution witnesses on payment of fees by accused."

The petitioners now apply to have the order requiring them to pay fees which, I take it, means only process fees set aside.

I think the order should be set aside. Section 350, Criminal Procedure Code, gives the accused, in the circumstances arising in this case, an absolute right to have the witnesses re-called and re-examined. No condition is imposed and, in my opinion, it is not within the competence of the Magistrate to impose any condition.

The imposition of such a condition as in the present case might conceivably have the effect of a denial of the right expressly conferred by section 350.

I, therefore, submit the proceedings to the Chief Court with the recommendation that the order of the Magistrate be set aside and that he be directed to re-summon the prosecution witnesses without requiring any payment by the accused.

I would add that in such circumstances it seems inequitable that the complainant should have to pay the further expenses incurred. The case seems to be one in which the Magistrate should exercise his discretion under section 544, Criminal Procedure Code, and direct the payment of the additional expenses by the Government. The case, however, is not dealt with in the rules for the payment of expenses of witnesses framed

In re RAMBILAS.

under that section.—Instructions for keeping Criminal Register No. III—and I am in some doubt whether, in view of those rules, the Magistrate can direct the payment of the expenses of the witnesses by the Government. I would, therefore, ask that, if possible, instructions should be given to the Magistrate on this point also.

ORDER.—The order of the Magistrate requiring the accused to pay fees for the summoning of the prosecution witnesses is set aside, and he is directed to re-summon them without payment of any fees.

His attention is called to rule 20, paragraph 870, of the Lower Burma Court's Manual, Volume II, and to rule 1 (3) of the rules as to payment of witnesses' expenses published at page 137 of Volume II of the Lower Burma Courts Manual.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 326 OF 1914.

CRIMINAL REVISION PETITION No. 279 OF 1914.

October 21, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

In re RAMBILAS AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 179—Hundis sent for encashment to Bombay from Dharapuram in Erode—Receipt of hundi and misappropriation of proceeds in Bombay—Petitioner resident of Bombay—Jurisdiction of Sub-Divisional Magistrate, Erode, to try offence—Criminal breach of trust, offence of, when complete.

Where the petitioners who were brokers residing and carrying on business in the Bombay Presidency, were charged with having committed criminal breach of trust before the Sub-Divisional Magistrate of Erode in respect of the proceeds of certain *hundis* entrusted to them for encashment by the complainants, merchants of Dharapuram in Erode, and the *hundis* were received and cashed by the petitioners in Bombay and the sale-proceeds retained and misappropriated there:

Held, that the Sub-Divisional Magistrate of Erode had no jurisdiction to try the case and section 179 of the Criminal Procedure Code did not give him jurisdiction.

The offence of criminal breach of trust is completed by the misappropriation or conversion of the property dishonestly, *i. e.*, with the intention of causing wrongful gain or wrongful loss. It is only the *intention* which is essential. Whether wrongful gain or loss actually results is immaterial; it is a consequence but no essential part of the offence, and a person is not accused of the offence by reason of it.

Ganeshi Lal v. *Nand Kishore*, 15 Ind. Cas. 319; 13 Cr. L. J. 479; 10 A. L. J. 45; 34 A. 487, referred to.

Queen-Empress v. *O'Brien*, 19 A. 111; A. W. N. (1896) 191; *Mahadeo* v. *Emperor*, 6 Ind. Cas. 563; 11 Cr. L J. 372; 7 A. L. J. 319; 32 A. 397; *George Langridge* v. *Grace Atkins*, 17 Ind. Cas. 792; 13 Cr. L. J. 856; 10 A. L. J. 431, 35 A. 29, *Assistant Sessions Judge of North Arcot* v. *Ramaswami Asari*, 22 Ind. Cas. 991; 1 L. W. 302; (1914) M. W. N. 324; 15 Cr. L. J. 207; 26 M. L. J. 235, explained.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional first Class Magistrate of Erode, in Calendar Cases Nos. 110 of 1913 and 3 of 1914.

Dr. *S. Swaminadhan*, for the Accused.

The *Public Prosecutor*, for the Crown.

ORDER.—The petitioners, who are stated to be brokers carrying on business in the Bombay Presidency, are accused in two cases on the file of the Sub-Divisional Magistrate of Erode. The complaint against them is that they committed criminal breach of trust in respect of the proceeds of certain *hundis*, entrusted to them for encashment by the complainants, merchants of Dharapuram in the Erode Sub-Division.

The question is whether the Erode Sub-Divisional Magistrate has jurisdiction to try the cases.

From the recitals in the complaints, it is clear that the *hundis* were received and cashed by the accused (petitioners) in Bombay and that the cash proceeds were retained and misappropriated there.

It is conceded in the course of the hearing before us that the accused have been, and still are, residing outside this Presidency; so that section 185 of

the Criminal Procedure Code does not apply.

The Sub-Divisional Magistrate has held the cases to fall within his jurisdiction in virtue of section 179 of the Criminal Procedure Code, on the ground that the wrongful loss occasioned by accused's act accrued to complainants at their residence and place of business, Dharapuram.

We have carefully considered the effect of section 179 of the Criminal Procedure Code read with section 405 of the Indian Penal Code, and are clearly of opinion that it cannot be interpreted as giving jurisdiction to the Erode Sub-Divisional Magistrate to try the present cases. The offence of criminal breach of trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property (in this case the cash proceeds of the *hundis*) dishonestly, *i.e.*, with the intention of causing wrongful gain or wrongful loss. It is only the intention which is essential. Whether wrongful gain or loss actually results is immaterial: it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it. The learned Public Prosecutor has drawn our attention to the second part of section 405, which deals with dishonest use or disposal of property in violation of law or contract. He says accused had contracted by letters received at Dharapuram to remit the amounts to the complainants there; and argues that the contract was broken by failure to deliver the money at Dharapuram, and that this fact gives jurisdiction to the Erode Court. We are unable to follow this reasoning. In the first place the present case falls under the first, and not the second, part of the section: the complaint clearly charges dishonest misappropriation to accused's own use, and not use or disposal in violation of law or contract. *Secondly*, if it were otherwise, the offence would be committed where the dishonest use or disposal took place—not where the contract was made or should have been performed.

No authority has been quoted in support of this last argument, but the Sub-Divisional Magistrate has based his decision on two rulings of the Allahabad High Court, *Queen-Empress* v. *O'Brien* (1) and *Mahadeo* v. *Emperor* (2). These cases are undoubtedly in point and afford some authority in support of his view. We observe that in the first case, the Court was proceeding under section 185 of the Criminal Procedure Code and appears to have been influenced to some extent by considerations of convenience. The second case was decided by a single Judge, who was disposing of a revision petition against a conviction. In declining to interfere he quoted *Queen-Empress* v. *O'Brien* (1) and was prepared to follow it, but he also relied on section 182 of the Criminal Procedure Code as giving jurisdiction, and, further, on section 531 of the Criminal Procedure Code as justifying his refusal. This decision certainly adds nothing to the earlier one, and, if the latter is to be taken as an expression of opinion on the strict interpretation of section 179, then with all respect we are unable to follow it.

In a later case, *Ganeshi Lal* v. *Nand Kishore* (3), another learned Judge of the same Court, Karamat Husain, J., while distinguishing *Queen-Empress* v. *O'Brien* (1) on the facts, discussed the meaning of section 179 of the Criminal Procedure Code in relation to a similar case to the present one and expressed exactly the same view as we are inclined to adopt. In a still later case *George Langridge* v. *Grace Atkins*(4), another learned Judge (Mahomed Rafique, J.) elected to follow *Queen-Empress* v. *O'Brien* (1) but did not discuss the point apart from the rulings thereupon.

The only case of this Court to which we are referred is that of the *Assistant Sessions Judge of North Arcot* v. *Ramaswami Asari* (5). This arose out of an application to quash the commitment, and the main part for determination was the applicability of section 188 of the Criminal Procedure Code and the necessity of a certificate from the Political Agent. Spencer, J., remarked that the loss occasioned by the breach of trust in that case was a "consequence" within the meaning of section 179 of the Criminal Pro-

(1) 19 A. 111; A. W. N. (1896) 191.

(2) 6 Ind. Cas. 563; 11 Cr. L. J. 372; 7 A. L. J. 319; 32 A. 397.

(3) 15 Ind. Cas. 319; 13 Cr. L. J. 479; 10 A. L. J. 45; 34 A. 487.

(4) 17 Ind. Cas. 792; 13 Cr. L. J. 856; 10 A. L. J. 431; 35 A. 29.

(5) 22 Ind. Cas. 991; 1 L. W. 302; (1914) M. W. N. 324; 15 Cr. L. J. 207; 26 M. L. J. 235.

cedure Code sufficient to give jurisdiction, and quoted *Queen-Empress* v. *O'Brien* (1) and *George Langridge* v. *Grace Atkins* (4) as authority. But the bulk of the judgment of both learned Judges was devoted to the effect of the want of a certificate, and with all respect we do not feel compelled to treat this as a considered ruling on the point binding upon us.

These are all the cases to which we are referred : and we do not think their effect would justify our adopting a different interpretation of section 179 of the Criminal Procedure Code and section 405 of the Indian Penal Code to that which a careful consideration of the sections themselves seems to indicate.

We set aside the order of the Sub-Divisional Magistrate and direct the discharge of the petitioners.

Conviction set aside;
Accused discharged.

BOMBAY HIGH COURT.

CRIMINAL CONFIRMATION CASE No. 3 OF 1914.

March 9, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

HANMARADDI RAMARADDI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 162—Statements to Police Officers, admissibility of—Evidence Act (I of 1872), s. 157.

Under section 162 of the Criminal Procedure Code a Police Officer can be allowed to depose to what a witness had said to him in the course of the investigation for the purpose of corroborating the testimony of that witness before the trial Court.

Per *Shah, J.*—Section 162 of the Criminal Procedure Code excludes only the *writing*.

Criminal Confirmation Case No. 3 with Criminal Appeal No. 42 of 1914 from conviction and sentence passed by the Sessions Judge of Dharwar.

Mr. *Velinkar* (with him Mr. V. V. *Bhadkamkar*), for the Accused.

Mr. *S. S. Patkar*, Goverment Pleader, for the Crown.

JUDGMENT.

HEATON, J.—A certain Hanmaraddi has been convicted of the murder of Rama Valikar and has been sentenced to death. The case comes before us for confirmation of that sentence and also on the appeal of the convict.

It appears that about the 22nd of August 1913 the corpse of a man, whose head was almost severed from his body, was found in the village of Haleratti. On making inquiries the Police discovered from the neighbouring villagers that the murdered man had been accompanied by another man and a woman. They were all strangers to that locality. Neither the identity of the murdered man nor his companions was at the time ascertained. About a month later, however, the identity of the murdered man came to be suspected. His wife was questioned and thereafter the Police were enabled to make complete inquiries. They discovered that the murdered man was one Rama and that his companions were the accused and the deceased's wife, Honnava It was found that Honnava had for some time been living at Makrabi where the accused also lived, that her husband had been working at another village, Magal, that he had taken his wife from Makrabi for a time and that thereafter he and his wife set out to go to Haveri and were joined on the way by the accused. On their journey these three persons crossed the ferry between Bannimatti and Galagnath, whence they proceeded to the place where the corpse was subsequently found. From there Honnava and the accused returned, spending the night at a village on the way and re-crossing the ferry on the following day. This gave the Police an opportunity of which they availed themselves of tracing the movements of these persons and identifying the individuality of each. They have been enabled to put before the Court perfectly credible evidence of all the circumstances that I have stated. Then there is the evidence of the dead man's wife Honnava, who describes how her husband was murdered. It is said that she is an accomplice witness. However that may be, we must, in a case of this kind, regard her evidence with caution, because whether an accomplice or not, she was present at the murder and for weeks thereafter she gave no information about the crime and it is proved that she had illicit

intimate relations with the accused. It does not seem to me to matter in the least whether you call her an accomplice or not. Her evidence must be valued in relation to these circumstances. However, in the light of the surrounding circumstances, from the undoubted truth of the facts that the three persons travelled together, that one of them was left dead where his body was found and that the other two returned to their village together, there can be little doubt that the man was murdered by one or both of them. This conclusion is fortified by the subsequent conduct of the accused himself who gave an untrue account of his proceedings and had two letters written at intervals of about a fortnight which were designed to induce people to believe that the murdered man was still alive and working in a distant village. Here, again, the evidence is, to my mind, credible and indeed convincing. Taking the circumstances as a whole, they leave no doubt whatever that the accused was the man, whether helped by the woman or not it does not matter, who killed Rama.

The credit of the elucidation of these circumstances is mainly due to the promptness and intelligence of the Police inquiry and for that inquiry I gather, Balwant Vyankatesh, Sub-Inspector of Haveri, is mainly responsible.

For these reasons I confirm the conviction and also the sentence in this case.

There has arisen and has been discussed a point as to the meaning of section 162 of the Criminal Procedure Code. It appears that amongst the villagers, who were near the scene of the offence when the murder took place, was a boy who happened to see the three persons. The deceased's wife before the Committing Magistrate stated that she had not seen this boy. Before the Sessions Court she stated that she had seen him. On this state of facts the defence might very easily and with no other facts bearing on the point known with some force argue that the woman had changed her story, that the earliest known account of the matter which she gave was less favourable to the prosecution case than that she gave to the Sessions Court and thereon they might very properly found an argument that the witnesses had been tampered with and that the case presented clear indications of that kind of influence which properly ought to raise doubts in the mind of the trying Judge. To rebut an argument of this kind it was proved from the mouth of the investigating Police Officer that to him the deceased's wife had said that she saw the boy. If what the investigating Police Officer says be true, then it completely destroys the defence argument. The question argued before us is, whether the Police Officer could, as the law stands, be allowed to depose to what this woman had said to him for the purpose of corroborating what she said before the Sessions Judge. My own opinion is that the Police Officer could depose to that effect. I do not propose to discuss the various authorities which have been referred to. Lengthy arguments on this very point find a place in the books. I will only say that I do not think that either by its terms or by its intention section 162 of the Criminal Procedure Code prohibits the Court from receiving such evidence for such a purpose.

SHAH, J.—I concur. The learned Sessions Judge has examined the evidence with great care in an exhaustive judgment and has considered all the arguments urged in favour of the defence. Substantially the same arguments have been urged before us. Generally speaking I agree with the lower Court in its appreciation of the evidence and with the inferences drawn by it.

It is not disputed before us that the deceased whose body was found on the 22nd August last was Rama, the husband of Honnava, and the evidence in the case clearly establishes the fact.

I accept the evidence of Honnava and Gudda as true in the main. Honnava's evidence, no doubt, must be received with caution, though I do not accept the argument that she is an accomplice. She did not give out her present story soon after the occurrence and gave varying accounts from time to time, which was to a certain extent natural under the circumstances. Having regard to the proved circumstances in the case, I am inclined to believe her present account that she saw the accused killing the deceased. As to the evidence of Gudda, quite apart from the fact whether he was seen by Honnava or not, I accept it as true, despite the criticism of Mr. Velinkar on his evidence.

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The fact of the journey of the deceased and Honnava in the company of the accused is proved by reliable evidence in the case. The subsequent conduct of the accused, which I do not propose to examine in detail, lends strong corroboration to the prosecution story. It is enough to refer to his association with the letters, Exhibits 27 and 28. The accused is proved to have taken those letters to Satyava, which appear on the evidence to have been written at his instance. It is proved that the deceased was never at Amlikop. The obvious inference that arises from the proved conduct of the accused is that he was trying to conceal the death of Rama, which was known to him. On a careful consideration of the evidence and the arguments advanced on behalf of the accused, I have no hesitation in coming to the conclusion that the deceased Rama was murdered by the accused. The circumstances connected with the crime demand that the sentence should be confirmed.

The Police investigation in this case appears to me to have been made with unusual ability and thoroughness, and affords a telling illustration of the manner in which a case could be investigated without the aid of a confession.

I desire to allude to a point which has been raised before us in connection with Honnava's evidence. It has been pointed out that though she stated before the Committing Magistrate that she did not see any Kurbar boy then, she now denies having made that statement, and says that she had seen a boy from Haleritti. It is urged that the statement before the Committing Magistrate represents the truth. Even then I do not think that the main conclusion in the case is affected in any way. It is urged on behalf of the prosecution, however, that the argument is based upon a misapprehension of facts and that the Sub-Inspector has been examined to show that Honnava stated before the Police that she did see a boy at the time. The question of law that arises is, whether the prosecution can be allowed to adduce oral evidence in proof of her statement before the Police in order to corroborate her testimony at the trial. Her statement to the Police was admittedly reduced to writing, and it is common ground that such writing cannot be used as evidence. Mr. Velinkar contends, and not without force, that it would be unreasonable to allow any oral evidence of the statement to be given when the writing containing the statement cannot be proved. On the other hand, it is argued on the strength of section 157 of the Evidence Act that the right of the prosecution to prove any statement to corroborate the testimony of any witness under that section is not taken away by section 162 of the Code of Criminal Procedure which only provides that the writing shall not be used as evidence. The point is not free from difficulty which is sufficiently reflected in the diversity of judicial opinions bearing on the question. The judgment of Knox, J., in *Rustam* v. *Emperor* (1) and the observations of Beaman, J., in *Emperor* v. *Narayan Raghunath Patki* (2) represent one side of the question and the judgment of Karamat Husain, J., in the case of *Rustam* v. *Emperor* (1) and the decisions in *Fanindra Nath Banerjee* v. *Emperor* (3); *Emperor* v. *Nilakanta* (4) and *Muthukumaraswami Pillai* v. *Emperor* (5) represent the other side. I have carefully considered the question, and on the whole I incline to the view that looking to the plain language of section 162, Criminal Procedure Code, the *writing* only is excluded from evidence, but the right to prove any *statement* made to the Police by oral evidence to corroborate the testimony of any witness is not taken away by that section. This conclusion derives support, from or is at least in consonance with, the view taken by this Court in *Emperor* v. *Babaji* (6) in which the Court, while directing a re-trial, ordered that the Chief Constable should be examined as to the statements made to him by the witnesses during the Police investigation. Such an order would be inappropriate, if the oral evidence of the statements were inadmissible. The anomaly, if any, can be remedied by the Legislature. Our duty plainly is to construe the section without unduly straining the language used by the Legislature. I think, therefore, that the evidence of the Sub-Inspector was rightly

(1) 6 Ind. Cas. 101; 7 A. L. J. 468; 11 Cr. L. J. 235.
(2) 9 Bom. L. R 789; 32 B. 111; 6] Cr. L. J. 164; 2 M. L. T. 414 (F. B).
(3) 1 Ind. Cas 970; 5 M. L. T. 97; 13 C. W. N. 197; 9 C. L. J. 199; 9 Cr. L J. 452; 36 C, 281.
(4) 14 Ind. Cas. 849; (1912) M. W. N. 207; 13 Cr. L. J. 305; 22 M. L. J. 490; 35 M. 247; 11 M.L.T. 1 Supp.
(5) 14 Ind. Cas. 896; 13 Cr. L. J. 352; (1912) M. W. N. 549; 12 M. L. T. 1; 35 M. 397.
(6) 9 Bom. L. R. 366; 5 Cr. L. J. 353.

admitted on this point. At the same time, I think that under ordinary circumstances the admission of the oral evidence of the statements made to the Police when they are reduced to writing is not in keeping with the spirit of section 162, Criminal Procedure Code, and the existence of exceptional circumstances would be absolutely necessary to give any appreciable value to such evidence. In this case, for instance, Honnava's statement in question at the trial deserves to be credited, not simply because the Sub-Inspector says that she had made a statement to that effect to him, but mainly on the additional ground that though it was suggested in her cross-examination that she had made a contradictory statement before the Committing Magistrate, it could not be suggested to her that her earlier statement to the Police on this point was in conflict with her present version and that the Sessions Judge did not ask her any question on this point, though she was re-called on the 8th January after the Sub-Inspector was examined and questions on other points, arising out of her statement reduced to writing before the Police, were put to her by the Court.

Conviction and also sentence confirmed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 310 OF 1914.
May 27, 1914.
Present:—Mr. Justice Piggott.
NATHI MALL—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 12, 460 528 -Transfer of case Magistrate made Chairman of Municipal Board, whether still Magistrate and subordinate to District Magistrate—Jurisdiction.

A Magistrate, who is gazetted to the office of the Chairman of a Municipal Board and takes charge of that office, is divested of his territorial jurisdiction as Magistrate and is no longer subordinate to the District Magistrate. The latter, therefore, cannot transfer any criminal case to him for trial.

Criminal revision from an order of the District Magistrate of Cawnpur.

Mr. *E. A. Howard*, for the Applicant.

Mr. *R. Malcomson*, for the Opposite Party.

JUDGMENT.—The District Magistrate of Cawnpur has for certain reasons given in his order transferred a criminal case pending in the Court of Mr. J. N. G. Johnston, Joint Magistrate of Cawnpur, for trial by Mr. R. H. Williamson, Chairman f the Municipal Board, Cawnpur. I have no doubt that when Mr. R. H. Williamson was gazetted to the office of the Chairman, Municipal Board, and took charge of that office, he was thereby divested of his territorial jurisdiction as Magistrate, first Class, attached to the Cawnpur District. Even if it could be contended that Mr. Williamson continued to be a Magistrate of some sort while holding the office of Chairman, Municipal Board, I am quite clear that he is not a Magistrate subordinate to the District Magistrate. The order complained of cannot be sustained. It is, therefore, set aside.

Order set aside.

CALCUTTA HIGH COURT.
CRIMINAL REVISION CASE No. 599 OF 1914.
May 25, 1914.
Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.
SHERATI SHEIKH *alias* SHERATI SARCAR—ACCUSED—PETITIONER
versus
EMPEROR ON THE COMPLAINT OF GOBINDA CHANDRA SHAHA —OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 494—Accomplice—Withdrawal of prosecution, effect of—Prior statements of accomplice, whether should be produced.

An accomplice, who is tried jointly with the accused, ceases to be on trial with the accused as soon as the prosecution against him is withdrawn under section 494 of the Criminal Procedure Code, and becomes a competent witness in the case.

Prior statements of such a witness made to and verified by a Magistrate must be made accessible to the accused for the purposes of cross-examination and, if necessary, contradiction.

Criminal revision against an order of the Additional Sessions Judge, Mymensingh, dated 9th March 1914, affirming that of the Deputy Magistrate, Tangail, dated 26th January 1914.

Babu *Monmotha Nath Mukerjee*, for the Petitioner.

In re PERUMAL NAIDU.

JUDGMENT.—In this case one Sherati Sheikh was convicted on the 26th January 1914 under section 411 of the Indian Penal Code and sentenced to rigorous imprisonment for three months and to a fine of Rs. 40.

It appears that in the first instance the petitioner and one Mojum Khan were placed on their trial together and that on the 6th November, with the consent of the Court, the Public Prosecutor withdrew from the prosecution of Mojum Khan under section 494 of the Criminal Procedure Code.

Mojum Khan was thereupon examined as a witness, and it is largely upon his evidence, the evidence of an accomplice, that the petitioner has been convicted.

It appears also that prior to the trial Mojum Khan had made a confession to a Magistrate and that his confession was subsequently verified by the same or another Magistrate to whom presumably, therefore, the confessing prisoner made further statements. The confession and these further statements have not been placed on the record, and on this ground copies were refused to the petitioner.

On his behalf it is then contended before us, *first*, that no formal order of discharge having been recorded in the case of Mojum Khan, his evidence was inadmissible; and, *secondly*, that the petitioner has been prejudiced by the failure of the prosecution to produce the confession and further statements of the said witness.

The first contention is based on the case of *Banu Singh* v. *Emperor* (1), but in the present case it is clear that notwithstanding the inadvertent omission to record a formal order of discharge the accomplice ceased to be on trial with the present petitioner as soon as the prosecution against him was withdrawn and that being so, he became a competent witness. The matters urged against the value of his testimony do not render it inadmissible.

There can, however, be no question that for the purposes of cross-examination and if necessary, contradiction the prior statements of the witness should have been made accessible to the accused, and we are at a loss to understand why the Public Prosecutor should have withheld them and why the trying Magistrate failed to compel their production.

(1) 33 C. 1353; 10 C. W. N. 962; 4 Cr. L. J. 145.

We, therefore, set aside the conviction of and sentence imposed upon the petitioner and direct that he be re-tried, the re-trial to take place before some other competent Magistrate at Tangail if available, if not at the District headquarters.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 689 OF 1914.
CRIMINAL REVISION PETITION No. 580 OF 1914.
October 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re PERUMAL NAIDU AND OTHERS —ACCUSED Nos. 1 AND 3 TO 6—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 424—Appellate Court, whether entitled to alter conviction for principal offence into one of abetment—Abettor present at commission of offence, whether can be convicted of principal offence.

An Appellate Court cannot alter a conviction of an accused into one of abetment.

If an accused who abetted an offence was present at the commission of it he is rightly convicted of the principal offence.

Petition, under sections 435 and 436 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the first Class Deputy Magistrate of Saidapet Division, in Criminal Appeal No. 14 of 1914, preferred against that of the Second Class Magistrate of Poonammalle in C. C. No. 43 of 1914.

Mr. *R. N. Aiyanger*, for the Petitioners.

ORDER.—The Appellate Magistrate should not have altered the conviction of the 1st accused to one of abetment and he had no right to alter it. [See *Padmanabha Payi Kanniah* v. *Emperor* (1)]. As the 1st accused was present at the commission of the offence which he abetted, he was rightly convicted by the trial Magistrate of the principal offence (section 114, Indian Penal Code).

On the merits I see no reason to interfere and having pointed out his error to the Appellate Magistrate, I reject this revision petition.

Petition rejected.

(1) 5 Ind. Cas 145; 7 M. L. T. 79; 11 Cr. L. J. 49; 20 M. L. J. 84; 33 M. 264.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 412 OF 1914.
CRIMINAL REVISION PETITION No. 344 OF 1914.
November 12, 1914.
Present:—Mr. Justice Ayling.
In re ANANTHA PADIYARA—ACCUSED No. 4—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 239—"Same transaction," meaning of—Trespass and on ejection assembling men to force entry, whether part of same transaction—Joint trial, whether legal.

The act of a trespasser in entering into a factory, and, subsequent to his ejection therefrom, his act in assembling men to force an entry into it, are acts unconnected with each other and do not form part of the same transaction, within the meaning of section 239 of the Criminal Procedure Code, and a joint trial for such offences is illegal.

Mussalappa v. *Emperor*, 6 Ind. Cas. 242; 7 M. L. T. 367; 11 Cr. L. J. 293; (1910) M. W. N. 541; *Gobind Koeri* v. *Emperor*, 29 C. 385; 6 C. W. N. 485; *Subrahmania Aiyar* v. *King-Emperor*, 25 M. 61; 11 M. L. J. 253; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I A 257 (P. C.); 2 Weir 271, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of South Canara, in Criminal Appeal No. 60 of 1913, preferred against that of the Joint Magistrate of Coondapur in C. C. No. 66 of 1913.

Dr. *Swaminadhan*, for the Petitioner.

The Acting *Public Prosecutor*, for the Government.

ORDER.—The sole question for determination in this case is whether the offences forming the subject-matter of the three charges can be said to have been committed "in the same transaction" within the meaning of section 239 of the Criminal Procedure Code. The second and third charges may be said to arise out of actions of the same unlawful assembly in prosecution of the same common object, and forming part of the same transaction. But this cannot, in my opinion, be said of the first charge, which relates to the initial trespass of accused Nos. 1, 2, 3 and 11 into the factory. The formation of the unlawful assembly which committed the acts referred to in the second and third charges only began after the ejection of the trespassers and I cannot find any ground for holding that the collection of this assembly formed part of any pre-concerted plan entertained at the time of the original trespass. It seems to have arisen solely in consequence of the forcible ejection of the trespassers.

The cases dealt with in *Mussalappa* v. *Emperor* (1) and *Gobind Koeri* v. *Emperor* (2) are very similar cases, in each of which there was held to be misjoinder of charges, and I can only hold that there was misjoinder here in respect of the first charge on the one hand and the second and third charges on the other.

The conviction must, therefore, be set aside. Vide *Subrahmania Aiyar* v. *King-Emperor* (3).

As petitioner has already undergone the sentence imposed on him, it does not seem necessary or desirable to order a re-trial and neither his Counsel nor the Public Prosecutor suggest that course.

Petition allowed; Conviction set aside.

(1) 6 Ind. Cas. 242; 7 M L T. 367; 11 Cr. L. J. 293; (1910) M. W. N. 541.
(2) 29 C. 385; 6 C. W. N. 468.
(3) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.); 2 Weir 271.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 697 OF 1914.
CRIMINAL REVISION PETITION No. 586 OF 1914.
November 19, 1914.
Present:—Mr. Justice Sadasiva Aiyar.
EMPEROR—PETITIONER
versus
RICE—ACCUSED.

Motor Vehicles Act (XI of 1890), s. 6 (1)—Charge against both coachman and owner, whether illegal.

There is nothing in section 6 (1) of Act XI of 1890, restricting the prosecution of either the "coachman or the owner." The prosecution of both or one after another is not illegal. A conviction of one does not operate as a bar to the trial of the other.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Honorary Presidency Bench Magistrates, Egmore, in C. C. No. 21338-A of 1914.

The *Crown Prosecutor*, for the Government

Mr. *S. Venkatachallam Pillai*, for Mr. *S. Gurusami Chetty*, for the Accused.

ORDER.—The Honorary Magistrates were wrong in holding that under section 6 (1) of Act XI of 1890 "either the coachman or the owner" could be prosecuted, evidently meaning that both cannot be prosecuted and that the prosecution of one is a bar *to the prosecution of the other*.

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I see nothing in the section which prevents the prosecution of both together or one after the other.

The order of acquittal is set aside and the case will be heard and disposed of by the Bench *de novo*.

Acquittal set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1036 OF 1913.

February 16, 1914.

Present:—Justice Sir George Knox, KT.

EMPEROR—PROSECUTOR

versus

GANESH AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 110, 112—Detention in custody on mere request of Police—Magistrate to consider reasons and to place them on record.

Persons, who after investigation made have been found to be persons not proved to have been concerned in any cognizable offence and against whom there is no reasonable complaint or suspicion of their having been so concerned, should at once be released and any further detention of them is a detention not warranted by law. A Magistrate has no jurisdiction of any kind to act under section 110 of the Code of Criminal Procedure until he has sufficient information before him as will suffice for making an order in writing setting forth its substance and the further particulars required by section 112 of the Code.

Reference submitted by the Sessions Judge of Cawnpore as per his letter No. 59/III, dated 21st January 1914.

JUDGMENT.—From the papers on the record it would appear that Ganesh and Raja had been arrested by the Police on a suspicion of having been concerned in a dacoity. That suspicion was apparently ill-founded, and on the 8th of April the Police asked for the detention of these two persons as persons against whom an inquiry ought to be made under section 110 of the Code of Criminal Procedure. This Court has always pointed out that procedure of this kind is illegal. The Magistrate, upon receiving the report from the Police, should at once have declined to pass any such order. Ganesh and Raja were persons who after investigation made had been found to be persons not proved to have been concerned in any cognizable offence and against whom there was no reasonable complaint or suspicion of their having been so concerned. They should have been at once released and any further detention of them was a detention not warranted by law. The Police, however, while to their credit they informed the Magistrate that this was the state of things, asked that Magistrate to detain Ganesh and Raja in custody and to authorise their detention for a still further time. The learned Magistrate upon this request of the Police authorised detention but did not record his reasons for so doing. Here he committed a clear breach of the law. If he had, as the law requires him to do, paused to consider reasons and to place them on record, he would probably have discovered the false position into which he was getting.

A Magistrate has no jurisdiction of any kind to act under section 110 of the Code of Criminal Procedure until he has such information before him as will suffice for his making an order in writing, setting forth its substance and the further particulars required by section 112 of the Code. The Magistrate had no such foundation and he made no order such as is required under section 112. All that the Magistrate had before him on the 8th of April pointed strongly to the inference that Ganesh and Raja had been wrongly suspected of dacoity and that with an object of their further detention proceedings under section 110, they resting on no substance at all, were being used against them. Unconsidered action like this tends to bring discredit upon Magistrates. Ganesh and Raja were detained in custody, the former until the 20th of April and the latter until the 15th of April. A third person, Chumman, was arrested on the 9th of April and remained in custody until the 18th of June. So little foundation had the Police for their action at that time that it was not until the 22nd April that the notice required by section 112 was read over to Ganesh, Raja, and Chumman. The notice which was read over on the 22nd was an utterly bad notice, and I am somewhat surprised that the learned Magistrate should have affixed his signature to it. It did not set out the substance of the information that the Magistrate had received. From its terms it would appear that the Magistrate had no information before him until the 22nd of April and that this order authorising detention, as pointed out above, was an order not justified by law. So unprepared even then was the evidence

against these persons that it was not until the 8th of May that any witnesses except a Sub-Inspector were examined as against them. After the 8th of May, the action of the learned Magistrate continues to be as erratic as before. He takes the evidence of three witnesses against Ganesh and the others, and then the evidence of sixteen witnesses who apparently deposed in their favour. On the 10th of May, the Sub-Inspector was again sent for, examined and cross-examined. Counsel for the accused then asked for two days' time in which to produce a copy of a document, then for two days further in order to produce a Law Report. A Sub-Inspector was next asked to produce Law Reports in support of his view. This occupied the Court to the 20th of May. On the 20th of May both the Sub-Inspector and Counsel for Ganesh and others asked permission to produce further evidence. Twenty-six witnesses were put forward by this Sub-Inspector and twenty-two witnesses were put forward by Ganesh and others. Finally, on the 18th of June, Ganesh, Raja and Chumman were called upon to execute bonds with sureties for periods of one year and under.

No wonder that the learned District Magistrate observes that the learned Magistrate's action in this case is open to severe stricture. If the learned Magistrate would only follow the procedure laid down in the Code and not a fancy procedure of his own, he would find that he would decide cases better and at a far less cost of time and trouble to all concerned.

Let the record be returned.

Record returned.

CALCUTTA HIGH COURT.
CRIMINAL RULE No. 404 OF 1913.
May 8, 1913.
Present:—Mr. Justice Imam and Mr. Justice Chapman.
ANUKUL CHANDRA ROY—PETITIONER
versus
KAMARALI SARDAR—OPPOSITE PARTY.

Workmen's Breach of Contract Act (XIII of 1859), s. 2—Order of imprisonment, when to be passed—Appeal from order under s. 2, whether lies.

As an order passed by a Magistrate under section 2 of the Workmen's Breach of Contract Act does not come under the provisions of section 408, Criminal Procedure Code, no appeal lies to a Sessions Judge from such an order.

An order of imprisonment cannot be passed under section 2 of the Workmen's Breach of Contract Act unless there is a non-compliance with the order of re-payment or carrying out the contract.

Babu *Brojendra Nath Chatterjee*, for the Petitioner.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Nadia as well as the opposite party to show cause why the decision of the learned Sessions Judge should not be set aside on the ground that it was passsd without jurisdiction, and why the order of the Honorary Magistrate should not be set aside on the ground that Act XIII of 1859 does not apply to the accused.

The accussd in this case has been ordered under section 2 of Act XIII of 1859 to perform a certain contract that he entered into as a workman. All that we have got to see in connection with this case is whether the accused is a workman or not. The evidence is clear that he is a workman. In fact the contract was given to him on the basis of his being a workman and he engaged to do the work himself and to get it done by others, and in consideration of his agreeing to do this he received from the petitioner's master large sums of money aggregating to over Rs. 8,000. A certain portion of the work has been done and Rs. 2,078 is yet due for which work has to be rendered. The accused has refused to do any more work and hence the order passed by the Honorary Magistrate in this case. Against that order the accused appealed to the Judge, who has set aside the order of the Honorary Magistrate on the ground that the Act does not apply to the accused along with some other grounds. We see that in this case no appeal lay to the Judge. The order passed by the Magistrate does not come under the provisions of section 408 to make it appealable to the Judge. We, therefore, set aside the order of the learned Judge purporting to have been passed in appeal. That order being vacated, the order of the Honorary Magistrate will remain.

But we notice that the learned Magistrate has erred in directing the accused to suffer imprisonment for three months. That order could be passed under section 2 after there is a non-compliance with the order of re-payment or carrying out the contract.

We, therefore, make the Rule absolute in respect of the first part of the Rule and discharge the Rule in respect of the second portion.

The first part of the Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 867 OF 1914.

November 6, 1914.

Present:—Mr. Justice Tudball.

SAGARMAN OR SURJIRAMA—APPLICANT

versus

EMPEROR THROUGH BHAGWAN DAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Application made after four months—Delay, whether excusable.

An application for sanction to prosecute ought to be made promptly. A delay of four months is too long.

Revision against an order of the Sessions Judge of Agra.

Mr. *Howard*, for the Applicant.

Mr. *Benode Behari*, for the Opposite Party.

JUDGMENT.—This and the connected applications numbered 868, 869 and 870 are applications in respect of sanctions which were granted by the Sessions Judge of Agra for the prosecution of the applicants for offences under sections 211 and 193 of the Indian Penal Code. The applicant, Raghbar Dayal, had a brother who was drowned, accidently or otherwise, in the river at Agra. He thought that the opposite party had been instrumental in the death of his brother. The Police made inquiries and reported that

the death was accidental. He filed a petition in Court and the Magistrate made further inquiries and on the 5th of December 1913 dismissed his complaint. The inquiries had been made under section 203 of the Code of Criminal Procedure. Four months afterwards the opposite party applied to the Magistrate for sanction. The Magistrate chiefly on the ground that the opposite party had been guilty of unexplained delay in applying for sanction, refused to grant it. The Sessions Judge has granted the sanction.

In my opinion the order of the Magistrate is the better of the two. It is hardly credible that the opposite party had no knowledge of the proceedings in Court and if they wished to obtain sanction, they ought to have come into Court promptly and not after so long a period as four months. In such a case as this it is highly undesirable to grant sanction. I, therefore, allow the application and set aside the order of the Sessions Judge.

Application allowed.

CALCUTTA HIGH COURT.

CRIMINAL RULE No. 595 OF 1914.

May 21, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

MANIPUR DEY—PETITIONER

versus

BIDHU BHUSAN SARKAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Question of title raised—Magistrate, duty of, to decide bona fides of question—Procedure—Civil Court, reference to—Party failing to have recourse to Civil Court—Magistrate, power of—Power under s. 133, how to be used.

Per *Sharfuddin, J. (Teunon, J. dubitante)*—

When a person called upon to show cause under section 133, Criminal Procedure Code, raises a question of title, the trying Magistrate must decide whether

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the question has been raised *bona fide* or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim set up is a mere pretence, he should pass final orders and make the Rule absolute, but if he finds that it is *bona fide* raised, he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the Rule absolute.

The provisions of section 133, Criminal Procedure Code, should be sparingly used as any order passed under the section cannot be questioned in any Civil Court.

Criminal Rule against the order of the Sub-Divisional Magistrate of Manikganj, dated the 28th February 1914.

Mr. *K. N. Chowdhuri*, Counsel, with Babu *Upendra Lal Roy*, for the Petitioner.

Mr. *P. L. Roy* Counsel, with Babu *Ramoni Mohan Chatterji*, for the Opposite Party.

JUDGMENT.

SHARFUDDIN, J.—This is a Rule calling upon the District Magistrate of Dacca to show cause why the order passed under sections 133 and 137, Criminal Procedure Code, dated the 28th February 1914, should not be set aside on the ground that having regard to the *bona fide* question of title raised and in the absence of any finding that the objection raised was not *bona fide*, the order is without jurisdiction. It appears from the order of the Deputy Magistrate concerned, that Manipur Dey, the petitioner before us, on receipt of a notice under section 133, Criminal Procedure Code, appeared and alleged that the pathway in question was not a public pathway. The following are the findings of the trying Magistrate with regard to the objection thus raised: "It is contended on behalf of Manipur that the way cannot be called public if a few neighbours and acquaintances have acquired mere permissive right thereto. . . . It is idle in the present case to urge that the way is Manipur's private property; it is waste land lying between houses and extending beyond Manipur's house. . . . It is pointed out that the Settlement Department has not recognised the way as a public *rasta*. It is to be remembered that a *rasta* which is less than 15 *links* in width is incapable of representation on the Settlement map (scale 16 inches to a mile), and is ordinarily ignored in the *khatians*." Section 133 occurs in a Chapter headed Public Nuisances, and the section itself deals with unlawful obstruction, etc., of any way, etc., used by the public, etc. Sub-section (2) of section 133, Criminal Procedure Code, provides that no order duly made by a Magistrate under this section shall be called in question in any Civil Court. From this latter provision it is clear that the provisions of section 133, Criminal Procedure Code, should be sparingly used. Any order passed under this section cannot be questioned in any Civil Court. It is, therefore, necessary that if the party against whom the order is contemplated to be passed, raises a question that the pathway is not a public property in the sense of the provisions of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land, or if it is for public use, but he should even when the claim of the objector is not substantiated, find whether the claim is *bona fide*, or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the Rule issued by him absolute. If, however, he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised *bona fide*, he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the Rule absolute. In the present case the objector, who is the petitioner before us, had contended that the pathway in question was a private property and that only the neighbours and acquaintances had been using it in a permissive way. The question is whether this contention on the part of the objector is a *bona fide* contention or not. From the findings of the lower Court it is clear that the pathway in question is close to the objector's house. It is apparent from the judgment of the lower Court that the path in question has not been shown as a pathway in the map prepared by the Settlement Department. Regard being had to the above two facts, I think it was necessary for the lower Court to have come to a finding as to whether the claim set up by the objector was a mere pretence or whether it was *bona fide*. In this view I am supported by a number of authorities of this Court, *viz.*, the cases of *Belat Ali* v. *Abdur Rahim* (1);

(1) 8 C.W.N. 143; 1 Cr. L. J. 70.

Matukdhari Tewari v. *Hari Madhab* (2); *Luckhee Narain* v. *RamKumar*(3)and *Preonath* v. *Gobordhone* (4).

For the above reasons, I would set aside the order complained against and make the Rule absolute. I would further direct that the lower Court should try the case from the point reached on the 13th January 1914 and dispose of it according to law.

TEUNON, J.—Having regard to the long series of decisions in which this Court has held that when a person called upon to show cause under section 133, Criminal Procedure Code, raises a question of title the trying Magistrate must decide whether that question has been raised in good faith; I am prepared, in the present case, without agreeing in all the reasons advanced by my learned colleague to assent to the order proposed by him.

Rule made absolute.

(2) 9 C. W. N. 72; 2 Cr. L. J. 11; 31 C. 979.
(3) 15 C. 564.
(4) 25 C. 278.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 50 OF 1914.

May 23, 1914.

Present:—Justice Sir George Knox, KT.

RAJA RAM—APPLICANT

versus

EMPEROR—OPPISITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 195, 476—Complaint—Sanction.

Where the order of the Court was "I hereby complain against *R* ..... that he on..... .....filed two false and forged bonds in suit No. ....., ... in the Court of.....and thereby committed an offence under sections 471/467 and 209, Indian Penal Code. The papers will be sent to the District Magistrate with the request that they may be made over to a competent Court for disposal:"

Held, that this was a complaint as defined in section 4 (*b*) and not a sanction under section 195 or section 476 of the Code of Criminal Procedure.

Civil Revision from an order of the Sessions Judge of Mainpuri.

Mr. *W. Wallach*, for the Applicant.

Mr. *A. E. Ryves*, for the Opposite Party.

JUDGMENT.—This is an application in revision. One Raja Ram asks this Court to set aside an order passed by the Judge of Mainpuri on the 10th of March 1914. The application does not state whether the Judge of Mainpuri passed the order as a District Judge or Sessions Judge. I have read the order which the applicant asks me to set aside and I have heard a very long and strenuous argument made by the learned Counsel for Raja Ram. The order as it stands is very clear. It runs as follows: "I hereby complain against Raja Ram, son of Ganga Ram, Brahman of Kachal that he, on 15th of July 1912, filed two false and forged bonds in Suit No. 337 of 1912 (*Raja Ram* v. *Babua*) in the Court of Small Causes, Mainpuri, and thereby committed an offence under section 471/467 of the Indian Penal Code and section 209 of the Indian Penal Code. The papers will be sent to the District Magistrate with the request that they be made over to a competent Court for disposal." This document falls within the definition of the word "complaint" as given in section 4 (*h*) of the Code of Criminal Procedure. It is an allegation made in writing to a Magistrate with a view to his taking action under the Code of Criminal Procedure that some person known and mentioned in the complaint has committed the offence. It is not a sanction given under section 195 or under section 476 of the Code of Criminal Procedure. The Judge was a Court to which the Munsif of Mainpuri was subordinate. He was acting within his jurisdiction in making the complaint and it has not been shown to me that in taking such action he was acting with material irregularity. The order is not open to revision. I dismiss this application with costs. The stay order is removed.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL RULE NO. 27 OF 1914.

February 13, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

PRABHAT CHANDRA CHATTERJEE AND OTHERS—1ST PARTY—PETITIONERS

versus

PRASANNA KUMAR SEN AND OTHERS—2nd PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 522—Order under s. 522, whether bars proceedings under s. 145.

An order under section 522, Criminal Procedure Code, which is never carried out, does not bar the jurisdiction of a Criminal Court under section 145.

Application for revision against the order of the Deputy Magistrate, Faridpur, dated the 24th October 1913, in a proceeding under section 145, Criminal Procedure Code.

Mr. *Bagram* and Babu *Monmatha Nath Mukherjee*, for the Petitioners.

Messrs. *Caspersz* and *A. K. Fazul Huq* and Babu *Probodh Chandra Roy*, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Faridpur and the opposite party to show cause why the order under section 145 should not be set aside as made without jurisdiction, inasmuch as there is a subsisting order under section 522 which rendered any order under section 145 *ultra vires*.

What we understood by the subsisting order under section 522 was the order by which the Criminal Court had, as a matter of fact, restored possession to the person who had been ejected from the property by criminal violence. But having heard from the learned Counsel on both sides the actual facts in connection with this case, we find that possession under section 522 was never as a fact delivered to the petitioner and that there was no bar to any proceeding under section 145 which the Magistrate, whose concern under that section is only with the place of his district, was not entitled to take. It is in vain to say that the Magistrate has no jurisdiction to stay his own order under section 522 or that the effect of the conviction being set aside by the High Court does not necessarily do away with the order under section 522 and specific order must be passed by the Appellate Court setting it aside. All this is perfectly true as a proposition of law; but here, as in all questions of possession, we have to deal with what is purely a question of fact and the facts being as they are, we find that the order purporting to have been passed under section 522 on the 22nd February 1913 was infructuous and was never carried out and it was, therefore, no bar to the jurisdiction of the Criminal Court under section 145. To hold otherwise would be to take grave risks of continual breaches of the peace in connection with matters which had been dealt with by judicial orders which had never been carried out. The mere fact that an order has been obtained cannot possibly oust the jurisdiction of another Court, which has to deal with the preservation of the peace, in face of the fact that the previous order has never been carried out.

The Rule must, therefore, be discharged.

Rule discharged.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 274-B OF 1913

September 2, 1913.

Present:—Mr. Justice Twomey.

MA THAW—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 488, 490—Maintenance - Recovery of arrears—Jurisdiction.

An order for the recovery of arrears of maintenance may be made either by the Magistrate who passed the original order or by a Magistrate having jurisdiction in the district where the person ordered to pay maintenance has gone to reside.

JUDGMENT.—The facts of this case are set forth in the following extract from the order of reference by the Bassein Sessions Court:—"On the 28th October 1910 the the petitioner, Ma Thaw, was granted by the Second Additional Magistrate of Bassein, in his Criminal Miscellaneous No. 103 of 1910, an order under section 488 of the Criminal Procedure Code, directing her husband, Maung Tut Ni, to pay her monthly the sum of Rs. 20 for the maintenance of herself and her child.

"On the 12th August 1913 Ma Thaw applied to the Second Additional Magistrate, Bassein, for the recovery of Rs. 200 due as arrears under this maintenance order. On the same day the Second Additional Magistrate Maung San Win, a First Class Magistrate, returned the petition to her with an endorsement to the effect that under section 490, Criminal Procedure Code, the order can only be enforced by a Magistrate within whose jurisdiction the respondent now is. In the heading of the petition it was stated that the respondent was an Excise Officer, serving at Minhla, Upper Burma (Thayetmyo District.)

"Ma Thaw now applies for revision of this order, filing the original petition and order.

MA THAW v. EMPEROR.

"In my opinion the Magistrate's order is wrong. Section 490 is not very satisfactorily worded, and when taken by itself suggests the view that the Magistrate has taken. But even by itself I do not think it is sufficient to establish that view. As a matter of natural principle if a Magistrate has power to pass an order he, has also the power to take the necessary steps to enforce it.

"In this particular case it would appear that the respondent was living in the Bassein District when the order was passed. But supposing that no order had yet been passed and that this was an application for an order for maintenance, then the Second Additional Magistrate would have jurisdiction to pass the order provided that petitioner could show that she and respondent had last resided together in this district. See section 488 (9). On the Magistrate's view, although he could pass that order he could not afterwards enforce it, which is absurd.

"In the case of *Queen* v. *Karri Papayamma* (1), it was held that section 538 of the old Code did not deprive the Magistrate who has made an order for maintenance of the power given to him by section 536. The only difference between the two Codes seems to be that the words 'may be enforced' in section 490 of the present Code have been subtituted for 'shall be enforceable' in the old one. This does not seem to me to make any essential difference.

"The learned Judges of the Madras High Court held, however, that the Magistrate who passed the order (including, of course, his successor) had discretion either to exercise his jurisdiction or to refer the applicant to the Magistrate having jurisdiction at the place in which the respondent is to be found. With all due respect to this opinion I am unable to agree with it. The effect of the law, as the learned Judges interpreted it and as I understand it, is to give the applicant the option of proceeding either in the Court which originally passed the order or in that having local jurisdiction over the respondent. I know of no authority under which either of those Courts could refuse to exercise a jurisdiction which it possesses merely on the ground that some other Court also has concurrent jurisdiction. If the principle were adopted, then it seems to me that any of the Courts referred to in section 488 (9) would also have discretion to refuse to exercise the jurisdiction conferred by that clause.

"As a matter of fact this portion of section 490 seems to be superfluous. Section 488 (3) prescribes the procedure to be adopted in case of a breach of the order, and section 488 (9) appears to apply to this clause just as much as to clause (1).

"No doubt there may be inconvenience in proceeding in Bassein, but there is obviously at least equal inconvenience if the petitioner is referred to Thayetmyo. She would have to travel there and stay there some time, and it is quite likely that, as she says in her present petition, she cannot afford to do so. In this case the order of the Magistrate would operate to deprive her of her legal right to have the order enforced."

I concur in the learned Sessions Judge's remarks. The provisions of section 490 cannot be held to derogate from section 488 (3). Under section 488 (3) the Magistrate who has passed the order for maintenance can levy the amount due in the manner provided for levying fines, that is to say, he can issue a warrant under section 386 for the distress and sale of any moveable property belonging to the person against whom the order was passed. Such a warrant can be executed either within the local jurisdiction of the Magistrate, or without such limits under section 387 when it has been endorsed by the District Magistrate within the local limits of whose jurisdiction the moveable property is found. It must be held that section 490 merely provides an alternative course by enabling the person in whose favour the order was passed to apply direct to a Magistrate in any district where the person bound by the order may be. That Magistrate, on satisfying himself as to the identity of the parties and the non-payment of the allowance, will enforce the order by issuing a distress warrant in accordance with section 386. I agree with the Sessions Judge in thinking that it is left to the applicant to choose whether she should apply to the Magistrate who passed the original order or to a Magistrate having

(1) 4 M. 230; 2 Weir 652.

jurisdiction at the place where the respondent may be.

The order of the Second Additional Magistrate, Bassein, returning the petition is set aside and it is ordered that the said Magistrate shall receive it and deal with it according to law.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 727 OF 1914.

June 4, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

GAYA ROY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Police Act (IV B. C. of 1866), s. 13B, cl. (c)—Police constable in possession of money contrary to order, conviction of—Defence, consideration of—Plea of guilty—Admission—Government order, proof of—Practice.

A copy of the Government order or an extract therefrom or a reference thereto should be placed on the record if a person is convicted of having contravened that order.

A Police constable when being tried under section 13B, clause *(c)*, of Act IV of 1866 for being in possession of a sum of four annas while on duty contrary to an order of the Commissioner of Police, pleaded guilty to having the money in possession but stated he was not on duty:

Held, that the plea of guilty was to be looked upon merely as an admission of the fact that he had at the time in question the sum of annas four upon his person and that he could not be convicted unless his defence was considered and adjudicated upon.

Criminal revision against an order of the Second Presidency Magistrate of Calcutta, dated the 1st May 1914.

Babu *Tarakeswar Pal Chowdhury*, for the Petitioner.

JUDGMENT.—In this case the petitioner, a Police constable, was convicted under section 13B, cl. (*c*), of Act IV of 1866 and sentenced to 14 days' rigorous imprisonment. The charge against him was that while on duty in Kyd Street he was in possession of a sum of annas four contrary to an order passed by the Commissioner of Police, which was his duty as such Police officer to obey. He was placed on his trial and one witness was examined. Thereupon, it appears, the accused pleaded guilty to having, as a matter of fact, the money in his possesion. He was thereupon convicted and thereafter obtained the present Rule from this Court calling upon the Chief Presidency Magistrate to show cause why the conviction of and the sentence imposed upon him should not be set aside on the ground, *first*, that the order said to have been contravened was not proved, and *secondly*, that it was not proved that the constable at the time in question was on duty. In his explanation the Presidency Magistrate says: "the rule, the contravention of which was the subject-matter of the complaint, is contained in Government Order No. 746 P., dated 12th February 1910, and as such requires no formal proof." That may be so. But it was advisable that a copy of the Government Order or an extract therefrom or a reference thereto should have been placed on the record. It is then stated that the witness examined, *viz.*, the Sub-Inspector deposed that the accused was on duty at the time in question. The duty has not been specified. The accused now states that at the time in question he was in fact not engaged on Police duty, but was engaged in the private business of a certain Police officer. It would seem from the affidavit filed in support of the application for the present Rule, which has not been contradicted, that before the trying Magistrate he made this statement and also the statement that he had been on duty the previous night. It would thus appear that his plea of guilty is to be looked upon merely as an admission of the fact that he had at the time in question the sum of annas four upon his person.

In these circumstances, we make the Rule absolute, set aside the conviction and sentence and direct that the petitioner be re-tried and that in the re-trial his defence be considered and adjudicated upon. We further direct that the re-trial do take place at the Central Police Court before the Chief Presidency Magistrate or a Magistrate to be nominated by him.

Rule made absolute.

In re THE SESSIONS JUDGE, MADURA.

MADRAS HIGH COURT.
CRIMINAL MISCELLANEOUS PETITION NO. 485 OF 1914.
November 14, 1914.
Present:—Mr. Justice Spencer.
In re THE SESSIONS JUDGE, MADURA —PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 212, 347—Magistrate, power of, to commit to Sessions after summoning and examining defence witnesses.

The discretion given to a Magistrate to commit a case to the Sessions, under section 347 of the Code of Criminal Procedure, is neither restricted nor taken away merely because he issues summons to the defence witnesses under section 212 of the Code of Criminal Procedure and examines them.

Phanindra Nath Mitra v. *Emperor*, 1 Ind. Cas. 469; 12 C. W. N. 1014; 8 Cr. L J. 221; 36 C. 48, followed.

Queen-Empress v *Ahmadi*, 20 A. 264; A. W. N. (1898) 52, *Emperor* v. *Muhammad Hadi*, 26 A. 177; 1 Cr. L. L. 357, dissented from.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash commitment of the accused in Sessions Case No. 56 of 1914, on the file of the Court of the Sessions Judge, Madura, (R. C. XII of 1914, on the file of the 2nd Class Magistrate, Nelakottai).

ORDER.—Section 347, Criminal Procedure Code, empowers a Magistrate *in any trial at any stage of the proceedings*, when he makes up his mind to commit for trial, *to stop further proceedings* and commit the accused. It is pointed out in *Phanindra Nath Mitra* v. *Emperor* (1) that this section belongs to Chapter XXIV and is not governed by the provisions of section 208 in Chapter XVIII, which lay down the procedure to be followed before the Magistrate decides that the case is one for the Sessions.

The above ruling dissents from the views expressed in *Queen-Empress* v. *Ahmadi* (2) and in *Emperor* v. *Muhammad Hadi* (3) and is based on sound reasons. It is true that there the application to cite defence witnesses, was made after the Magistrate had decided to commit, while here the Magistrate had already issued summonses to the defence witnesses named in the list put in by the accused's Pleader on September 21st and had examined some of them before he made up his mind on September 29th to commit.

(1) 1 Ind. Cas. 469; 36 C. 48; 12 C. W. N. 1014; 8 Cr. L. J. 221.
(2) 20 A. 264; A. W. N. (1898) 52.
(3) 26 A. 177; 1 Cr. L. J. 357.

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But section 212 of the Code of Criminal Procedure shows that it is not imperative on a Magistrate to examine any defence witnesses after reaching the stage of framing a charge under section 210; and the power to stop proceedings at any stage which section 347 rests in him, is unqualified.

Applying, therefore, the test applied in *Phanindra Nath Mitra* v. *Emperor* (1) there is no ground to interfere with the order of commitment in this case. The records will be returned to the Sessions Judge in order that he may proceed with the trial.

Records returned.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE NO. 433 OF 1914.
May 8, 1914.
Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.
GENU MANJHI AND ANOTHER—ACCUSED —PETITIONER
versus
EMPEROR ON THE PROSECUTION OF KURKURI TANTI—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 323—Criminal Procedure Code (Act V of 1898), ss. 236, 237, applicability of—Rioting, charge and conviction of—Appellate Court, power of, to set aside conviction of rioting and convict under s. 323.

Where the accused were originally charged under section 147, Indian Penal Code, and convicted and sentenced under that section, but on appeal the Appellate Court held that there was no case under section 147, Indian Penal Code, but that there was a case against them under section 323, Indian Penal Code, and accordingly set aside the conviction and sentence under section 147, Indian Penal Code, and convicted the accused under section 323, Indian Penal Code, although no charge was originally framed against them under that section:

Held, that as no charge was framed against the accused of an offence under section 323, Indian Penal Code, they were not prepared to give any defence against that charge; and, unless the facts of the case brought it under section 236, Criminal Procedure Code, they could not be lawfully convicted of any other offence under section 237 of the Code.

Yakub Ali v. *Lethu Thakur*, 30 C. 288, referred to.

Criminal revision against an order of the Sessions Judge, Bhagalpur, dated the 15th January 1914.

BECHAI v. EMPEROR.

Babus *Dasarathi Sanyal* and *Atul Chandra Dutt* for Babu *Sailendra Nath Palit*, for the Petitioners.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Bhagalpur to show cause why the conviction of and the sentence passed on the petitioners under section 323, Indian Penal Code, should not be set aside on the ground that there was no charge framed against them of any offence under that section, or why such other order should not be made as to this Court may seem fit and proper.

It appears that the petitioners were originally charged under section 147, Indian Penal Code, and convicted and sentenced under that section to undergo rigorous imprisonment for four months. On appeal, the Appellate Court held that there was no case under section 147, Indian Penal Code, and that there was a case against the accused under section 323, Indian Penal Code, for having caused hurt. The learned Sessions Judge, therefore, set aside the conviction and sentence under section 147, Indain Penal Code, and convicted the petitioners of the offience of commiting hurt and inflicted a fine of Rs. 50 on each. They moved this Court and obtained the present Rule. The Magistrate in his explanation says that most likely the petitioners relied on section 238 of the Criminal Procedure Code, but their case really falls under section 237 of the Code. Section 237 has to be read with section 236. If the facts of the case do not fall under section 236, section 237 has got no application. There is no doubt that the offence committed, as found by the lower Appellate Court, was an offence of causing hurt. But the accused were not prepared to give any defence against the charge of hurt. There was no charge framed against them for an offence of causing hurt. They had, therefore, no opportunity to defend themselves on this charge.

In making this Rule absolute we may refer to the case of *Yakub Ali* v. *Lethu Thakur* (1) which is on all fours with the present case.

The Rule is, therefore, made absolute. The fine, if paid, must be refunded.

Rule made absolute.

(1) 30 C. 288.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 234 OF 1914.

June 17, 1914.

Present:—Mr. Justice Chamier.

BECHAI—PLAINTIFF—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 117—Enquiries under Chap. VIII—Rules of evidence—General repute, evidence of—Admissibility of evidence, test of—Witness to general reputation—Examination and cross-examination—Practice.

Enquiries under Chapter VIII of the Code of Criminal Procedure are governed by the ordinary rules of evidence. Evidence which would not be admissible at an ordinary trial should not be admitted at a trial under section 117 of the Criminal Procedure Code.

Evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community in which the person concerned lives or to which he belongs, or the personal opinion of the witnesses who are examined.

The test of the admissibility of evidence of general opinion is whether it shows the general reputation of the man, not necessarily the opinion of the entire community to which he belongs but at least the opinion of a considerable number of persons. It must not be merely the repetition of what one or two persons have said to the witness.

A witness to general reputation may be examined and cross-examined as to his means of knowledge and when he gives his own opinion, he may be asked to give the grounds of his opinion and to give the names of the persons whom he has heard speak against the character of the person concerned.

Criminal revision from an order of the District Magistrate of Allahabad.

Mr. *G. P. Boys*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicant has been bound over to be of good behaviour.

The Police relied upon three classes of evidence relating respectively to

(1) applicant's association with bad characters,

(2) his connection with specific acts of theft,

(3) his general repute.

On appeal the District Magistrate rightly ruled out all the evidence of the first of these classes on the ground that there was no proof that the persons with whom applicant is said to have associated are in reality bad characters. As regards the evidence of general repute he remarked that a large proportion

of it was not in fact admissible being merely hearsay, and much that was admissible was of very little value because it had not been properly tested. But he was of opinion that the admissible evidence of general repute coupled with the evidence of the applicant's connection with what he calls a "long catalogue of crime" was more than sufficient to justify the orders of the Deputy Magistrate.

To me it appears that there is no evidence at all that the applicant was in any way connected with or responsible for any of the specific offences referred to in the record. He has not only never been convicted of any offence, but it is said that he has never even been named in any first report or complaint of a crime or summoned to a Criminal Court as an accused person. The so-called evidence which is supposed to connect him with various offences consists of (1) Police lists of cases in which he is said to have come under suspicion, (2) the statements of witnesses each of whom says that he *suspected* the applicant of complicity in this or that isolated offence, (3) a list of cases in which the applicant's house has been searched on suspicion that he had committed some offence. None of this proves that the applicant has committed any offence. Police lists of the kind here referred to have been repeatedly held to be inadmissible and suspicion cannot take the place of proof that a man has committed an offence. I may point out also that the evidence regarding the searches has been used in a most unfair manner. Nothing suspicious has ever been found in the man's house. This fact is not allowed to count in his favour, but the fact that his house was searched at all is treated as a strong point against him as evidence that the applicant has been in any way convicted of any specific offence. All this is quite worthless. No one would dream of putting forward such materials as evidence in support of a charge of a specific offence.

Many Magistrates seem to think that proceedings under Chapter VIII of the Code of Criminal Procedure are not governed by the Evidence Act at all and they admit anything which the Police choose to put forward in the name of evidence.

When, as in the present case, it is shown that a mass of irrelevant materials has been used as evidence, one has to choose between examining the record in order to ascertain whether there is admissible evidence sufficient to justify the order which has been passed, and setting aside the proceedings altogether and either ordering a fresh inquiry or leaving it to the Magistrate to take further proceedings if he thinks proper. In the present case I choose the latter alternative, because it appears to me that no serious effort has been made to keep out irrelevant matter and it is impossible to say that the applicant has not been prejudiced by the way in which the proceedings have been conducted.

No less than sixty-three witnesses were produced by the Police, but their evidence does not prove that the applicant took part in any of the offences mentioned by them. It seems, therefore, that if the applicant is to be bound over it must be on the strength of such evidence of his general reputation as may be available.

As the Deputy Magistrate, who passed the order in this case, seems to have somewhat vague notions as to what is evidence of general repute, a few remarks on the subject may not be out of place. A good specimen of what has been considered valuable evidence of this description is to be found in the evidence of the witness Amir Husain. This man said that a theft occurred in his house a few years ago, so he sent for some local bad characters and adjured them to tell him whether they had had any hand in it. They with one accord took Ganges water, *tulsi* leaves, etc., in their hands and swore that they were innocent. When pressed to say who had committed the theft, these worthies said that their profession had been taken up by the present applicant. This evidence does not purport to give the opinion of any considerable body of men regarding the applicant, but merely repeats the self-exculpatory insinuation of a few persons that the applicant may have been responsible for the particular offence that had been committed.

It has been suggested more than once that the rulings of this and other High Courts as to the meaning of evidence of general repute make it difficult, if not impossible, for the Police to prove by such evidence that a man is an habitual offender. The suggestion, even if well founded, would be no reason for supposing that the Courts had misinterpreted the law. But the suggestion is generally made by those who will not take the trouble to find out what evidence of general repute means or

who hold that the words "evidence of general repute or *otherwise*" in section 117 of the Code are intended to let in various kinds of so-called evidence which would not be admissible at any ordinary trial. This Court has always held that inquiries under Chapter VIII of the Code are governed by the ordinary rules of evidence and, apart from any difficulty that may arise from the reluctance of people to give evidence in such cases for fear of the consequences to themselves (nothing of this kind is suggested in the present case), there ought to be no difficulty in proving that a man is an habitual thief or robber by proper evidence of general repute, where there really do exist grounds for taking this kind of action against him.

Evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community in which the person concerned lives or to which he belongs, or the personal opinion of the witnesses who are examined. The test of the admissibility of evidence of the former kind is whether it shows the *general* reputation of the man, not necessarily the opinion of the entire community to which he belongs but at least the opinion of a considerable number of persons. It must not be merely the repetition of what one or two persons have said to the witness. A witness to general repute may, of course, be examined and cross-examined as to his means of knowledge and when he gives his own opinion he may be asked to give the grounds of his opinion and to give the names of the persons whom he has heard speak against the character of the persons concerned.

It is needless to cite authorities for this. There should be no difficulty in keeping evidence of general repute within proper limits. I trust that if further proceedings are taken against the applicant the Deputy Magistrate will be careful to exclude all irrelevant matter.

The order requiring the applicant to furnish security for good behaviour is set aside and if he is still in custody, he must be released. I leave it to the Magistrate to decide whether it is advisable to take further proceedings against him.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 133 OF 1914.

July 16, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

SUBANS SINGH—COMPLAINANT

versus

MAHABIR PROSHAD SINGH AND OTHERS —ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order to pay—Opportunity to show cause, sufficiency of.

Where a Magistrate passed an order to the following effect: "Judgment delivered. Accused acquitted. . . . . Complainant to pay Rs. 50 compensation to each of the accused under section 250, Criminal Procedure Code, and show cause why he should not pay. Subans Singh (complainant) is absent. His brother verbally shows cause which is insufficient. Order made absolute:"

Held, that the complainant was in fact given no opportunity of showing cause, and that therefore the order could not be sustained.

Criminal reference by the Sessions Judge of Patna, dated 6th January 1914, against an order of the Sub-Divisional Officer, dated January 25th, 1914.

Mr. *Bagram*, Counsel, with Babu *Baidyanath Narain Sinha*, for the Complainant.

Babus *Monmatha Nath Mukherjee* and *Siva Nandan Ray*, for the Accused.

JUDGMENT.—This is a reference made by the Sessions Judge of Patna recommending that an order under section 250, Criminal Procedure Code, passed by the Sub-Divisional Magistrate of Barh, should be set aside on the ground that the complainant was not given an opportunity of showing cause against the said order.

It appears that the complainant instituted a case against 24 accused. The case was tried before the Sub-Divisional Magistrate of Barh and resulted in the acquittal of the accused.

Thereupon the Magistrate made the following order as appears from the order-sheet: "Judgment delivered. Accused acquitted. Enter false sections 147 and 379, Indian Penal Code. Complainant to pay Rs. 50 compensation to each of the accused under section 250, Criminal Procedure Code, and show cause why he should not pay. Subans Singh is absent. His brother verbally shows cause which is insufficient. Order made absolute." On this we think that the complainant was in fact given no opportunity of showing cause, and we, there-

fore, set aside the order as recommended by the Sessions Judge of Patna.

We do not consider it necessary, as prayed for by the other side, to send the case back in order that the complainant may be now given an opportunity to show cause.

Order set aside.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 287 OF 1914.

October 27, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

VAITHIANATHA AIYAR AND ANOTHER—FIRST PARTY—APPELLANTS

versus

SUPPALU AMMAL AND ANOTHER—SECOND PARTY—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145, inquiry under—Magistrate, duty of.

In an inquiry under section 145, Criminal Procedure Code, it is the duty of the Magistrate to determine who is in actual possession of the property at the time of his preliminary order.

Quaere—Whether proceedings under section 145 of the Code of Criminal Procedure can be taken where the two parties are in the position of principal and agent?

In the matter of the petition of Behari Lal, 24 A. 443; A. W. N. (1902) 111; *Dhondhai Singh* v. *Follet*, 31 C. 48; 7 C. W. N. 825 (F. B.); 1 Cr. L. J. 49, referred to.

Letters Patent Appeal against the judgment of the Hon'ble Mr. Justice Spencer, in Criminal Revision Case No. 212 of 1914, reported in 25 Ind. Cas. 997, preferred against that of the first Class Sub-Divisional Magistrate of Kumbakonam, in Miscellaneous Case No. 3 of 1914.

FACTS.—The dispute in this case is with reference to the properties which belonged to one Suri Aiyar, deceased, the first party claiming to be in possession as the executor or devisee of the deceased and the second party claiming to be in possession as the widow of the deceased. Proceedings having been initiated under section 145, Criminal Procedure Code, both the parties appeared before the Sub-Divisional Magistrate of Kumbakonam and filed written statements of their respective claims. The said Magistrate, thereupon, without inquiry as to who was in actual possession on the date of the preliminary order, held that the first party as agent could not claim possession against the second party, the principal, and relying upon the decision in *In the matter of the petition of Behari Lal* (1) passed an order "in the usual form in favour of the second party." The first party then preferred Criminal Revision Petition No. 212 of 1914* to the High Court and that petition having been dismissed by Spencer, J., this appeal was filed under the Letters Patent.

Messrs. *T. Rangachariar* and *S. Muthia Mudaliar*, for the Appellants:—The order passed by the Magistrate is clearly illegal and without jurisdiction. The question of actual possession has to be decided and not the right to possession. When the dispute arises as between principal and agent the dispute has to be decided, as it cannot be said that the possession of the latter is the possession of the former. The case of *In the matter of the petition of Behari Lal* (1), relied upon by the Sub-Divisional Magistrate, has no application and has been dissented from in *Dhondhai Singh* v. *Follet*(2). Further, according to the contention of the opposite party, the agency terminated with the death of Suri Aiyar.

Mr. *T. Narasimha Iyenger*, for the Respondents:—There is no question of jurisdiction. The High Court will interfere only in such cases [*Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal*(3)]. The Magistrate has decided that the second party is in possession.

JUDGMENT.—On a careful consideration of the Sub-Divisional Magistrate's order it seems clear to us that he has declined to exercise the jurisdiction, vested in him by section 145 of the Criminal Procedure Code, of determining which of the two parties was in actual possession of the disputed property—a jurisdiction which, on the averments in the written statements filed by the parties, it was his duty to exercise.

He has done so on the ground that the first party, as agent, cannot claim to be in possession as against the second party, his principal. The ruling on which he relies, *In the matter of the petitton of Behari Lal* (1), has no application; and *Dhondhai*

(1) 24 A. 443; A. W. N. (1902) 111.

(2) 31 C. 48; 7 C. W. N 825; 1 Cr. L. J. 49 (F. B.).

(3) 17 Ind. Cas. 65; 12 M. L. T. 439; 23 M L. J. 499; 13 Cr. L. J. 753; (1912) M W. N 1154; 36 M. 275.

*See 25 Ind. Cas. 997; (1914) M. W. N. 795; 15 Cr. L. J. 669. -Ed.

Singh v. *Follet* (2) is clear authority to the contrary. But it is not necessary for us to consider the point, because this is, on the pleadings, no case of agent and principal. The second party does not recognise the first party as her agent, and the first party clearly alleges that since the death of the late Suri Aiyar, he has been in possession of the property as the latter's executor or devisee.

It was the duty of the Magistrate to determine, who was in actual possession of the property at the time of his preliminary order. The learned Judge who disposed of the revision petition refers to "the order in the usual form in favour of the second party." This order, not being based on an inquiry and decision on the above point as required by section 145 of the Criminal Procedure Code, must in my opinion be treated as an order without jurisdiction. We must accordingly set it aside and remand the case to the Magistrate for disposal according to law.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 19 OF 1914.

July 21, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

EMPEROR—OPPOSITE PARTY

versus

DALU SARDAR—ACCUSED.

Penal Code (Act XLV of 1860), ss. 302, 325—Murder—Hanging up unconscious body believing it to be dead—Death due to hanging—Intention—Offence—Grievous hurt.

The accused assaulted his wife, who became unconscious and was thought to be dead. Then in order to create an appearance that she had committed suicide, he took up her unconscious body and hung it up by a rope, thinking it to be a dead body, but the medical evidence showed that most probably she had died of hanging:

Held, that there could be no intention to kill the woman when he thought that she was already dead and that, therefore, the offence committed was not of murder under section 302 but only an offence under section 325, Indian Penal Code.

Criminal reference under section 307, Criminal Procedure Code, by the Sessions Judge, Rajshahi, dated 17th June 1914.

Babu *Birbhusan Dutt*, for the Accused.

Mr. *D. N. Sirkar*, for the Crown.

JUDGMENT.—This is a reference made by the Sessions Judge of Rajshahi under section 307, Criminal Procedure Code. The accused was tried by jury on a charge under section 302, Indian Penal Code, of the murder of his own wife on the 29th of April 1914. Out of the five jurors, four were of opinion that the accused was not guilty and one of them was of opinion that the accused was guilty. The learned Sessions Judge, not finding himself in a position to accept the verdict of the majority of the jury and thinking that for the ends of justice the matter should be referred to this Court, has done so under section 307, Criminal Procedure Code.

The facts of the case are these. On the date of the occurrence the accused was seen assaulting his wife outside his house and pushing her inside the house. The neighbour witnesses say that they actually heard the woman crying from inside the house that she was being killed. When the people arrived, they wanted to rescue the woman and at last the husbaud was separated from the wife. They found the wife in an unconscious state. They tried to give her water, but the woman could not drink. The people thought that she was dead. Then it appears that the accused again went inside the house, turned out one or two persons who were inside the house and shut the door. Before this the woman was lying on the ground, but after the accused re-entered the house, people discovered that this woman was hanging by the neck by a piece of string tied to the roof of the house. On this the accused was sent up for trial.

It appears that soon after the occurrence the accused admitted to one Sharafat, a witness for the prosecution, that he had killed his wife, because she was carrying on an intrigue with one Madari. It also appears that the accused made a statement before a Judicial Officer some days later. Therein also he made a similar statement.

The question now is what offence he has committed.

But before we come to answer that question, it is necessary to ascertain from the medical evidence the probable cause of the death of this woman. The medical evidence shows that she most probably died of hang-

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ing. There can be no doubt that her body was suspended by a rope by the husband, the present accused. The question is whether he at the time intended to kill her. The people thought her dead when she was slapped and kicked in the region of the abdomen and, no doubt, the accused also thought that she was dead. When for the second time he entered into the house, most likely in order to create an appearance that the woman had committed suicide, he took up the unconscious body of his wife, thinking it to be a dead body, and hung it up by a rope. Therefore, he could not have intended to kill her, if he thought that the woman was already dead. We have, therefore, to fall back on what happened at the earlier stage of the occurrence when the accused gave the deceased kicks, blows and slaps. No doubt the kicks were given below the navel, a place it is most especially dangerous to kick a woman. She fell down and became unconscious. The offence, therefore, that the accused committed was an offence under section 325, Indian Penal Code. Under the circumstances of the case we are of opinion that he cannot be convicted of murder, but of an offence under section 325, Indian Penal Code, only. We, therefore, convict him under that section and sentence him to undergo rigorous imprisonment for four years.

Accused convicted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 105 OF 1914.

CRIMINAL REVISION PETITION No. 92 OF 1914.

November 5, 1914.

Present:—Mr. Justice Kumarasawmy Sastri.

In re PACHAI GOUNDEN AND OTHERS—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), ss. 99, 100—Right of private defence of person—Plea need not be set up when shown by circumstances—Right, when to be exercised—Persons aiding in such defence, whether commit offence.

If the circumstances show that the right of private defence was legitimately exercised, the Court should take it into consideration even though self-defence was not specifically pleaded.

Veerana Nadan v. *Emperor*, 15 Ind. Cas. 310; (1912) M. W. N. 404; 13 Cr. L. J. 470; 11 M. L. T. 251, referred to.

Where danger to the person of the accused was imminent and where the evidence shows that he had no time to seek the aid of the public authorities;

Held that he was entitled to use all force necessary to repel the attack, even to the extent of firing a gun at his assailants. Such acts for repelling the attack do not amount to a criminal offence nor are the persons aiding him in such acts, guilty of being members of an unlawful assembly.

Fateh Singh v. *Emperor*, 20 Ind. Cas. 140; 14 Cr.L.J. 380; 41 C. 43, *Pachakauri* v. *Queen-Empress*, 24 C. 686; 1 C. W. N. 423, *Silajit Mahoto* v. *Emperor*, 4 Ind. Cas. 19; 36 C. 865; 13 C. W. N. 80; 10 Cr. L. J. 471, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of South Arcot, in Criminal Appeal No. 42 of 1913, preferred against that of the Sub-Divisional first Class Magistrate of Tirukkoiyelur, in C. C. No. 193 of 1912.

Mr. *T. R. Krishnasawmi Aiyar*, for the Petitioners.

The *Public Prosecutor*, forthe Government.

ORDER.—The facts of the case are fully set out in the judgment of the Sessions Judge and the only question is whether the petitioners were acting within their rights and in the exercise of the right of private defence.

It is common ground that there were disputes between P. W. No. 1 and the 1st accused about the succession to the Ariya Gownden *Jagir* in the South Arcot Districts. The 1st accused claimed to succeed and he also had his son installed as the Elavarasu or heir-apparent. The prosecution 1st witness filed a criminal complaint against 1st accused and others, but withdrew it. The 1st accused, therefore, filed a petition praying for sanction to prosecute prosecution witness No. 1 for having preferred a false charge. Feelings seem to have been bitter between the parties and having regard to the fact that the people of the *Jagir* are according to the Sessions Judge an ignorant and primitive race, there can be little doubt that prosecution witness No. 1 and his party were in no mood to deal gently with the 1st accused and his adherents, as they had not only defied the authority of the *Jagirdar* (prosecution witness No. 1) but had installed an heir-apparent and had ventured to charge P. W. No. 1 in a Criminal Court.

The Sessions Judge finds that P. W. No. 1 sent his men to the accused's village, with the object of seizing the 1st accused and taking him by force to Podur in order that he might explain his conduct, and the

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short question is whether having regard to the avowedly unlawful attempt of P. W. No. 1 and his party and the apprehension that 1st accused had, of ill-treatment if he was taken to the village of P. W. No. 1, the accused acted within their rights in resisting the complainant's party.

The evidence does not justify the remark of the Sessions Judge that the accused got timely warnings and could have had resort to the Police for protection. On the contrary, the evidence is all the other way. The nearest Police station (Sankarapuram) was about 17 or 18 miles away and takes six hours to reach, as appears from the evidence of the Sub-Inspector of Police (P. W. No. 16). All that appears from the evidence of P. Ws. Nos. 2, 3, 4, 5 and 6 is that as the party which was sent to seize 1st accused were coming along, a man saw them and went in advance. The learned Public Prosecutor is unable to point to a single line in the evidence which supports the view that the accused had timely warning. If the nearest Police station was 17 or 18 miles away and took six hours to reach, it is impossible to see how the accused can have had reasonable warning when all that is proved is that one of their party, seeing a strong force coming to the village, ran in advance and warned them of the danger.

Having regard to the fact that P. W. No. 1 without any authority or justification sent a number of men to use force and seize the 1st accused and bring him to the village of P. W. No. 1, I have no doubt that the 1st accused had a reasonable apprehension of personal danger at the hands of P. W. No. 1, his enemy, and that he was justified in using force to resist the unlawful seizure of his person. The medical evidence shows that the force used was not unreasonable. It is found that the party of P. W. No. 1 inflicted injuries on the accused's party and the fact that they were trivial does not take away the right of the accused to resist force by force. It is difficult to expect that a blow given would be returned with just the same degree of violence. The Sessions Judge finds that the 1st accused fired a gun at random to frighten away the party of P. W. No. 1 who were coming to seize him and that he had no intention of injuring anybody. Under the circumstances disclosed by the evidence in the present case I do not think 1st accused was not justified in doing so.

The Sessions Judge finds that the party of P. W. No. 1 consisting of several persons came to accused's village with the avowed object of using force and dragging him to the village of P. W, No. 1.

The accused, who assembled to resist the unlawful seizure of 1st accused and who had resonable apprehension that if 1st accused were to be taken to the village of P. W. No. 1 he would suffer harm, would not be guilty of being members of an unlawful assembly. I need only refer to *Fateh Singh* v. *Emperor* (1), *Pachkauri* v. *Queen-Empress* (2), *Silajit Mahoto* v. *Emperor* (3).

It is not necessary for the accused to plead in so many words that they acted in self-defence. If the circumstances how that the right of private defence was legitimately exercised, the Court should take it into consideration even though self-defence was not specifically pleaded [*Veerana Nadan* v. *Emperor* (4)].

I am of opinion that the accused were acting legitimately in the exercise of the right of private defence, and set aside the conviction and sentences passed on them. The fines, if paid, will be refunded. In the view I take of the case it is unnecessary to consider whether the sentences passed by the Sessions Judge are illegal as amounting to an enhancement of the sentences passed by the Divisional Magistrate. The order of acquittal will be without prejudice to any proceedings that the authorities might think it desirable to take to prevent a breach of the peace by either or both the parties.

Petition allowed;
Conviction set aside.

(1) 20 Ind. Cas. 140; 14 Cr. L. J. 380; 14 C. 43.
(2) 24 C. 686; 1 C. W. N. 423.
(3) 4 Ind. Cas 19; 36 C. 865; 13 C. W. N. 801; 10 Cr. L. J. 471.
(4) 15 Ind. Cas. 310; 11 M. L. T. 251; (1912) M. W. N. 404; 13 Cr. L. J. 470.

NATHU MISTRY *v.* NARI LAL MISTRY.

CALCUTTA HIGH COURT.
CRIMINAL REVISION CASE No. 1177 OF 1914.
August 14, 1914.
Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.
NATHU MISTRY *alias* NRITYA LAL PATTO—PETITIONER
versus
NARI LAL MISTRY—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 552, order under—Custody of wife, application for—No allegation of girl's wish in complaint—Order of restoring wife, passed without inquiry, illegal—Complainant, remedy of.

Where a husband complained to the District Magistrate that his father-in-law was wrongfully detaining his wife and refused to send her to his house, without alleging that she was being so detained contrary to her own wish, and the District Magistrate passed an order under section 552, Criminal Procedure Code, directing her restoration to the husband without making any inquiry into the matter of the complaint:

Held, that on the facts the case was not one to which the provisions of section 552, Criminal Procedure Code, should be applied and that, if the husband had any grievance, he should seek his remedy in the Civil Court.

Criminal revision against an order of the District Magistrate, Alipur, dated 29th June 1914.

Babu *Monmatha Nath Mukkerji*, for the Petitioner.

Mr. *Rasul*, Counsel, with Babu *Haradhone Chatterji*, for the Opposite Party.

JUDGMENT.—In this case it appears that one Nari Lal Mistry on the 10th June complained to the District Magistrate of Alipur to the effect that his father-in-law, one Nathu Mistry, was wrongfully detaining his wife and refused to send her to his, the husband's house. Thereupon the Magistrate issued a notice upon Nathu Mistry requiring him to show cause why the girl should not be restored to the custody of the petitioner before him. On the 29th June, no cause having been shown, he made an order directing the restoration of the girl to her husband, purporting to make that order under section 552, Criminal Procedure Code. In pursuance of this order he directed the issue of a warrant, with a provision for the taking of security in the sum of Rs. 100 for the production of the girl in his Court on the 8th of July in order that she might be made over to the husband. The father-in-law, Nathu Mistry, thereupon applied to this Court and obtained the present Rule calling upon the District Magistrate of Alipur to show cause why the order should not be set aside and further inquiry directed.

There is some difference of opinion between the parties as to the age of this girl. The father says that she is eleven years of age and the husband says that she is over thirteen and has attained the age of puberty. We further observe that though the complainant in the Court of the District Magistrate has asserted that the father refused to send the girl to the husband's house, there is no allegation in his petition that the girl was being detained contrary to her own wish. We further find that the District Magistrate has made no inquiry whatever into the matter of the complaint. He has examined no witness either as to the age of the girl or as to the reason why the father does not think it fit to send the girl to her husband. On all these facts we are clearly of opinion that this is not a case to which the provisions of section 552, Criminal Procedure Code, should be applied and that if the husband has a grievance, he ought to seek his remedy in the Civil Court. We, therefore, do not think it necessary to direct any further inquiry and without doing so, we set aside the order complained of.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 30 OF 1905.
September 18, 1905.
Present:—Mr. Justice Woodroffe and Mr. Justice Mookerjee.
EMPEROR—PROSECUTOR
versus
KANGAL MALI—ACCUSED.

Evidence Act (I of 1872), ss. 25, 33—Confession to Police Officer—Statements made by accused in order to exculpate himself—Test of admissibility—Admission of deposition when witness not found, when allowed—Circumstantial evidence.

Section 25 of the Evidence Act does not say, that all statements made to the Police are inadmissible but it excludes only confessions made to them: there being a distinction between mere admissions and confessions which are statements either directly admitting the guilt of the accused or statements which suggest the inference that he committed the crime with which he is charged. Further, the general rule is subject to that which admits statements leading to discovery whether such statements amount to a confession or not.

Statements put forward by the accused by way of his defence are admissible notwithstanding that they are shown by other evidence to be inconsistent with truth.

A useful test as to the admissibility of statements made to the Police is to ascertain the purpose to which they are put by the prosecution. Such statements are admissible if they are relied on, not because of their truth, but because of their falsity.

Sufficient ground for the admission of the previous deposition of a witness under section 33 of the Evidence Act is not established where the only evidence is the statement of a Police Officer that the witness is a man of another district and cannot be found, but where there is no evidence to show what was done to find the man.

In order to justify the inference of guilt the prosecution must show that the inculpating facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Criminal reference by the Sessions Judge of the Assam Valley Districts, dated August 1st, 1905.

Babu *Bhujagendra Mustafi*, for the Accused.

Babu *Hari Bhushan Mookerjee*, for the Crown.

JUDGMENT.—The accused Kangal Mali, a boatman, is charged with the murder, on the evening of the 13th December 1904, of one Mahabir who had left a place named Kalachera on the day previous by boat for Sealtek Bazar on the Barak river. The majority of the jury have returned a verdict of not guilty. One juryman, however, and the Sessions Judge are of opinion that the accused is guilty of the offence with which he has been charged.

The Sessions Judge has, therefore, referred the case to this Court.

The facts as to which there is practically no doubt are these. The deceased Mahabir, a trader at Kalachera, had in his employ a boatman, named Labhan. The latter fell ill and sent as his substitute his brother, the accused, who is a young man of about 25 years of age. The deceased was both an older man and, according to the evidence given by his brother-in-law, a strong, stout man, a man of greater strength than the accused. Mahabir intended to go to Sealtek Bazar to buy goods for his shop. He left Kalachera with the accused, no one else being in their company, on the afternoon or evening of Monday the 12th of December 1904. The boat in which they went was a 35-maund boat, about 18 or 19 cubits long and about 4 cubits wide. It was covered with a bamboo roof for its whole length except for about $2\frac{1}{2}$ cubits in the bow and in the stern. The roof was about $2\frac{1}{2}$ cubits high and the evidence is that a man could not stand up in the boat under its roof. The deceased took with him some cooking utensils, some other articles and Rs. 100 in a bag and a cloth-belt which he wore and in which, to use the language of his widow who has given evidence, there was a sum of "less than Rs. 80." The boat moored at Kuchila Garden at 11 or 12 o'clock at night and the accused and the deceased passed the night of the 12th of December apparently alone together on the river. On Tuesday morning the 13th of December, the deceased bought some parched rice from one Siv Gopal Singh at Kuchila. So far as the evidence for the prosecution goes, this is the last place and the last time at which the deceased was seen alive. From this time until the afternoon of the 14th December the facts which we now state rest upon the statements of the accused. He says that at 10 or 11 o'clock he and the deceased passed the Matijuri Ghat, and the deceased told the Ghat Babu (who has not been called to give evidence) that he was taking the boat empty to Sealtek for goods. At 12 o'clock the deceased and the accused passed Bandukmara, and then they cooked and ate rice and reached Sadar garden at about 4 o'clock. There, it is said, three persons of the names of Noyan Mali, Narayan Mali and Sibram Mali, who were going in

a boat, were met. They asked the deceased where he was going and were informed that he was going to Sealtek Bazar. The accused's statement then runs as follows :—" Thereupon they said, 'let both our boats proceed together.' Noyan and Sibram came on our boat, smoked tobacco and went away. Then Narayan came and smoked tobacco. At 7 or 8 in the evening those three men came and told me to be an accomplice of theirs. I declined. I said, 'take his money but do not take his life.' I made a sign to Mahabir by a wink. Mahabir did not understand it. Thereupon Narayan caught hold of me, and the other two, Sibram and Noyan, killed Mahabir, with what I cannot say." In the statement made by the accused before the Magistrate, on the 29th December 1904, he says that he was threatened by the dacoits, who told him to inform the deceased's widow that a dacoity occurred in this way otherwise they would go one night and take his life. He says in his statement before the Sessions Judge that while he was held by Narayan he, on the excuse that he wanted to make water, went to the side of the boat. Narayan held him by the arm, but he jumped into the water. He then says that he swam to the bank of the river and raised a hue and cry. He then went to the village and asked the inmates of the first house for help, but they drove him away as a mad man. He further says that he walked through the public road to Rup Charan's house and some one gave him a mat and he slept on it. This was on the night of the 13th December. The next day he proceeded on his journey home and reached Hailakandi in the afternoon of the 14th December (Wednesday), and there he took a pice from a relation of his, Ratan Mali, who has deposed that he saw the accused. He asked for this pice to enable him to cross the Matijuri ghat. Ratan Mali gave the accused a pice as requested. After that the accused states that his brother's friend, Rasa Mali, gave him a fish for his (the accused's) brother's wife, that he went home by the Matijuri road and reached his brother's house at a late hour of the night, that he wished to lodge an information with the Police, but he was unable to do so as he had no pice with him. As it was apparently very late at night, the accused took his food and went to sleep immediately after his return home. His brother Labhan and the latter's wife have been called to speak to what took place on the accused's arrival and on the following day. Admittedly, on the morning of the 15th December, Thursday, the accused gave out that there had been a dacoity although, it is said, that he did not mention the names of the dacoits until, according to the evidence of the Police, sometime between the 22nd and the 24th December. On the evening of the 15th (Thursday), the accused was taken into custody by the Police on suspicion and thereafter he remained in such custody. On the 16th his house was searched, but none of the missing properties were discovered. A search was then made for the boat and for Mahabir and both were found on Sunday the 18th of December. There were marks of blood inside but not outside the boat. The inside of the bamboo roof and the mat in the boat were found splashed with blood. The things inside the boat were in such disorder as if, as was stated by the deceased's brother-in-law, a struggle had taken place in the boat. A certain number of articles were found, including the deceased's cloth-belt in which were Rs. 75-8, a sum in all probability representing the whole or nearly the whole amount taken by the accused in that belt. About a quarter of a mile from the boat the dead body of Mahabir was found floating in the water. It bore a number of wounds. There were four cuts through the skull, two through the bone on the right side of the chest, two through the bone on the right shoulder, one on the surface of the right wrist and another on the fleshy part of the left forearm. The frontal bone, the right parietal and the occipital were cut through. The second and third ribs were cut through and the scapula was also cut through. These were the wounds which were discovered by the Hospital Assistant who has given evidence. But in addition to these, the brother-in-law of the deceased stated that he found that the fingers of the left hand of the deceased had been cut off. The medical witness states that in his opinion the wounds which he spoke of were inflicted with some sharp heavy instrument like a *dao*.

On the 29th of December the accused made to the Magistrate a statement implicating three persons namely, Narayan,

Sibram and Noyan, as the authors of the crime, and which statement is substantially the same as that made by him subsequently to the Sessions Judge. There is no doubt upon these facts that Mahabir was murdered, and in all probability the motive for such a crime was robbery as, amongst other things, the bag which he carried with him containing the Rs. 100 had disappeared. The real question, however, to be determined is, who committed the cirme? There is no direct evidence on this point, the evidence being entirely of a circumstantial character. There is no question that the accused and the deceased were together and were apparently last seen together. They, however, as was stated, admittedly passed the night of the 12th December together alone, and the crime did not take place until the following day. It is upon the fact of the accused last being seen with the deceased and upon the subsequent conduct of, and statements made by, the accused, to which we will refer, that the Sessions Judge is of opinion that the accused should be found guilty.

The prosecution evidence is of three kinds. In the *first* place it is said that no mention was made by the accused, on the 14th December, of any dacoity having occurred to the witnesses Ratan Mali, Abbas Ali, his (the accused's) brother Labhan and the latter's wife Maya. Further, if we are to believe the evidence of Abbas Ali, the accused gave a false account of himself, stating that he had come from Badarpur, whether he had gone carrying the cloths of a *bairagi* whose name he said was Padma Lochan. Though it was late in the evening when Ratan and Abbas are said to have been met by the accused and then the accused arrived home, and though his not giving out until the next morning that a dacoity had been committed makes the matter a delay of a few hours only, still this evidence, if true, does raise a suspicion against the accused as also (allowing for any fear caused by the alleged threat of dacoits) the fact, if true, that the names of the dacoits were not given until some days later.

Nextly, it is said that certain previous statements made by the accused are inconsistent with the story which he told the Magistrate and the Sessions Judge. These statements were made both to the Police and to third parties. In so far as the statements made to the Police are concerned, it has been contended that they are inadmissible in evidence. The law, however, does not say that all statements made to the Police are inadmissible, but it excludes only confessions made to them : there being a distinction between mere admissions and confessions which are statements either directly admitting the guilt of the accused or statements which suggest the inference that he committed the crime with which he is charged. Further, the general rule is subject to that which admits statements leading to discovery, whether such statements amount to a confession or not. Applying these principles before us, we find that they divide themselves into two classes, first, there is the evidence of statements made by the accused to the Police pointing out the place where the alleged dacoity was committed, the place where after the dacoity he concealed himself in the paddy field, and also the houses where, he said, he went for assistance. As regards these statements, whether they be regarded as information leading to discovery or as statements made by the accused as part of his defence, it does not appear to us that any objection can successfully be taken. Then there are statements which were made by the accused as to what, according to his case, had actually happened,—statements exculpating himself and put forward by way of his defence. These statements also are admissible notwithstanding that by other evidence it may be shown that such statements are inconsistent with truth. In fact a useful test as to admissibility of statements made to the Police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statements of the accused to the Police as being true then they may, and probably in many cases will, be found to amount to confessions. If, on the other hand, as in the case of the statements to which we have just referred, the statements of the accused are relied on, not because of their truth, but because of their falsity, they are admissible. They are in such cases brought forward to show what the defence of the accused is, and that, as the defence is untrue, this is a circumstance tending to prove the guilt of the accused.

EMPEROR v. KANGAL MALI.

We are, however, inclined to think that there is one statement which was made to the Police and which should have been excluded. That is a statement which the accused is alleged to have made with reference to the mark on his *dhoti* which is said to be the mark of blood. The Police Inspector, Ambica Charan Sen, says: "My attention was drawn to the accused's cloth by a constable. On my asking accused what the marks were, he first said they were tobacco stains, then he said they were stains of betel nut and then he said it was blood." We are inclined to think that this statement is, under the circumstances, (if it was in fact made) of an incriminating character, from which an inference might, though not necessarily, be drawn as to the accused's guilt. No doubt the statement is not absolutely inconsistent with the accused's innocence, for it may be that his *dhoti* was stained (if it was in fact stained) in an attack made by others. Still the fact that the attack was probably made under the bamboo roof at some distance from the accused who, according to his account, must have been standing in the open part of the boat, and the prevaricating character of the alleged statements, render it of at least doubtful admissibility, if not, as we are disposed to think, inadmissible. Further, for the reasons which we shall state, we are not able to accept the evidence that there was any mark of blood on the *dhoti*. On these grounds, therefore, we think that the statement should have been excluded as we exclude it from our consideration. The discrepancies which are alleged between these previous statements of the accused and the statements made to the Magistrate and the Sessions Judge are these. It is said that the case of the accused as originally made was that the boat was moored, whereas in his statements before the Magistrate and the Sessions Judge he says that the boat was at the time of the attack proceeding down the river. Then he is said to have previously stated that the dacoits came from the east by land, whereas his case in the statements before the Court is that they were in a boat and had come from their boat into his. Then there is a discrepancy as to the time of the alleged dacoity which in the previous statement is alleged to be 3 A. M. in the morning of the 14th December instead of about 7 or 8 o'clock of the 13th December as alleged in his statement before the Court. Nextly, there are some discrepancies also as to the number of the dacoits. The accused stated in Court that they were three in number, but in his previous statements on the point mention is made of a large number of men. An attempt has lastly been made to show that these statements, which the accused is said to have made, were in fact false. It has been shown that the place, said to have been pointed out by the accused as that where his boat was, is a place at which the bank is steep and high and where the current is strong, and, therefore, a position at which the boat could not have been moored. It is said that the *dhan* field, which the accused pointed out as the place in which he concealed himself, showed no signs of damage whatever, and the persons, to whom he is reported to have said that he went for assistance on the night of the dacoity, have been called to show that he did not come to them. The evidence, however, of these persons cannot, in our opinion, be relied upon to establish this point. The first witness, Rup Charan Mali, states that he does not know the accused which is also the case of the latter. He says the accused never came to his house, but he does not state in any portion of his deposition, whether in examination or in cross-examination, that he was in his house on the night in which the accused is alleged to have committed the dacoity. It is true that the witness Dhanu Ram, father of the witness Rup Charan, states that the accused never came to his *bari* and that he always remains at home, but the third witness, a man of the name of Golak Ram Deb, while stating that tht accused never came to his *bari*, also distinctly says that he was not at home on the day in question. Then, it is also said that if a dacoity had occurred, as alleged by the accused, no noise or cries were heard by persons who were in a position to have heard them. On this point the evidence of the two witnesses, Santi Ram Namsudra and Abdul Bepari, was relied upon. But what the first witness says in his cross-examination is this: "No cries could be heard at my house from the place pointed out by the accused." The other witness, Abdul Bepari, gave his evidence

before the Magistrate at Hailakandi, but he was not called before the Sessions Judge and his former deposition was put in evidence. In our opinion, sufficient foundation was not laid for the reception of this deposition. The only evidence in support of the allegation that this witness could not be found is that of the head constable, Chandra Nath Sarma. He says he recorded Abdul's statement and that the latter was examined before the Magistrate of Hailakandi. He further says: "Search has been made for Abdul to summon him to attend this Court but he could not be found. A warrant was also issued. He is a man of Dacca District."

It appears to us that this evidence is clearly insufficient. No warrant was produced. There is no evidence on the record to show that an attempt was made to serve the warrant, or, if so, what was done for this purpose. There is no evidence to show what was done to find this man. It is quite clear that the witness said that a search was made, but he does not say that he himself made the search. If he did, he does not state what steps he took, and if he was not the person who made the search, his evidence on the point is, if based on report, inadmissible.

Under these circumstances, we think that no sufficient ground was made for the admission of the deposition of this witness under section 33 of the Indian Evidence Act; we think it should have been excluded as we exclude it from our consideration. On a review of the matters to which we have referred we find that a portion of the evidence is inadmissible, and other facts relied on have not been sufficiently proved or are at least inconclusive. As to the remainder of the evidence, even if we were disposed (as we are not) to accept it as reliable in its entirety, we do not consider that it outweighs the circumstances favourable to the accused, to which we shall now refer, or is sufficient to establish his guilt.

In order to justify the inference of guilt, the prosecution must show that the inculpating facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The hypothesis in the present case, which the prosecution have to exclude, is that the crime was the deed of dacoits as is in fact alleged by the accused. He has stated in detail the circumstances under which the dacoity and murder took place and has implicated by name the authors of the crime. No reason has been given why he should falsely implicate these three particular persons. This being so, the fact that he names them tends to show that he at least met them. These persons were apparently present at an inquiry conducted by the Police. They should have been, but have not been, examined as witnesses, and no explanation has been offered as to why they were not so examined. They have themselves not been called to deny the allegations which the accused has made against them of being concerned in this murder. Though the prosecution has omitted to call these three persons who are directly implicated, it has put forward one Durga Ram, a *pan*-seller who says that these three persons, Narayan, Noyan and Shibram, are also *pan*-sellers and go to Sealtek Bazar for *pan*. But he cannot say where they were at the time in question.

Another witness, Prokash Chandra Mazumdar, was also called, apparently to establish the *alibi* of these three persons. He says that on the last Tuesday of Agrahayan, which apparently corresponds to the 13th December, he saw them at Sealtek Bazar until 11 o'clock at night only. He speaks, moreover, even as to this period from unaided recollection, and he says that there was no special occurrence connected with these three men which would make him recollect their presence on that particular day at Sealtek Bazar. Another apparently remarkable fact is that the Police-papers, to which we have been referred, show that, on the 24th December, some cooking utensils were found in the house of the man Noyan, whom with the other two men the accused charged with the crime. According to the same papers those cooking utensils (and it is to be observed that some cooking utensils were admittedly carried in the boat) were identified by the widow of the deceased as her late husband's property.

It is true that the Police Officer says, in his report of the 25th December, to which we have been also referred, that he did not give credence to the identification. It may be that

the identification cannot be relied upon and that there is in fact nothing in the point which is not capable of explanation. In our opinion, however, it was the duty of the prosecution to have brought out this matter, and to have explained it if necessary. Were it not for the view which we take of the other facts given in evidence, we should have considered it necessary to have remanded the case to take further evidnce upon this point. As we have already observed, the deceased was admittedly an older and a stronger man than the accused. Except for a short space at the bow and stern the boat was closed in. The marks of blood show that the crime was committed inside the boat and under the bamboo roof under which, according to the evidence, a man cannot stand. There was no one else but the accused in the boat and, therefore, no one to manage it during the commission of the crime. The wounds were, as the evidence shows, most severe and numerous. The body was found floating in the water. It does not appear to us to be probable, having regard to the circumstances proved, that a single man and a weaker man than the deceased (as the accused was) could have been able to overpower the deceased and to come off without any wound or mark upon himself, even assuming that he had with him a *dao* in the boat as is alleged by the deceased's widow. Her evidence, however, upon this point does not appear to us to be reliable. In cross-examination she said that she had given evidence twice previously in the case and that she had previously mentioned that the accused took a *dao*. As a matter of fact, as pointed out by the Sessions Judge, there is no mention to be found of this statement in her previous depositions. This being so and there being no other evidence on the point to show that the *dao* was taken by the accused, we cannot accept the fact. Nor can, in our opinion, the evidence that some marks which were found on the *dhoti* of the accused and which appeared to the witnesses to be like marks of blood, be accepted. We have already dealt with the question of the admissibility of the accused's alleged statement to the Police Officer. There is nothing to show that the mark, supposed to be that of blood, is in fact the mark of blood as the cloth was not sent for chemical examination. Further, the so-called marks of blood were not discovered admittedly until the 18th of December and after the accused had been in the custody of the Police for three days. Unless, therefore, these so-called marks of blood were so insignificant as to have been seen with difficulty, it is wholly unexplained why it was not discovered before the expiration of this period.

Nextly, the accused was alone with the deceased at night of the 12th December at which time, so far as we can see, if the accused had been so disposed, the robbery and the murder could have been committed. According to the prosecution witness, the deceased's widow Sanjharia, the accused knew that the deceased had money in his cloth-belt, yet that belt and money were left in the boat and, so far as we can see, the contents of that belt were intact. This, we need hardly say, is not likely to have happened, had the accused been the person who committed the crime, but it is what we might expect to have occurred, had the robbery and murder been committed by third parties, who, unless they carefully searched the accused or the boat, would have been unaware of the fact that he carried on his person in a cloth-belt a sum of about Rs. 80.

It is further the case for the prosecution that the accused must have stolen the money, which is alleged as the motive of the murder, yet we are also asked to believe that the accused who had so stolen the money was obliged to request the witness, Ratan Mali, shortly after the alleged murder and robbery, to lend him a pice to enable him to cross the Matijuri ghat. Even supposing that the accused had committed the robbery and had not taken all the money with him, it seems to us in the highest degree unlikely that he should not have kept even a pice about him.

Then we have the circumstance to take into our consideration that none of the missing properties were discovered with the accused, though his house was searched on the 16th December. We are, on these facts, disposed to think that the dacoity and murder were committed by several persons and not by a single man as alleged; and we think that some of these facts, so far as they go, tend to exculpate the accused from having taken any part in the crime. There are certainly, if all the admissible evidence be true, which we must not be understood to hold, circumstances

which threw some suspicion on the accused and which demanded a careful judicial inquiry. But they are insufficient to establish his guilt, and are, moreover, in our opinion, outweighed by the general considerations, to which we have just referred, which tell in his favour. We, therefore, agree with the verdict of the majority of the jury and acquit the accused and direct that he be released from jail and set at liberty.

We desire to express our obligations to the learned Vakil, Babu Bhujagendra Mustafi, who has kindly appeared on behalf of the accused (who was previously unrepresented) and who has carefully laid before us the questions of both fact and law which required our consideration in the case.

Accused acquitted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 448 OF 1914.

June 24, 1914.

Present:—Mr. Justice Piggott.

YUSUF ALI—ACCUSED—APPLICANT

versus

WAHAJUDDIN—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 179—Criminal breach of trust—Cheating—Jurisdiction.

The complainant ordered and received a consignment of matches from a firm at Calcutta and found the consignment so seriously damaged as not to be marketable. But he had already sent in advance currency notes by registered cover from the Moradabad post office. The complainant filed a complaint at Moradabad, charging the accused with criminal breach of trust and cheating:

Held, that the criminal breach of trust, if committed at all, was committed in Calcutta and was not triable in Moradabad.

Held, further, that the entire offence of cheating, if committed at all, was completed at Moradabad and the Magistrate of Moradabad had the jurisdiction to try the case.

Criminal revision from an order of the Magistrate of Moradabad.

Mr. *Nehal Chand*, for the Applicant.

Mr. *Sital Prasad Ghosh*, for the Opposite Party.

JUDGMENT.—Wahajuddin, the complainant in this case, is a shop-keeper at Moradabad. He ordered a consignment of matches from a firm of Calcutta, which describes itself as A. M. Essobhoy of Calcutta, and he received a consignment which, according to his allegations, was so seriously damaged as not to be marketable, and was in any case not of the quality of goods which he had ordered and for which he had been made to pay in advance. He brought a complaint before a Magistrate at Moradabad in which the accused was specified as being "A. M. Essobhoy", resident at a certain address at Calcutta. The complaint was made under sections 417 and 409, Indian Penal Code. A warrant issued against the accused as described in the complaint was eventually executed on the person of one Usuf Ali in Calcutta, who was brought before the Magistrate who had issued the warrant. He was there bound over to appear and answer the charge.

The said Usuf Ali has applied to this Court in revision to have the whole proceedings taken against him quashed. There is, first of all, a question of jurisdiction. In so far as the complainant alleges an offence under section 409, Indian Penal Code, to have been committed, I feel no hesitation in holding that that offence, if committed at all, was committed in Calcutta and is not triable in Moradabad either by reason of the provisions of section 179 or of section 182 of the Criminal Procedure Code.

The case is otherwise, in my opinion, with regard to the alleged offence of cheating. The complainant's case is that he was deceived by means of certain letters received from Calcutta; this took place, if at all, when he read those letters, and, therefore, took place at Moradabad. The complainant alleges that by reason of this deception he was induced to do that which he would not otherwise have done, that is to say, he handed over to the post office at Moradabad for delivery to a certain address in Calcutta a certain registered cover containing Government currency notes. It seems fairly arguable that the entire offence of cheating, if committed at all, was completed in Moradabad. Even if there be room for the argument that the offence was not completed until the registered covers containing the currency notes were delivered to the addressee in Calcutta, the provisions of section 182, Criminal Procedure Code, would apply so as to make the offence triable in Moradabad. I hold, therefore, that the Magistrate at Moradabad had jurisdiction to take cognizance of this complaint.

SADASIB MANDAL *v.* EMPEROR.

His subsequent proceedings I am unable to endorse. The examination of the complainant was conducted without any reference to those ingredients in the offence of cheating as defined in section 415, Indian Penal Code, which distinguish the offence of cheating from a mere breach of contract. The examination of the complainant Wahajuddin, which is recorded on the back of his complaint does not seem to me to disclose any adequate ground for holding that an offence punishable under section 417, Indian Penal Code, had been committed by any person. Apart from this there is nothing in the complaint, or in the deposition of Wahajuddin, to warrant any action being taken against the accused Usuf Ali. If it be the complainant's case that it was Usuf Ali who, masking himself under the name of A. M. Essobhoy, obtained delivery of those currency notes, that fact should have been made clear in the complaint and in the complainant's deposition, before action was taken against this accused. It has been urged before me in argument that the complainant desires an opportunity of proceeding further in this matter and believes himself to be in a position to produce evidence such as to satisfy the Court that a criminal offence punishable under section 417, Indian Penal Code, as distinguished from an actionable breach of contract, was in fact committed upon him, and that it was committed by the accused Usuf Ali. The order which I propose to pass in the present case should not be held to debar Wahajuddin from filing a fresh complaint on proper materials if he is so advised.

The case as it stands before me now does not warrant the action which has been taken, or the taking of any further action, as against the accused Usuf Ali. I quash all the proceedings in this case and direct that the record be returned to the Court of the Magistrate to be there consigned to the record room.

Proceedings quashed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 1723 OF 1913.

December 5, 1913.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

SADASIB MANDAL—ACCUSED—PETITIONER

versus

EMPEROR, ON THE COMPLAINT OF PURNA CHANDRA NAG—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 522—Violence against fencing, not against any individual—Order under s. 522, whether competent—Penal Code (Act XLV of 1860), s. 349, applicability of.

The term "force", as defined in section 349 of the Penal Code, applies to force when used in connection with the human body.

Therefore, where an accused is convicted of the offence of rioting for causing violence to a fencing, and not to any person, an order under section 522, Criminal Procedure Code, should not be passed inasmuch as there is no use of criminal force to any individual.

Application for revision against the order, dated 18th September 1913, of the Assistant Magistrate, Dacca.

Babu *Surendra Nath Guha*, for the Petitioner.

Babu *Heramba Chandra Guha*, for the Opposite Party.

JUDGMENT.—The petitioner was convicted of the offence of rioting under section 147, Indian Penal Code, and of abetment of theft under section 379 read with section 114, Indian Penal Code, and sentenced on each count to three months' rigorous imprisonment. The charge under section 147, Indian Penal Code, set out the common object of the rioters to be destruction of the complainant's fencing and raising of a new fencing on the complainant's land. The conviction under section 379 read with section 114 was set aside on appeal. There was further order passed under section 522, Criminal Procedure Code, directing delivery to the complainant of the piece of land that had been taken possession of by the petitioner unlawfully.

The findings of the lower Courts clearly show that though there was the conviction under section 147, Indian Penal Code, it was not for the use of criminal force but for causing violence in prosecution of the common object. In section 349, Indian Penal Code, the term "force" is defined as being ap-

plicable to force when used in connection with the human body; and under section 522, Criminal Procedure Code, delivery of immoveable property may be made to the person who had been dispossessed of it when the accused is convicted of an offence attended by criminal force. In the present instance violence was caused to the fencing and not to any person. Under the circumstances the order under section 522, Criminal Procedure Code, should not have been passed inasmuch as there was no use of criminal force to any individual. This Rule, therefore, must be made absolute and the order directing delivery of possession of the land in question to the opposite party is set aside.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 183 OF 1914.

October 22, 1914.

Present:—Mr. Lindsay, J. C.

Thakur SHEO SINGH—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 107, 125—Security for keeping peace—Bond for keeping peace, cancellation of—District Magistrate, jurisdiction of—Admission of case, wrong, effect of—Revision, High Court's power in—Questions of fact, when to be considered in revision.

Section 125, Criminal Procedure Code, does not confer upon a District Magistrate either an appellate or revisional jurisdiction, but it confers an original jurisdiction in respect of orders binding down persons to keep the peace. A person so bound down has no remedy by way of appeal to the District Magistrate. The proper course for him is to bring his case in revision before the Sessions Judge.

Barka Chandra Dey v. *Janmejoy Dutt*, 32 C. 948; 9 C. W. N. 860; 2 Cr. L. J. 550, followed.

A High Court, having once admitted a case in revision and having fixed a date for the hearing thereof, ought to dispose of it on the merits after hearing the applicant for revision.

In criminal revisions, the High Court does not ordinarily consider questions of fact, except where the matter has been before only one Court below.

Application against the order of the District Magistrate, dated 5th August 1914, upholding that of the Deputy Magistrate, Kheri, dated 2nd July 1914.

Mr. *St. J. Jackson*, for the Applicant.

The *Government Pleader*, for the Crown.

JUDGMENT.—This is a somewhat curious case. The applicant, Thakur Sheo Singh, has been bound over by a Deputy Magistrate under section 107 to keep the peace. The proceedings were initiated against Thakur Sheo Singh by the *Patwari* of the village of which Thakur Sheo Singh had been the *thekadar* for some five years. It is common ground that his *theka* expired some months ago. After the order had been made, the applicant here went to the District Magistrate and made an application under section 125 for cancellation of the bond. The grounds on which cancellation was sought were not that any facts had come into existence, since the date of making the order, which made the order no longer necessary. The petition was by way of an appeal or revision, and the District Magistrate was invited to consider the merits of the case in which the order had been passed. So far as I can see there is no warrant for the application of this kind under section 125 of the Code of Criminal Procedure. The law has, in my opinion, been rightly laid down in the case reported as *Barka Chandra Dey* v. *Janmejoy Dutt* (1), in which it was held that this section of the Code of Criminal Procedure does not confer upon a District Magistrate either an appellate or revisional jurisdiction in respect of orders binding down persons to keep the peace. It confers only an original jurisdiction. The proper course which ought to have been pursued by this applicant was to have the case brought in revision before the Sessions Judge. So far as I can see there is no remedy by way of appeal. The case, however, has been admitted here by one of the Judges of this Court and this being so, I think I had better dispose of it once for all. Ordinarily I do not enter into the merits of cases in revision, that is to say, I refuse to consider questions of fact. However in the present case the matter has been before only one Court and I have, therefore, examined the record and considered the evidence which was produced in support of the application made by the *Patwari*. The principal witness is the *Patwari* himself and he is certainly in the best

(1) 32 C. 948; 9 C. W. N. 860; 2 Cr. L. J. 550.

position to explain what apprehension he had against the accused Sheo Singh. It appears that Sheo Singh had been dealing oppressively with some of the tenants of this village, that the *Patwari* had taken the part of the tenants and a complaint had been made to the District Officer in consequence of which an inquiry was made. It is also admitted that in this inquiry the *Patwari* gave evidence against Sheo Singh. This is alleged to be the origin of the bad feeling between the parties. As for the evidence of any exhibition of bad feeling between them, all that the *Patwari* deposed was that on a certain date the accused used threats saying that he would kill him. The *patwari* in cross-examination admitted that he had met the accused a number of times after this occasion and that no further threats had been used towards him. Reading the evidence of the *Patwari* I am disposed to think that the case is a very thin one and I doubt very much whether such evidence, as I have before me, justifies the binding over of the accused Sheo Singh to keep the peace. I also take into consideration the fact that Sheo Singh's connection with this village as *thekadar* has now come to an end. He is no longer in a position, I imagine, to harass the tenants of the village and this being so it seems unlikely that there should be any further occasion for ill-feeling between himself and the *Patwari*. The result, therefore, is that I allow this application and set aside the order of the Magistrate directing Sheo Singh to file security to keep the peace. The security bond will be cancelled.

Application accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 493 OF 1914.

May 14, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

Shaikh BAZU—COMPLAINANT—PETITIONER

versus

RAIKA SINGH—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 258, 439 - Revision - Acquittal, when can be set aside - Transfer of case.

A Magistrate fails to deal with a case before him with judicial care and impartiality if he lays great stress on all considerations that might affect the credibility of the several prosecution witnesses and omits to take into consideration what might be advanced in their favour, *e. g.*, fails to appreciate or even to correctly cite in his judgment the evidence of an important witness.

Such circumstances fully justify a High Court to set aside an order of acquittal passed by the Magistrate and transfer the case to another district.

Criminal revision against an order of the Deputy Magistrate of Singhbhum, dated the 6th of March 1914.

Mr. *P. K. Majumdar* and Babu *Hari Bhusan Mukerjee*, for the Petitioner.

Mr. *Sultan Ahmed*, for the Crown.

JUDGMENT.—In this case it appears that the petitioner complained against a Police constable, one Raika Singh, his complaint being to the effect that while the constable was employed in impressing carts for certain purposes, he voluntarily caused grievous hurt to one Sheikh Tajoo. The constable was placed on his trial before a Deputy Magistrate of Chaibassa and after a trial extending over a month and a half, he was acquitted under section 258, Criminal Procedure Code. The petitioner thereupon obtained this Rule from this Court calling upon the Deputy Commissioner of Chaibassa and upon the accused to show cause why this order of acquittal complained of should not be set aside practically on the merits.

We have read and considered the judgment of the trying Magistrate and we are forced to the conclusion that he has failed to deal with the case before him with judicial care and impartiality. While laying great stress on all considerations that might affect the credibility of the several prosecution witnesses, it would seem that he has omitted to take into consideration what might be advanced in their favour. In particular we find that he has failed to appreciate or even to correctly cite in his judgment the evidence given by a Deputy Magistrate named Babu Bhaba Deb Sarkar. This witness says that as he was passing by, he saw the accused constable running away followed by a number of men who were shouting, some apparently "*maro shalako*", some apparently "*mar dia.*"

Amongst the men pursuing the constable was the petitioner Sheikh Bazu. The Deputy Magistrate proceeds to say that he stopped the petitioner and questioned him and that the petitioner thereupon informed him that the constable had broken the leg or knee of some one of his relatives. The trying Magistrate has wholly omitted from his judgment this portion of the evidence. He has, therefore, failed apparently to consider the corroborative value of that evidence. What value in fact should be given to that evidence is not for us now to say, and we desire to say nothing that may prejudice the accused in the re-trial that we are now about to direct.

For the reasons we have given, we set aside the order of acquittal passed on the 6th March 1914 and direct that the accused Raika Singh be re-tried. Having regard to all the facts of this case we are further of opinion that the re-trial should take place at the headquarters of another district. We direct accordingly that the case be now re-tried at the headquarters of the District of Manbhum by some competent Magistrate to be appointed by the District Magistrate of that District.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 457 OF 1914.

CRIMINAL REVISION PETITION No. 385 OF 1914.

October 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re DHARMALINGA MUDALI AND OTHERS—ACCUSED—PETITIONERS.

Penal Code Act (XLV of 1860), ss. 426, 447—Mischief—Trespass—Trespasser's entry, whether gives him judicial possession—Removal of obstruction, whether offence—Pathway—Obstruction.

A mere trespasser cannot obtain what is known in law as possession by the act of entry, or by the continuance of that act, so long as the act is disputed and resisted.

Therefore, if a person takes possession of the site of a public road and builds upon it to the obstruction of the public, it is no offence for a member of the public to pull down that obstruction and exercise his right of way.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the District Magistrate of North Arcot, in Criminal Revision Case No. 19 of 1914, against that of the 2nd Class Magistrate of Arkonam, in C. C. Nos. 78 and 79 of 1914.

Mr. *A. Sundaram*, for the Petitioners.

The *Acting Public Prosecutor*, for Government.

ORDER.—The Sub-Magistrate discharged the accused because he held that, in pulling down the wall built by the complainant, the accused acted in the assertion of a *bona fide* public right to the site on which the wall was built, that site being a public way

The accused was charged under sections 147, 426 and 447, Indian Penal Code. Section 426 relates to mischief and mischief includes an intent to cause wrongful loss. If the site was a public path and if the complainant obstructed it wrongfully by a wall, the loss caused to him by the members of the public, who pull it down in order to exercise their right of way through the site, cannot be considered wrongful loss. As regards section 447, that again depends on the question whether the site was a public path and, even if it was not, whether it was in complainant's *effective possession*. As soon as the complainant began to build and obstruct the path, the accused remonstrated and took steps to have the obstruction removed and it cannot be held that, in these circumstances, the complainant had taken such effective possession as would make the act of the public who pulled down the obstruction (caused by the complainant) to constitute criminal trespass. In *Browne* v. *Dawson* (1) Lord Denman, C.J., said: "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects." As Mr. Mayne says: "A mere trespasser cannot obtain what is known in law as possession, by the act of entry, *or even by the continuance of the act*, so long as the act is disputed and resisted." It is on this ground that in section 145, Criminal Procedure Code, clause 4, proviso (1), it is stated that possession within two months before the date of the Magis-

(1) (1840) 12 A. & E. 624; 4 P. & D. 355; 10 L. J. Q. B. 7; 113 E. R. 950.

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trate's order might be treated as a continuing peaceable and juridical possession, even though there was a subsequent and very recent forcible dispossession by the opposite party. This shows that the Legislature held that a mere trespasser need not be considered as having acquired peaceable and juridical possession till his possession is acquiesced in for two months. A person who takes possession of the site of a public road and builds upon it to the obstruction of the public cannot by his very act of creating a public nuisance be held to have acquired peaceable and effective possession of that site so as to prevent a member of the public from pulling down that obstruction and exercising his right of way. If, of course, peaceable and effective possession has been acquired by the wrongful act and has been in a manner acquiesced in for a reasonable period, private persons cannot afterwards be allowed to assemble in force and commit trespass upon the site, so effectively and peaceably taken possession of by the person, without their being guilty of the offence of being members of an unlawful assembly, though the person who had obstructed the road might be liable to punishment on criminal indictment and may be dispossessed by the public authorities under section 133 of the Criminal Procedure Code and under section 6 of the Madras Land Encroachment Act III of 1905. But it is only where a trespasser's possession has been acquiesced in, and hence he has acquired juridical possession, that the person entitled to possession cannot dispossess him by force without making himself liable under the criminal law [See *Kailash Ghose* v. *Jugal Lohar* (2)].

In the present case, the accused had been exercising their right of way through the site in question till the complainant began to build upon it. Before he could acquire effective peaceable and juridicial possession and without acquiescing in his possession, they dispossessed him and removed the obstruction caused by him. Hence I think that the Sub-Magistrate was justified in discharging them and the learned District Magistrate ought not to have ordered further enquiry. The District Magistrate's order is set aside and the proceedings against the accused (petitioners) will be dropped.

Order set aside.

(2) 1 C. L. J. 104; 2 Cr. L. J. 161.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 405 OF 1914.

June 24, 1914.

Present:—Mr. Justice Piggott.

CHURAMAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Way or public place—Obstruction, removal of—Magistrate, power of.

Section 133 of the Code of Criminal Procedure empowers a Magistrate to order the removal of an obstruction from any way or from any public place, and before the section can be applied there must be a finding that the obstruction in question is situated on a way which may be lawfully used by the public or on a public place.

Criminal reference made by the Sessions Judge of Muttra.

Mr. *Satya Chandra Mukerji*, for the Applicant.

JUDGMENT.—This is a reference by the Sessions Judge of Muttra asking this Court to set aside an order purporting to have been passed under section 133, Criminal Procedure Code, by a first Class Magistrate of that district. The facts as they appear to me from an examination of the record are that one Churaman, the owner of a corner shop, proceeded to make certain additions to the same, the result of which according to the Magistrate has been that whereas previously the *tazias* carried in procession by Muhammadans in connection with the Muharram festival had been able to pass through a certain lane on one side of Churaman's shop, they were no longer able to do so in consequence of the new constructions made by Churaman. The order passed has been one requiring Churaman to demolish so much of a certain wall as will leave a sufficient space for *tazias* to pass along the whole length of the front of his shop. The Sessions Judge is of opinion that the inquiry conducted by the Magistrate prior to passing this order was irregular and that on this ground the order should be set aside. The explanation offered by the Magistrate shows that he himself had some doubts whether the obstruction which Churaman has been ordered to remove was in fact an obstruction situated on any way which may be used by the public, or any public place, or was in reality a construction on land of which Churaman was the owner,

There will have to be a finding on this point before any final order under section 133 of the Code of Criminal Procedure can be passed. That section empowers a Magistrate to order the removal of an obstruction from any way or from any public place, and before it can be applied there must be a finding that the obstruction in question is situated on a way which may be lawfully used by the public or on a public place. The Magistrate's explanation suggests that he felt he had strong reasons for interfering with Churaman's proceedings, even though it might have been made to appear on inquiry that Churaman had only been building upon his own land. It is possible that further inquiry may show that the case in question was not one for action under section 133, Criminal Proceduce Code, but one to which the provisions of section 144, Criminal Procedure Code, were applicable. The latter section undoubtedly gives a Magistrate, under certain circumstances, power to dircet a person to take certain order with certain property in his possession. I accept the reference of the Sessions Judge, set aside the order complained of and direct that the record be returned to the Magistrate for further inquiry and decision in accordance with law.

Order set aside.

CALCUTTA HIGH COURT.
CRIMINAL RULE No. 83 OF 1914.
February 13, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
REAJADDIN MOLLA AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *ss.* 143, 447—*Criminal trespass*—Bona fide *assertion of grazing right – Unlawful assembly.*

A person cannot be convicted of criminal trespass because he asserts a grazing right which has never been declared against him and which he *bona fide* believes he has, nor can he be said to be a member of an unlawful assembly because he went with his party and protested against the land being ploughed up.

Criminal revision against the order of the Deputy Magistrate of Comilla, dated the 19th of November 1913.

Mr. *Norton* and Babus *Manmatha Nath Mukerjee* and *Jatindra Mohan Ghose*, for the Petitioners.

Mr. *Orr*, for the Crown.

JUDGMENT.—This Rule arises out of an unfortunate dispute between two landlords in consequence of which, in a proceeding under section 145, an order attaching the property has been passed under section 146, Criminal Procedure Code, and a Receiver appointed. Unfortunately it appears that the Magistrate who appointed the Receiver has omitted to give any direction as to how the property should be managed and still more unfortunately, the tenants on both sides appear to be at loggerheads as regards the grazing rights over the property; but one thing appears to be admitted that the *zemindar* of the present accused gave them the grazing rights over this land, and that they objected to one Amjad Ali, who was a leading tenant of the rival *zemindar*, ploughing up a portion of the land, over which they allege they have grazing rights, under colour of a lease from the Receiver.

It appears to us that the Receiver should not have granted the lease to Amjad Ali entitling him to cultivate the whole of this land without making proper provision for the grazing rights. The trying Magistrate assumes that he did make such provision, but it is clear from the judgment that he had been given no authority to make such provision and that he had not, as a matter of fact, determined what the grazing rights were, to what extent they required the land and to what amount of land Amjad Ali might be entitled for cultivating purposes. The result is, as is too frequently the case in this country, that the peasants left to themselves and finding their grazing rights interfered with fell out, but fortunately owing to the presence of the Police on the spot no harm was done. But we think that it is not right that these cultivators should be convicted of criminal trespass when they were asserting a right which had never been declared against them, which they *bona fide* believed they

had, and for the same reason we think that they cannot be said to have formed an unlawful assembly, because they went and protested against the land being ploughed up. The Receiver should now receive proper instructions from the Magistrate with regard to the management of the property attached, and when such instructions have been given, this Court, as has always been held, would not interfere with such an order of management; and if the orders are duly promulgated and the *raiyats* know what their rights are under the Receiver and then by show of force do anything contrary to the Receiver's authority, there would be ground for proceeding against them. But at present we think that there is no such ground and that it would be extremely unfortunate to allow this conviction to stand.

The conviction and sentence are, therefore, set aside and the fine, if paid, will be refunded. The Rule is made absolute.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL RULE No. 466 OF 1914.

April 23, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

MADHO CHOWDHURY—COMPLAINANT—PETITIONER

versus

TURAB MIAN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 247, 403 Previous acquittal without jurisdiction, whether bar to second complaint.

A previous acquittal wholly without jurisdiction is no bar to a Magistrate taking cognizance of a second complaint.

Therefore, a Magistrate, who on a complaint made by a servant of a *zemindar* for maiming his master's elephant issues process under section 426, Indian Penal Code, to the accused but acquits the accused under section 247, Criminal Procedure Code, on the ground that the complainant is dead, acts without jurisdiction and is not debarred from hearing a second complaint by another servant.

Rule against the order of the Sub-Divisional Officer of Beguserai, dated the 12th of February 1914.

Babu *Abani Bhusan Mukerjee*, for the Petitioner.

Babu *Harihar Proshad Singh*, for Dr. *Sarat Chandra Bysak*, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Monghyr and also upon the opposite party to show cause why the order of acquittal under section 247 and the order of dismissal of the complaint of the petitioner, Madho Chowdhury, under section 203 should not be set aside and the case proceeded with.

It appears that an elephant of the *zemindar* got loose into a chilli field belonging to one Turab Mian. The accused are then said to have attacked the elephant with spears and *lathis* and maimed the animal. Apparently, the learned Magistrate who heard the complaint did not think that the animal had been maimed, but he issued process under section 426. When the day came for disposal, the servant of the *zemindar*, who had made the complaint, was dead, and the Magistrate adopted the rather extraordinary course, although he knew that the servant was dead, of acquitting the accused under section 247, Criminal Procedure Code. In the meantime another servant of the *zemindar*, the present petitioner, had complained to the Sub-Divisional Officer of the same offence of maiming his master's elephant. The Sub-Divisional Officer dismissed this case under section 203, Criminal Procedure Code, on the ground that the previous acquittal was a bar to his taking cognizance of it.

We must point out in the first place that the previous acquittal can be no bar, because it was wholly without jurisdiction, and if it is a bar, it is now going to be removed.

We make the Rule absolute.

We set aside the order of acquittal under section 247 and the order of dismissal under section 203 and direct that there should be a further inquiry and in making that inquiry, it should be ascertained before process is issued what the nature of the injury to the elephant is, for it will largely depend upon that whether the jurisdiction falls under section 426, 427 or 429, and that would affect the course of the proceedings at the trial.

Rule made bsolute.

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ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 758 OF 1914.

November 7, 1914.

Present:—Mr. Justice Piggott.

BAIRAGI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 109, 122—Magistrate's power to reject surety—Sufficient ground—Defence witness, whether can stand surety—Revision.

Sureties for good behaviour should not be rejected merely on the strength of the report of a Tahsildar and a Sub-Inspector of Police. without some further proceedings or at any rate without giving the sureties an opportunity of meeting any allegations that may be made against them. The fact that a person offering himself as surety for the good behaviour of another has given evidence in favour of that person in a proceeding under section 109 or 110 of the Code of Criminal Procedure, which resulted in the passing of an order requiring security, would not be at all a good reason for refusing to accept the surety.

The discretion conferred on a Magistrate by section 122 of the Code is a wide one and the High Court should not lightly interfere with any reasonable exercise of the same.

Criminal revision against an order of the Magistrate of Benares.

Mr. *G. L. Agarwala*, for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This application is connected with Criminal Revision No. 757 of 1914 which I have just disposed of. The applicant had been required to furnish security to be of good behaviour and when two security bonds were produced on his behalf executed by two men Parmeshwar Din and Raghubir, these sureties were rejected by the Magistrate in the exercise of the discretion vested in him by section 122, Criminal Procedure Code.

The Magistrate purports to act in part on reports received by him from the Tahsildar and the Sub-Inspector of Police. There is abundant authority in this Court for the proposition that sureties should not be rejected on the strength of such reports without some further proceedings, or at any rate without giving the sureties in question an opportunity of meeting any allegations that may be made against them. In the present case the Tahsildar's report really discloses nothing against the sureties in question. It is not denied that they have means sufficient to meet the liability undertaken by them in standing sureties and one of them, Parmeshwar Din, appears to be a village headman. The Magistrate has, however, been considerably influenced by the fact that Parmeshwar Din and Raghubir gave certain evidence in Bairagi's defence in the course of the proceedings against him under section 109 of the Criminal Procedure Code, which evidence was disbelieved. It seems to me to be fairly obvious that the fact that a person offering himself as surety for the good behaviour of another has given evidence in favour of that person in a proceeding under section 109 or 110 of the Code of Criminal Procedure, which resulted in the passing of the order requiring security, would not be at all a good reason for refusing to accept the surety. A person is quite entitled to say that the Police have been misled in believing a certain friend of his to be a bad character, and that in any case he is prepared to back his opinion as to the harmlessness of the person in whose favour he has given evidence by standing surety for his good behaviour. I suppose that, although the Magistrate does not go into detail on the point, the fact which impressed him in the present case was that Parmeshwar Din and Raghubir had contradicted the evidence given by the Sub-Inspector on certain questions of fact. They have not been prosecuted for perjury, and it is one thing to decline to rely upon their evidence in the teeth of that given by the Sub-Inspector and other witnesses in the case, and quite another to deal with their offer to stand surety for Bairagi on the assumption that they have certainly perjured themselves on his behalf. Even then the Magistrate does not seem to me to draw any definite inference from this circumstance, or to explain why the fact, that Parmeshwar Din and Raghubir gave evidence in Bairagi's defence upon which the Court refused to act, should satisfy him that they are necessarily unfit persons to stand surety for him. I do not, therefore, know whether, in the Magistrate's opinion, the facts on the record before him were such as to justify the inference that Parmeshwar Din and Raghubir were offering to stand surety for Bairagi, not with any purpose of exercising proper control over him, but in order to assist him in pursuing under cover of their surety a career of crime. I would not draw this inference myself from the circumstances on the record, but I am

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disposed to lay more stress on the fact that the Magistrate himself has not drawn any such inference. I have stated elsewhere that the discretion conferred upon a Magistrate by section 122 of the Code of Criminal Procedure is a wide one and that this Court should not lightly interfere with any reasonable exercise of the same. In the present case, however, it does not seem to me that the Magistrate has given any substantial reason for supposing that, if Parmeshwar Din and Raghubir had been permitted to stand sureties for this man, they would not have exercised proper control over him and kept him from injuring the public during the period covered by their bonds. It is unfortunate that there has been so much delay in bringing this matter to the notice of this Court, and in dealing with it here, that the greater part of the period covered by the Magistrate's order has already expired. This, however, seems no adequate reason for further detaining Bairagi under sentence of rigorous imprisonment. I set aside the order rejecting the security offered by Parmeshwar Din and Raghubir and direct the District Magistrate of Jaunpur to take suitable action to permit the release of Bairagi on his own bond and on those of the sureties in question.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL RULE NOS. 490 AND 491 OF 1914.

April 23, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

ADHAR CHANDRA DEY—PETITIONER

versus

SUBODH CHANDRA GHOSH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 345—Compromise out of Court—High Court, whether can give effect to, on revisional side.

The parties to a criminal case have no *locus standi* to ask the High Court sitting on the revisional side to treat the compromise which they have made of their own free will out of Court as one coming under section 345, Criminal Procedure Code.

Rule against the order of the Fourth Presidency Magistrate, Calcutta, dated the 13th of March 1914.

Mr. *P. N. Dutt*, Babu *Dijendra Kumar Ghosh* and *Haripada Chatterji*, for the Petitioner.

Babu *Manmatha Nath Mukerji* and *Mritunjoy Chatterji*, for the Opposite Party.

JUDGMENT.—Two Rules come before us on behalf of Adhar Chandra Dey, one to show cause why the sentence passed upon him should not be reduced and the other on behalf of the same man in the capacity of complainant to show cause why the order of dismissal of his case should not be set aside and a further inquiry ordered. Upon the parties coming before us and stating that they have compromised the matter out of Court, we can give effect to this compromise, as far as we can, by reducing the sentence to a mere nominal fine of one rupee and directing that no further inquiry be made into the counter-charge. The parties certainly have no *locus standi* to ask us, sitting here neither as a Court of original jurisdiction nor as a Court of appeal, to treat the compromise which they have made of their own free will as one coming under section 345, Criminal Procedure Code. No stigma can possibly attach to the petitioner on account of this petty fine for an equally petty assault.

The Rule No. 490 is made absolute in the terms we have indicated and the Rule No. 491 is discharged.

Rule No. 490 made absolute;
Rule No. 491 discharged.

ALLAHABAD BANK *v.* SURAJ KUAR.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 85 OF 1913.

October 13, 1914.

Present: —Mr. Lindsay, J. C.

THE ALLAHABAD BANK, LIMITED, LUCKNOW—PLAINTIFF—APPELLANT

versus

Rani SURAJ KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Interest, penal rate of—Mortgage suits—Contract rate of interest - Court rate of interest, meaning of—Interest, rate of, from date fixed for payment till date of realisation—Discretion of Court—Civil Procedure Code (Act V of 1908), s. 34—Transfer of Property Act (IV of 1882), s. 104.

The rate of simple interest at 7½ per cent. per annum is a moderate one, in view of the general rate prevailing in this part of the country, and cannot be said to be oppressive and unconscionable.

In mortgage suits a Court may, in the absence of any rules framed by the High Court in this respect under the provisions of section 104 of the Transfer of Property Act, award interest at the contract rate even after the date fixed for payment till the date of realisation, provided that the rate is reasonable. The Court has, under section 34, Civil Procedure Code, full discretion to do so.

Allahabad Bank, Ld. v. *Syed Mohammad Jawad*, 2 O. C. 37 and *Lal Sheopartab Bahadur Singh* v. *Allahabad Bank, Limited*, 3 O. C. 130, referred to.

Appeal from the decree of the Subordinate Judge, Kheri, dated 25th May 1913.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Lachman Parshad*, for Respondents Nos. 1 and 2.

Babu *Sita Ram*, for Respondent No 4.

JUDGMENT.—The only question raised in this appeal relates to the rate of interest allowed in the decree passed by the Court below.

The suit was one for sale on three mortgages executed by the late Raja Gobardhan Singh. There were five defendants to the suit of whom the first, second and third were the widows of the deceased under a Will executed by the mortgagor. These ladies have a life-interest in the mortgaged property. The fourth defendant is the remainder-man entitled to succeed to the property on the death of the life-tenants. The fifth defendant was interested in one of the villages mortgaged by reason of a provision made in the Will for payment to him of maintenance out of the revenues of the village. The first and second defendants filed a defence to the suit but subsequently admitted the plaintiff's claim. The third defendant (one of the widows) failed to enter any appearance and as against her the proceedings were *ex parte*. The fourth defendant contested the claim and pleaded *inter alia* that the rate of interest in the bonds was penal. The fifth defendant also made answer to the claim upon grounds which it is not necessary to consider here. The result of the suit was that the claim was decreed as against the first and second defendants in accordance with the admissions made by them in their petition of compromise. As against the other defendants the claim was decreed, interest at the contract rate being allowed up to the date fixed for payment and thereafter till the date of realization at the rate of 6 per cent. per annum only. It is this last term of the decree which has led to this appeal, the contention for the appellant being that the contract rate of interest should have been allowed till the date of realization.

The appeal has been contested only on behalf of the fourth respondent who was the fourth defendant in the Court below.

The rate of interest provided for in the bonds is 7½ per cent. per annum simple. There was a further condition that the plaintiff Bank would accept the lower rate of 6½ per cent. in case the interest was promptly paid, but the mortgagor never availed himself of this concession and no interest was ever paid at all.

There can be no ground for arguing that the rate of 7½ per cent. claimed by the Bank is oppressive or unconscionable *per se*. On the contrary the rate is a moderate one, having regard to the terms which are usually to be found in mortgage contracts in this part of the country. There can be no doubt that according to the practice of this Court interest at the contract rate can be awarded in cases of this kind up till the date of realization provided the rate is deemed to be a reasonable one. [*Cf. Allahabad Bank, Ld.* v. *Syed Mohammad Jawad* (1) and *Lal Sheopartab Bahadur Singh* v. *Allahabad Bank, Limited* (2).] But it has

(1) 2 O. C. 37.
(2) 3 O. C. 130.

been argued that the ruling of their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (3) must be taken to have overruled the authorities of this Court just referred to and to lay down that although interest may be allowed up till the date of realization, the rate should not exceed what is styled the Court rate of interest. It would appear from the language of the judgment that what was meant by the Court rate was the rate sanctioned by the Calcutta High Court in rules made by that Court under the provisions of section 104 of the Transfer of Property Act—a rate of 6 per cent. per annum.

It will be observed that this judgment of their Lordships was delivered in the year 1906 before the enactment of the new Code of Civil Procedure and at a time when the application of the sections of the Code of Civil Procedure relating to interest to the case of mortgage decrees was a debatable point. This matter has been set at rest by the inclusion in the new Code of sections 85 to 90 of the Transfer of Property Act. Those sections, as they stood in the Act, were repeated and were re-enacted in Order XXXIV of the first Schedule to the new Code of Civil Procedure, the result being that decrees passed in suits for sale and foreclosure are now amenable to the general provisions of the Code.

Under section 34 of the Code the Court is empowered to award interest at such rate as it deems reasonable from the date of the decree till the date of payment. There is no limitation placed upon the discretion of the Court in this respect, no definite rate is mentioned as being the limit up to which interest should be allowed. This is quite clear from a reference to the provisions of section 35 which deals with the award of interest on costs. There the Court is debarred from awarding interest in excess of 6 per cent. per annum. So far as I am aware no rules have been framed by this Court under the provisions of section 104 of the Transfer of Property Act and accordingly there is here no "Court rate" such as is referred to in the judgment of the Privy Council above mentioned, and the case is governed by the terms of section 34 of the Code of Civil Procedure according to which the Court rate is any rate which is deemed reasonable in the circumstances of the particular case.

It follows, therefore, that in a case like the present the Court may award interest at the contract rate even up till the date of realization provided that the rate is reasonable, as I hold it to be. The Subordinate Judge has given no reasons for reduction of the rate of interest; he probably thought on the authority of the Privy Council ruling above mentioned that 6 per cent. per annum was the limit up to which he could allow interest till the date of realization. In my opinion the rate of $7\frac{1}{2}$ per rent. should have been allowed and I accept the appeal to the extent of declaring that interest from the date fixed for payment till the date of realization shall accrue upon the sum found by the lower Court to be due on the 20th of November 1913 at the rate of $7\frac{1}{2}$ per cent. per annum, except as regards the portion of such sum which represents costs.

On this latter amount the interest from the date fixed till the date of realization will run at 6 per cent. only (*vide* section 35 of the Code of Civil Procedure). The decree of the lower Court will be modified accordingly and the decree of this Court will provide a period of three months for payment to run from the date of the decree.

The appellant's costs of this appeal will be borne by the respondent No. 4.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1429 OF 1912.

October 21, 1913.

Present:—Mr. Justice Miller and Mr. Justice Tyabji.

THALAGARA RAMANNE AND OTHERS—APPELLANTS

versus

KALAGARE GANGAYYA AND OTHERS—RESPONDENTS.

Hindu Law—Sale by widow—Bona fide *transaction—Reversioners, right of.*

(3) 34 C. 150 (P. C.); 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75; 34 I. A. 9.

THAYAMMAL *v.* KUPPANNA KOUNDAN.

A *bona fide* sale by a Hindu widow of her husband's estate, when a greater portion of the consideration is for legal necessity and the price paid is not unreasonably low, is binding on the reversioners and the purchaser for value is entitled to retain the property.

Second appeal from the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 222 of 1910, preferred against that of the Court of the Subordinate Judge of Kistna at Ellore, in Original Suit No. 42 of 1908.

Messrs. *T. V. Seshagiri Aiyar* and *T. Ramachandra Rao*, for the Appellants.

Mr. *Narayana Rao*, for the Respondents.

JUDGMENT.—The District Judge finds that out of the sum of Rs. 1,300, the price paid for the property, Rs. 1,022 was to pay off a debt or debts which the widow was legally justified in paying out of the corpus of her son's estate and that as regards the balance of Rs. 278, there was no justification for obtaining that money by sale of the land. The District Judge also finds that both sales were *bona fide* transactions and that the prices paid were not unreasonably low. These findings we accept, but we do not think they justify the decree which the District Judge has made.

The sale Exhibit IV for Rs. 700 is clearly wholly good as found by the District Judge and the reversioners have no claim to recover the property. The only ground suggested in support of the decree is inadequacy of price, but the District Judge's finding is that the price was not unreasonable.

As regards the sale for Rs. 600 the sum of Rs. 322 is binding, so to phrase it, on the reversion and Rs. 278 is not binding; but the sale was *bona fide* and the purchaser is, we think, entitled to retain the land.

We accept the view taken of this question in *Felaram Roy* v. *Bagalanand Banerjee* (1) and think that the right decree as regards the second sale will be one which permits the purchaser to retain the land. We need not consider the question whether the reversioners have a right to recover the sum of Rs. 278, because that question was not argued and it was stated by Mr. Seshagiri Aiyar if we accept the District Judge's finding, his clients were willing to pay that amount to retain the land.

(1) 6 Ind. Cas. 207; 14 C. W. N. 895.

We leave that question open for further consideration should it arise.

The decree will, therefore, be that the suit be dismissed with costs throughout as against defendants Nos. 1 to 14 and 17 and 18 and that if the 15th defendant do not within three months pay the amount of Rs. 278 with interest at 6 per cent. per annum from the date of the death of the widow, *i.e.*, on 24th January 1900, the plaintiff be at liberty to sell the property covered by Exhibit III for the amount; but if the payment is made within three months, the plaintiff's suit will stand dismissed against the 15th and 16th defendants also. The 15th defendant will pay his own costs but not the plaintiff's. The memorandum of objections is dismissed with costs.

Memorandum of objections dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2497 OF 1912.

July 17, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

THAYAMMAL AND ANOTHER—DEFENDANTS Nos. 3 AND 4—APPELLANTS

versus

KUPPANNA KOUNDAN—PLAINTIFF—RESPONDENT.

Hindu Law—Right of guardianship—Paternal aunt, whether natural guardian—Alienation by de facto *guardian—Limitation Act (IX of 1908), Sch. I, Art. 44.*

Under the Hindu Law no body else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties.

Therefore, under the Hindu Law a paternal aunt is not a natural guardian of a minor.

An alienation by a *de facto* guardian for no necessity need not be set aside.

Article 44 of the Limitation Act does not apply to alienations by unauthorised guardians.

Second appeal from the decree of the Court of the Subordinate Judge of Coimbatore, in Appeal Suit No. 174 of 1911, preferred against that of the District Munsif of Udumalpet.

Mr. *T. Ramachandra Rao*, for the Appellants.

Messrs. *T. M. Krishnaswami Aiyar* and *A. Anantharama Aiyar*, for the Respondents.

THAYAMMAL v. KUPPANNA KOUNDAN.

JUDGMENT.

SADASIVA AIYAR, J.—Following *Kristo Kissor Neoghy* v. *Kader Moye Dossee* (1) and *Bhikuo Koer* v. *Chamela Koer* (2) I hold that under Hindu Law, nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. Recourse must be had to the Court representing the rights of the King, which are paramount to even the rights of the parents, where there is no natural guardian alive.

The paternal aunt was, therefore, not the natural guardian of the plaintiff when she made the unauthorised alienation.

Assuming that she was the *de facto* guardian, her alienation for no necessity need not be set aside. Article 44 of the Limitation Act does not apply to alienations by unauthorised. guardians [See *Mata Din* v. *Ahmad Ali* (3)] The judgment of the lower Appellate Court is right in the main but in the decretal portion, it decrees possession of the entire lands covered by Exhibit III forgetting that so far as the portions covered by Exhibit II are concerned the claim had been held to be barred by limitation.

The lower Court's decree will be modified accordingly, that is, by providing that the plaintiff's suit shall be decreed only as regards the portion or fraction of the lands covered by Exhibit III, which is not included in Exhibit II, and it will be confirmed in other respects. The appellants will pay half of respondent's costs in this Court and bear their own.

TYABJI, J.—No direct authority is cited to us showing that a paternal aunt is a natural guardian (as distinguished from a testamentary guardian or a guardian appointed by Court) of a minor under the Hindu Law.

Mohammad Mondul v. *Nafur Mondul* (4) is, however, cited in which it is said that "it was not questioned and it would not very well be questioned" that a paternal grandmother of the minor who has acted as the manager of the minor's property, "answered to the description of natural guardian in this case." It is argued for the appellants that this is a ruling that a paternal grandmother is a natural guardian and that, therefore, a paternal aunt may also be such and may, therefore, be clothed with the powers of a guardian without being appointed to do so by competent authority. It may be that the remarks just preceding the statements I have cited may require reconsideration in view of what was said by their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (5). Apart from this, however, as my learned brother has said in his judgment (which I have had the benefit of reading), a female in the direct line of ascent stands in Hindu Law on a totally different footing as regards rights of guardianship from a collateral like paternal aunt. The only other authorities cited for the appellant consist of passages from MacNaughten's Hindu Law and similar text-books where it is said that paternal kinsmen have the right of guardianship. It is not quite clear whether female paternal kinsmen (not being in the direct line of ascent) are intended to be included amongst those relations who have the 'natural' right of guardianship. Mayne in his Hindu Law (8th Edition), page 278, paragraph 211, on the other hand expressly refers to male kinsmen alone as having this right. And this view is supported by the decision of *Kristo Kissor Neoghy* v. *Kader Moye Dossee* (1) and by the view expressed by my learned brother in his judgment.

I, therefore, agree in the order proposed by my learned brother.

The memorandum of objections is allowed with costs, as Exhibit III was not executed for purposes binding on the plaintiff and it is not proved that Rs. 50 (the money recovered by plaintiff's aunt) was spent for the plaintiff's benefit.

Memorandum of objections allowed.

(1) 2 C. L. R. 583.

(2) 2 C. W. N. 191.

(3) 13 Ind. Cas. 976; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49; 34 A. 230 (P. C.).

(4) 26 C. 820 at p. 825; 3 C. W. N. 770.

(5) 13 Ind. Cas. 331; 21 M. L. J. 1156; 39 I. A. 1; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232 (P. C.).

MOTTAI REDDY *v.* THANAPPA REDDY.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 646 OF 1910.

January 18, 1912.

Present:—Mr. Justice Sundara Aiyar.

MOTTAI REDDY *alias* RAMASAMI REDDY AND OTHERS—DEFENDANTS—PETITIONERS

versus

THANAPPA REDDY (DIED) AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract—Agreement to compound offence, promissory note executed in consideration of, whether legal—Necessary condition—Revision—High Court's power of interference—Mere errors of procedure, effect of.

As the offence of causing grievous hurt cannot be legally compromised except with the consent of the person to whom grievous hurt is caused, a promissory note executed as consideration for compounding such an offence committed against a person who had died previous to the complaint, is illegal and cannot be enforced. Such an agreement to pay money in consideration of compounding a criminal offence cannot be supported even on the ground that the party who executes the agreement would also be liable for damages.

The High Court as a Court of Revision has no power to consider justice apart from such justice as the law requires and cannot refuse to interfere on the ground that moral, as opposed to legal, justice, is a ground for refusing to interfere in revision.

Mere errors of procedure or technical defects not affecting the legal justice of a case will not be encouraged by a Court of Revision.

Petition, under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of the District Munsif of Sholinghur, dated the 19th April 1910, in Small Cause Suit No. 195 of 1910.

Mr. *V. V. Srinivasa Aiyangar*, for the Petitioners.

The Hon'ble Mr. *L. A. Govindaraghava Ayyar*, for the Respondent.

JUDGMENT.—The plaintiff is the endorsee of a promissory note executed by the defendants in favour of two persons, Muthammal and Chenga Reddi. The defendants denied that the plaintiff paid any consideration for the promissosy note. It does not appear that the plaintiff claimed in the lower Court to be a holder in due course. No issue was framed to try that question.

The promissory note, Exhibit A, states that it was executed in pursuance of the *razinamah* presented by the parties in Calendar Case No. 121 of 1909. That *razinamah*, Exhibit B, states that the amount for which the promissory note was executed was due as consideration for compounding Calendar Case No. 121. In that case the executants of the promissory note were charged with grievous hurt caused to one Gopal Reddi who had died previous to the complaint. It is not denied that the offence could not have been legally compromised except with the consent of the person to whom grievous hurt was caused, and the agreement to compound was, therefore, one prohibited by law. It was not contended in the lower Court that the consideration for the promissory note was anything different from what is stated in Exhibits A and B. The agreement to pay money evidenced by the promissory note appears, therefore, to be clearly illegal. The learned Vakil for the respondents contends that, as the complainant would also in law be entitled to claim damages for the injury caused to Gopala Reddi, the claim to damages must also be taken to be at least part of the consideration for the promissory note. But this case was not set up in the lower Court, and no evidence was given in support of any such allegation; I must take it, therefore, that the consideration was merely the compounding of the criminal offence. Mr. Govindaraghava Ayyar has drawn my attention to *Sheikh Nubee Buksh* v. *Musammat Bebbee Hingon* (1). Whether in that case the claim to damages was also part of the consideration for the document in question, I cannot say; but if the learned Judges meant to lay down that, even though it may not be proved that such was the case, an agreement to pay money in consideration of compounding a criminal offence could be supported on the ground that the party who executes the agreement would also be liable for damages, I am unable with all deference to follow that judgment. It is also argued that, as the executants of the promissory note would be liable in a Civil Court for damages, the ends of justice do not require that this Court should interfere. I do not think that this Court as a Court of Revision has any power to consider justice apart from such justice as the law recognises. I believe there are some cases where Courts have gone to the extent contended for by Mr. Govindaraghava Ayyar, but, in the absence of any decision of this

(1) 8 W. R 412

Court binding on me, I am not prepared to hold that I can refuse to interfere on the ground that moral, as opposed to legal, justice is a ground for refusing to interfere in revision. No doubt, mere errors of procedure or technical defects not affecting the legal justice of a case will not be encouraged by a Court of Revision; but when the law prohibits an agreement and requires that effect should not be given to it, I am of opinion that I am bound to interfere.

The order of the lower Court must be set aside and the plaintiff's suit dismisssd. There will be no order as to costs.

Order set aside.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 609, 610 & 633 TO 635 OF 1911.

June 1, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

UMA CHARAN MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MIDNAPORE ZEMINDARY COMPANY—PLAINTIFFS—RESPONDENTS.

Bengal Sales of Under-tenures Act (VIII B. C. of 1865), *s.* 16—*Intermediate landlord, obligations of—Agreement with another person to get rid of under-tenure, whether fraud—Under-tenure, annulment of—Wilful default by tenure-holder in payment of rent—Decree under Rent Law—Sale—Pre-arranged terms.*

An intermediate landlord is bound to protect his own tenant from all paramount claims and may be deemed to have committed an act of fraud against his under-lessee, when he enters into an agreement with another person to get rid of the under-tenure by means of a fraud and fictitious sale for arrears of rent.

Srinath Ghose Chowdhry v. *Haronath Dutt Chowdhry*, 18 W. R. 240; 9 B. L. R. 220; *Graham* v. *Allsopp*, (1843) 3 Ex. 186; 77 R. R. 592; 18 L. J. Ex. 85; *Kishore Chunder Sein* v. *Kally Kinkur Paul Chowdhry*, 20 W. R. 333, followed.

Appeals against the decrees of the District Judge of Manbhum, dated the 30th September 1910, affirming those of the Subordinate Judge of Purulia, dated the 21st March, 1910.

Mr. *S. P. Sinha*, Babus *Khetra Mohan Sen*, *Biraj Mohan Majumdar* and *Panchanan Ghose*, for the Appellants.

Dr. *Rash Behary Ghose*, Babus *Joges Chunder Roy* and *Sitaram Banerjee*, for the Respondents.

JUDGMENT.

S. A. No. 609 OF 1911.

MOOKERJEE, J.—This is an appeal by the defendants in a suit for annulment of an under-tenure and for possession thereof by a purchaser at a sale in execution of a decree for arrears of rent under the Bengal Sales of Under-tenures Act of 1865. The circumstances under which the sale took place may be briefly narrated. The plaintiffs-Company are the successors-in-interest of Robert Watson & Co., who obtained on the 8th March 1885 a *putni taluk* in Barohabhum from Raja Brojo Kishore Singh Deo, the then *zemindar*. Under the *putni*, there was a tenure, originally held by one Sarup Ganjan Singha, which had subsequently passed into the hands of Raja Jugabandhu Singh. The defendants are in occupation of the disputed lands as under-tenure-holders under the latter. The tenure-holder made default in payment of rent, with the result that the Company, as *putnidars*, brought a suit against him for arrears and obtained a decree. At the sale which was held in execution of the decree, the Company became the purchasers of the defaulting tenure on the 7th December 1908. The sale was confirmed on the 16th December 1908 and the Company commenced this action on the 28th May 1909 for recovery of possession on declaration that the under-tenure held by the defendants had been extinguished as the result of the rent sale. The defendants resisted the claim substantially on two grounds, namely, *first*, that the plaintiffs were not the purchasers of an entire tenure sold for its own arrears and were consequently not entitled to treat the under-tenure as cancelled under section 16 of Act VIII of 1865 (B. C.); and *secondly*, that the sale had been brought about and accomplished under circumstances which made it in essence a private sale and disentitled the purchaser to claim the privileges accorded by law to a purchaser of an entire tenure at a rent sale held under the provisions of the Bengal Rent Law. The first of these grounds raises a question of considerable nicety by no means free from difficulty, namely, did Sarup Ganjan Singha hold one or two tenures and what was the

legal effect of the deed of compromise, dated the 6th March 1884, on his title? But it is not necessary to examine this aspect of the matter, because the appellants are entitled, in our opinion, to succeed in their second contention.

The District Judge has in concurrence with the Subordinate Judge found that the tenure-holder Raja Jugabandhu Singh was determined to get rid of the property and was anxious to make the best possible bargain for it. The Company were ready to take the property by private purchase for Rs. 36,000. This was not acceptable to the Raja, who had fixed the minimum price at Rs. 40,000. This the Company would not pay, unless they could get a clear title by purchase at a rent sale, that is, a title free from the encumbrances of the under-tenure-holders. It was finally agreed on the day of sale that the Company should bid up to Rs. 40,000 and that the Raja should allow the sale to proceed, although he was well able to save the property from sale by deposit of the small sum of Rs. 200 for which the rent decree had been made. It was also arranged that at the sale a Pleader of the Court, Babu Satis Chandra Singh should offer bids up to Rs. 39,000 so as to lead up to the pre-arranged bid of Rs. 40,000 on behalf of the Company. The bid by Satis Chandra Singh was wholly fictitious; he never intended to buy the property, but offered the bid of Rs. 39,000 so that the Company might at once follow up with a bid for Rs. 40,000. The arrangement as made antecedent to the sale was carried out in every detail and the Company became the purchasers of the tenure at the sale. The question arises, whether in the events which have happened, they are entitled to claim the privileges of a purchaser at a rent sale or whether they are not in the position of private purchasers of the property.

The principles applicable to cases of this description have been laid down in cases of the highest authority. In *Srinath Ghose Chowdhry* v. *Haronath Dutt Chowdhry* (1) this Court was called upon to consider the effect of a sale of a tenure under the Rent Law brought about designedly to get rid of an under-lessee. There the tenure-holder had deliberately defaulted to pay the superior landlord his just dues, with the intention that a decree might be obtained against him and his tenure sold, so that the under-tenure might be extinguished. The plan succeeded; the decree was made and was executed. The purchaser was settled from before the sale and the price also was fixed beforehand. Under the circumstance, the Court held that although the sale was held under the provisions of the Rent Law, it had no higher effect than a private alienation, because it was in essence a transfer under pre-arranged conditions to a purchaser who was a party to the arrangement. Mr. Justice Markby accepted the principle recognised in *Graham* v. *Allsopp* (2) that an intermediate landlord is bound to protect his own tenant from all paramount claims, and held that he may be deemed to have committed an act of fraud against his under-lessee when he entered into an agreement with another person to get rid of the under-tenure by means of a fraud and fictitious sale for arrears of rent. The same principle was applied in the case of *Kishore Chunder Sein* v. *Kally Kinkur Paul Chowdhry* (3) where default was wilfully made by the recorded tenant and the tenure sold to a pre-arranged purchaser, with a view to get rid of unrecorded co-sharers in the property. The Court held that as the sale was not in essence a public sale, but only a device to give to what was really a private transaction the incident of a public sale, it must be treated as a private sale only. It is worthy of note that in the cases of *Srinath Ghose Chowdhry* v. *Haronath Dutt Chowdhry* (1) and *Kishore Chunder Sein* v. *Kally Kinkur Paul Chowdhry* (3), this Court merely applied the doctrine laid down by their Lordships of the Judicial Committee in *Nawab Sidhee Nuzur Ali Khan* v. *Rajah Ojoodhyaram Khan* (4), where an attempt was made to destroy the right of a mortgagee by recourse to the device of a sale for arrears of revenue, at which the purchase was to be made by a purchaser with whom the terms had been settled in advance. It was held that the Court would strip off all disguises from a case of this character, look at the transaction as it really is and treat the sale as a private sale, because it was a mere device for the achievement of an ulterior

(1) 18 W. R. 240; 9 B. L. R. 220.

(2) (1843) 3 Ex. 186; 77 R. R. 592; 18 L. J. Ex. 85

(3) 20 W. R. 333.

(4) 10 M. I. A. 540; 5 W. R. 83 (P. C.); 1 Suth. P. C. J. 675; 2 Sar. P. C. J. 198; 19 Eng. Rep. 1075.

purpose and never really meant to be a sale under the revenue laws for realization of arrears of revenue. Whatever may be the forms gone through, no one will be allowed, by means of a fictitious auction-sale, to cause loss to another and benefit to himself. The same principle was recently applied in the case of *Harendra Lal Roy Chowdhry* v. *Nawab Salimullah Bahadur* (5) where an attempt was made to destroy the rights of under-tenure-holders by means of a sale for arrears of revenue: the proprietor carefully defaulted to pay the Government revenue and arranged to have the property purchased by a person with whom all the terms were carefully pre-arranged and who agreed on those terms to offer bids at the sale which would inevitably follow the defaults. An analogous principle has been applied in the cases of *Harendra Lal Roy* v. *Purna Chandra Chatterjee*(6), *Chowdhury Ram Prosad Singh* v. *Chowdhury Pawan Singh* (7), *Janki Singh* v. *Debi Nandan Prasad* (8) and *Faizar Rahman* v. *Maimuna Khatun* (9).

In the case before us, the default was wilfully made; the sale was deliberately brought about though the judgment-debtor was able to pay the judgment-debt; the purchaser and the price to be paid by them were settled in advance. Here we have all the characteristics of a private sale. It was clearly an abuse of statutory provisions for sale of tenures in execution of decrees for rent, to bring about designedly a sale under such circumstances so that the right of under-tenure-holders might be destroyed, an unencumbered title conveyed to the purchaser, and the maximum of benefit conferred upon the defaulter. The transaction in all its characteristics was a private sale and if we were to regard it as a real rent sale, we would have to hold that an unscrupulous tenure-holder may successfully avail himself of the stringent provisions of the rent law, solely with a view to injure subordinate tenure-holders and to profit by their detriment, while providing, by means of a secret arrangement with the intending purchaser ample safe-guards against any possible loss to himself by the transaction. The conclusion appears to be irresistible that the plaintiffs must be treated as in no better position than a purchaser by a private transfer. In this view, their claim for annulment of the under-tenure of the defendants cannot be sustained. The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.

S. A. Nos. 610—633 to No. 635 OF 1911.

It is conceded that the above judgment will govern these appeals. They will consequently be allowed and the suits from which they arise will stand dismissed with costs throughout.

BEACHCROFT, J.—I agree.

Appeals allowed.

(5) 7 Ind. Cas. 21; 12 C. L. J. 336.
(6) 14 Ind. Cas. 368; 15 C. L. J. 132.
(7) 21 Ind. Cas. 354; 18 C. L. J. 97.
(8) 7 Ind. Cas. 772; 15 C. W. N. 776.
(9) 20 Ind. Cas. 510; 18 C. L. J. 111; 17 C. W. N. 1233.

MADRAS HIGH COURT.
CIVIL SUIT No. 31 OF 1914.
July 31, 1914.
Present:—Mr. Justice Bakewell.
VARADARAJULU CHETTY—PLAINTIFF
versus
DHANALAKSHMI AMMAL—DEFENDANT.

Mortgagor and mortgagee—Redemption Costs of unsuccessful redemption suit, whether mortgagee can add to his security—Transfer of Property Act (IV of 1882), ss. 58, 60, 92—'Mortgage money', meaning of—Tender—Validity of conditional tender.

A mortgagee is entitled to add to his mortgage security the costs incurred by him in defending an unsuccessful redemption suit by the mortgagor and the mortgagor is bound to pay the same before redemption.

It is an undoubted rule of equity that in taking an account between a mortgagee and a mortgagor, the former is entitled to be reimbursed all moneys properly and reasonably expended by him with reference to the mortgaged property. The payment of such expenses may be regarded as an implied term of the mortgage contract or as a condition imposed by a Court of equity upon the party who has invoked its assistance and the amount is added to the sum due on the security.

National Provincial Bank of England v. *Games*, (1886) 31 Ch. D. 582; 55 L. J. Ch. 576; 54 L. T. 696; 34 W. R. 600, referred to.

The term mortgage money in sections 58, 60 and 92 of the Transfer of Property Act includes all moneys which, on taking an account between the parties, may be properly allowed to the mortgagee.

The Transfer of Property Act is not a consolidating Statute and the right of a mortgagee to a general account of the moneys due to him under the mort-

gage contract is saved by the provision of section 2 (*b*) of the Act and his right has not been cut down to an account merely of the principal sum and interest by the said sections. A tender of money admitted to be due by a mortgagor is not valid *pro tanto*, if a larger sum is in fact due, if the tender is accompanied by a demand for cancellation and delivery of the mortgage-deed.

A tender by a person who has entered into a contract for purchasing the equity of redemption is not valid if conditional on the delivery to him of the title-deeds.

FACTS.—The plaintiff filed this suit for redemption. The plaint recited that one Papammal mortgaged the suit house on the 25th October 1908 to the defendant, that on the 9th November 1913 the said Papammal agreed to sell the house to the plaintiff and it was then agreed that the plaintiff should discharge the mortgage-debt due to the defendant, that on the 29th November 1913 the plaintiff tendered to the defendant Rs. 3,011-5-4, being the amount of principal and interest then due to the defendant, but the defendant refused to receive the same, that by a sale-deed, dated 1st December 1913, the plaintiff purchased the house from the said Papammal and obtained possssion thereof, and that the defendant is not entitled to interest after the 29th November 1913.

The defendant denied the tender and stated that the tender was invalid, even if true, as the amount tendered was less than the amount due, that Papammal had instituted Civil Suit No. 88 of 1910 on the file of the High Court for the redemption of the suit mortgage on the ground that the mortgage-debt had already been discharged, that on the 3rd May 1912 the said Papammal withdrew the suit and was directed to pay the defendant her costs of the suit, which were taxed on the 25th October 1912 at Rs. 96-4-0, that the defendant is in law entitled to add the amount of the said costs to the mortgage security and the plaintiff was bound to tender the amount of the said costs in addition to the principal and interest due on the mortgage, and that the defendant is also entitled to interest from the date of the alleged tender.

An issue raised in the case related to the right of the defendant to add the costs of Civil Suit No. 88 of 1910 to the mortgage moneys.

Mr. *M. Venkatasubba Rao*, for the Defendant:—Defendant is entitled to add the costs of the previous suit to the mortgage moneys. They were costs that the mortgagee properly incurred in defending her security. If Papammal succeeded in the previous suit, the defendant would be entitled to add the costs to her security.

Why should the defendant be in a worse position because Papammal withdrew the suit?

English authorities have uniformly held that in these circumstances the defendant would be entitled to add costs.

Ramsden v. *Langley* (1), *Lomax* v. *Hide* (2), *Webb v. Crosse* (3), *Eardley* v. *Knight* (4), *National Provincial Bank of England* v. *Games* (5); Seton on Decrees, 4th Edition, page 1059.

Section 72, Transfer of Property Act, gives this right to the mortgagee in possession. This does not by implication negative the right of a mortgagee who is not in possession.

The Transfer of Property Act is not a consolidating Act. The preamble states: "Whereas it is expedient to define *certain parts* of the law." Section 2 (*b*) provides that nothing in the Act shall affect any incidents of any contract which are consistent with the provisions of the Act.

The preamble of the Contract Act and section 1 of the said Act are similar to the above provisions of the Transfer of Property Act.

In *In the matter of McCorkindale* (6) it was held that as in section 171 of the Contract Act there is nothing inconsistent with the rule of English Law, the English Law applied and that where the Attorney discharges himself he has no lien.

Again in *Irrawaddy Flotilla Company* v. *Bugwan Das* (7) it was held that sections

(1) 2 Vern. 536; 23 Eng. Rep. 947.
(2) 2 Vern. 185; 23 Eng. Rep. 721.
(3) (1912) 1 Ch. 323; 81 L. J. Ch. 259; 105 L. T. 867; 56 S. J. 177.
(4) 41 Ch. D. 537; 58 L. J. Ch. 622; 60 L. T. 780; 37 W. R. 704.
(5) (1886) 31 Ch. D. 582; 55 L. J. Ch. 576; 54 L. T. 696; 34 W. R. 600.
(6) 6 C. 1; 6 C. L. R. 406; 5 Ind. Jur. 520.
(7) 18 C. 620; 18 I. A. 121 (P. C.).

relating to bailment do not affect either the written or the unwritten law relating to carriers.

Contrast the preamble of the Evidence Act.

In *Nogenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (8) English rule of costs was held applicable to India.

In *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (9) the right is recognised as one based on general principles. This was a case of a mortgagee not in possession.

It was followed in *Rakhohari Chatta Raj* v. *Bipra Das Dey* (10).

Girdhar Lal v. *Bhola Nath* (11) is a case of a mortgagee in possession; but the general principles of law are referred to,—see page 614.

Mr. *V. Raghunatha Sastri*, for the Plaintiff:—Section 88 of the Transfer of Property Act refers only to principal and interest and costs of the suit.

While providing for mortgagee in possession in section 72 the Act does not give a right to other mortgagees.

Mortgagor is personally liable for costs.

In *Mohunga Ojha* v. *Ram Bahadur Singh* (12) it was held that the mortgagor being personally liable, section 90, Transfer of Property Act, has no application.

Bansgopal Singh v. *Rup Narain Singh* (13) takes the same view.

In *Pokree Saheb Beary* v. *Pokree Beary* (14) the mortgagee was not allowed the costs incurrred in a previous suit.

I rely on *Upendra Chandra Mitter* v. *Tara Prosanna Mookerjee* (9) cited by the other side.

I also contend that my tender is valid, even if it should be held that it did not include the entire amount due.

Haji Abdul Rahman v. *Haji Noor Muhammad* (15) *Digambar Das* v. *Harendra Narain Panday* (16).

(8) 11 M. I. A. 241; 8 W. R. 17 (P. C.); 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R. 92.
(9) 30 C. 794; 7 C. W. N. 609.
(10) 31 C. 975.
(11) 10 A. 611; A. W. N. (1888) 238.
(12) 15 Ind. Cas. 23; 16 C. W. N. 731.
(13) 19 Ind. Cas. 384.
(14) 21 M 32.
(15) 16 B. 141.
(16) 5 Ind. Cas. 165; 14 C. W. N. 617 at p. 624; 11 C. L. J. 226.

Mr. *M. Venkatasubba Rao*, in reply:—Assuming the propostion regarding tender enunciated by the other side to be correct, which I do not admit, the tender here is clearly bad. It was a conditional tender. The plaintiff had no right to demand the return of the mortgage-deed and the title-deeds. If I parted with them I lost my security for the costs. If I did not part with them the money would not be paid to me.

JUDGMENT.—The plaintiff is the owner of a house subject to a mortgage in favour of the defendant executed by the plaintiff's assignor. The plaintiff's assignment is dated the 1st December 1913, and he alleges that on the 29th November 1913 he tendered to the defendant the amount of principal and balance of interest then due to her under her mortgage and brings this suit for redemption of the mortgaged property.

The plaintiff's assignor brought a previous suit, No. 88 of 1910, for redemption and by an order therein, dated the 3rd May 1910, it was directed that upon payment by her to the defendants therein of their respective costs the plaintiff "do have leave to withdraw from this suit." These costs have not been paid, and the 2nd issue in this case raises the question whether the defendant is entitled to add the amount thereof to the mortgage moneys. The order of the 3rd May 1910 is conditional upon the payment of costs, and since the condition remains unfulfilled it might be argued that the former suit is still pending and that the present suit does not lie; but this point has not been raised by the defendant. The order does not direct payment of the costs by the mortgagor personally, and, therefore, has not in any way affected the liability, if any, of the mortgagor; and the cases cited on behalf of the plaintiff may be distinguished on this ground.

It is an undoubted rule of equity that in taking the account between a mortgagee and mortgagor the former is entitled to be reimbursed all moneys properly and reasonably expended by him with reference to the mortgaged property. The payment of such expenses may be regarded as an implied term of the mortgage contract, or as a condition imposed by a Court of equity upon the party who has invoked its assistance, and the amount is added to the sum due on the security. [See *National Provincial Bank of*

England v. *Games* (5).] It is obvious that if a decree for redemption were made without taking such expenses into account and the mortgagee were driven to proceed against the mortgagor personally for the amount, the result might be to diminish *pro tanto* the amount of principal and interest which the mortgagee is entitled to receive under his security.

For these reasons I think that the term mortgage money in sections 58, 60 and 92 of the Transfer of Property Act, 1882, must be taken to include all moneys which, on taking an account between the parties, may be properly allowed to the mortgagee.

It has been argued on behalf of the plaintiff that section 72 provides for the allowance of certain moneys expended by a mortgagee in possession and their addition to the mortgage security and that the absence of a similar provision with respect to other mortgagees indicates the intention of the Legislatures that the latter should not have the same right. The preamble of the Act shows that it is not a consolidating Statute, and I am of opinion that the right of a mortgagee to a general account of the moneys due to him under the mortgage contract is saved by the provisions of section 2 (*b*) and that his right has not been cut down to an account merely of the principal sum and interest by the section to which I have already referred.

The costs in question were caused by proceedings taken by the mortgagor and would have been added to the defendant's security if those proceedings had been brought to their proper conclusion; and I, therefore, hold that the mortgagee is entitled to include them in her account and answer the 2nd issue in the affirmative.

The first issue is whether the plaintiff tendered a sum mentioned in the plaint. The evidence is that this sum and the letter, Exhibit B, were offered to the defendant by an apprentice of the plaintiff's Vakil on 29th November 1913 and that she refused to receive both the money and the letter. Exhibit B and the form of receipt enclosed therewith contemplate that the receipt of this sum should be endorsed upon the mortgage-deed, and, therefore, that the deed so endorsed should be delivered to the plaintiff. P. W. No. 1 states that he told the defendant that he would be satisfied with the receipt without the papers and did not ask for any papers to be returned; but his instructions clearly were to obtain an endorsed receipt and he could not obtain the receipt which he demanded without the mortgage-deed.

The tender was accordingly conditional upon the endorsement, cancellation and delivery of the mortgage deed. Since the defendant was entitled to retain the deed uncancelled as security for payment of her costs and since the plaintiff had not at that time obtained an assignment of the property from his vendor and was not entitled to possession of the title-deeds, the plaintiff had no right to impose this condition upon his offer and I, therefore, hold that there was no valid tender and answer the first issue in the negative.

This sum has been paid by the plaintiff since the institution of the suit and, therefore, there will be the usual decree for redemption upon payment of the sum of Rs. 96-4-0 with interest at 6 per cent. from 24th January 1913 and also the costs of this suit, within one month.

[As owing to a slip, the judgment did not give interest from date of tender to payment into Court, an application for review was made and granted. The interest claimed was accordingly decreed.—*Ed.*]

MADRAS HIGH COURT.

CIVIL APPEAL No. 188 OF 1911.

September 24, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

PAPACHAR SETHUMATHAVACHARIAR AND OTHERS—PLAINTIFFS Nos. 1, 28, 30 AND 32—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF SOUTH ARCOT, AND OTHERS—DEFENDANTS Nos. 1 TO 51 AND PLAINTIFFS Nos. 2 TO 35—RESPONDENTS.

Madras Irrigation Cess Act (VII of 1865*), s.* 1—Shrotriemdar—*Engagement—Irrigation, free of charge—Enjoyment for* 60 *years, if confers right to exemption* —Kassar, *meaning of*—Inam *title-deed, scope of—Recitals in* inam *title-deed, if conclusive as to enjoy-*

ment—Evidence aliunde, *admissibility of, to disprove such recitals.*

The term *kassar* means excess water-rate.

Ordinarily mere abstinence on the part of the Government from imposing water-cess for 40 years after the grant of an *inam* title-deed, does not debar the exercise of their right to levy the same.

An *inam* title-deed is not conclusive of the question of an engagement to exempt the lands from the liability to pay cess and evidence *aliunde* is admissible to prove that the enjoyment contended for was either anterior or subsequent to the Inam Settlement.

Chidambara Rao v. *Secretary of State for India in Council*, 26 M. 66; *Lutchmee Doss* v. *Secretary of State for India*, 3 Ind. Cas. 456; 6 M. L. T. 242; 32 M. 456 and *Kandukuri Mahalakshmiamma Garu* v. *The Secretary of State for India*, 8 Ind. Cas. 67; 8 M. L. T. 389; (1910) M. W. N. 595; 20 M. L. J. 823; 34 M. 295, explained.

Secretary of State for India v. *Ambalavana Pandara Sannidhi*, 8 Ind. Cas. 357; 9 M. L. T. 47; (1910) M. W. N. 119; 34 M. 366; *Kandalam Rajagopalacharyulu* v. *Secretary of State for India*, 22 Ind. Cas. 107; 14 M. L. T. 454; (1913) M. W. N. 937 and *Marra Susai Mudaliar* v. *Secretary of State for India in Council*, 14 M. L. J. 350, followed.

A grant of land by the Government implies an undertaking on its part to supply water free of charge to the extent of the accustomed flow at the time of the grant, and where the customary flow cannot be ascertained, the area irrigated will be presumed as the measure of the quantity of water used at the time of the grant.

In the absence of anything to show that the Inam Commissioner was not authorised to deal with a question, his decision will bind the Government.

Appeal against the decree of the District Court of South Arcot, in Original Suit No. 27 of 1908.

FACTS.—More than two centuries ago the suit villages were granted as hereditary *shrotriem* to the ancestors of the plaintiffs and defendants Nos. 2 to 41 by the Nawab of Bijapur. The grant was subsequently confirmed by the Nawab of the Carnatic, subject to the payment of a *jodi* of Rs. 827. The lands in these villages were classified in *paimaish* accounts as mostly *punjai* and the rest as *tottakkal*. There was no *tarawari* Settlement of these lands. In 1840 the Government wanted to construct a channel, called Punjai Vaikal, for bringing certain dry lands in some *ayan* villages under wet cultivation. As the proposed channel had to run part of its course through the plaint *shrotriem* villages, the Collector of South Arcot directed the Taluk Sheristadar to ascertain from the *shrotriemdars* of the said villages if, in consideration of their being allowed to use the water of the said channel to convert their dry lands into wet, they would contribute towards the cost of construction of the said channel and consent to pay *kassar* thereafter. The latter officer reported (Exhibit B) that the *shrotriemdars* were willing to contribute towards the cost of construction but not to pay *kassar*. The Collector by his order (Exhibit B1) dated 29th June 1840 directed that one-fourth of the estimated cost of excavating the channel should be recovered from the *shrotriemdars* and this was accordingly done. The channel was constructed in due course and the *shrotriemdars* converted some of their dry lands into *nunja* and continued to bear a portion of the expenses incurred for the upkeep and repair of the channel. From 1840 up to 1906 no attempt was made on the part of the Government to levy any water rate on the *shrotriemdars*. In 1857 a survey was made by Government which classed these lands to be *nunjas*. The *inam* title-deed granted to the *shrotriemdars* did not expressly exempt the grantees from their liability to pay the water-cess. In calculating the *beriz* for the purpose of levying quit-rent the extents of dry and wet lands shown in the account of 1827 were taken as the basis of calculation, the conversion of dry into wet lands being ignored apparently under Inam Rules. It also appeared that no compensation had been paid by the Government for the lands taken up for the channel and no deduction was made in the *jodi* payable by the plaintiffs. In 1906 the Government levied a sum of Rs. 1,187-10-0 as water-cess upon the suit lands. The present suit is for a declaration that the Government is not entitled to levy any cess upon the lands in suit, for an injunction against future levy of the same and for the refund of the amount of cess already collected on the ground that at the time of the excavation of the said channel, there was an undertaking by the Government not to levy cess upon such of the dry lands belonging to the *shrotriemdars* as may be brought under wet cultivation by the aid of the water of the new channel and that in consequence the levy of the same was illegal. The first defendant, the Secretary of State for India in Council, denied that there was any such undertaking on the part of the Government and contended that the Government was entitled to levy the cess in question under Madras Act VII of 1865. The District Judge of South Arcot dismissed the suit on the ground that the *engagement* set up by the plaintiffs was not proved. Against the said decree the plaintiffs Nos. 1, 28, 30 and 32 appealed to the High Court.

PAPACHAR SETHUMATHAVACHARIAR *v.* SECRETARY OF STATE.

Messrs. *P. R. Ganapathy Aiyar* and *R. Rangaswami Iyengar*, for the Appellants:—The appellants had been enjoying the use of the water in question free of charge ever since 1840. Exhibit B makes it quite clear that the *shrotriemdars* refused to pay *kassar*, and this was accepted by the Collector who ordered the collection of one-fourth of the cost of excavating the channel from the *shrotriemdars*. There has thus been an engagement on the part of the Government not to charge anything for the water used. The subsequent conduct of the Government is in keeping with this. In 1857 the villages were surveyed and in the Survey Registers the lands are shown as *nunja*. Even in the Inam Settlement, the conversion of dry into wet lands had been ignored. The *inam* title-deed did not reserve any right in the Government to levy water-rate. Ever since 1840 the *shrotriemdars* were in the habit of bearing every year a portion of the amount necessary for the upkeep and repair of the channel in dispute. The enjoyment of the *shrotriemdars* must, therefore, be referred to a legal origin and be deemed as of right. *Rajrup Koer* v. *Syed Abdul Hossein* (1) and *Sirnivasa Rau Sahib, Jagirdar of Arni* v. *Secretary of State for India* (2).

Dr. *S. Swaminadhan* and Mr. *S. Pandalay*, for the Respondents:—The Government is entitled to levy the cess, as admittedly the water came from a Government source. According to Exhibit BB, the *inam* title-deed, the plaintiffs are entitledto irrigate free of charge 533 acres of *nunja* and that entry is conclusive against the plaintiffs [*Chidambara Rao* v. *The Secretary of State for India in Council* (3), *Lutchmee Doss* v. *Secretary of State for India* (4)]. There is no express undertaking in the *inam* title-deed to exempt these lands from the liability to pay the cess. It is the *inam* title-deed which constitutes the appellants' engagement with the Government, and is the foundation of their rights. They are liable to be rated for any excess water they may take. Exhibit BI does not evince any intention on the part of the Government to give up their rights.

Mr. *P. R. Ganapathy Aiyar* in reply referred to the following cases: *Secretary of State for India* v. *Ambalavana Pandara Sannidhi* (5); *Kundukuri Mahalakshmamma Garu* v. *The Secretary of State for India* (6); *Maria Susai Mudaliar* v. *Secretary of State for India in Council* (7).

JUDGMENT.

WALLIS, OFFG. C. J.—The question in this appeal is, to what extent the *shrotriemdars* (appellants) are entitled to irrigation free of charge for their villages by virtue of an engagement with Government within the meaning of Act VII of 1865. The appellants enjoyed the irrigation free of charge without question for about 66 years from 1840 to 1906 and the question is whether such enjoyment must now be deemed to be as of right. The facts proved are fairly clear and the only question is as to the inference to be drawn from them. In 1840 the authorities were desirous of constructing a channel, now known as Punjai Vaikal, taking off from the Raja Vaikal, which again takes off from the Coleroon river. The channel was to pass first through certain *ayan* or Government villages, then through these *shrotriem* lands and finally into certain other *ayan* villages, in all of which lands till then dry would be irrigated from the channel. Exhibit B, dated 24th June 1840, is a report from the Taluq Sheristadar to the Collector of South Arcot in answer to a reference as to the extent of the dry lands in the above villages likely to be irrigated from the channel and the amount of *kassar* or excess charge that would accrue to Government, and also as to whether the *shrotriemdars* were prepared to contribute to the cost of construction at a certain rate per *cawny* to be irrigated. The Sheristadar reported that the *shrotriemdars* said they would not pay *kassar* but would contribute to the cost according to the extent to be irrigated. He also enclosed a statement as to the extent and the *kassar*, which as appears from the Collector's order, Exhibit B1, dated 29th June 1840, showed 124 *cawnies* as irrigable in the *ayan* and 40 *cawnies* in the *shrotriem* villages, yielding in the shape of *kassar* Rs. 746 inthe *ayan* and Rs. 240 in the *shrotriem* villages. The estimated cost of the work

(1) 7 I. A. 240 at p. 247; 7 C. L. R. 529; 6 C. 394; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth P. C. J. 816; 4 Ind. Jur. 530.
(2) 5 M. 226.
(3) 26 M. 66.
(4) 3 Ind. Cas. 456; 6 M. L. T. 242; 32 M. 456.
(5) 8 Ind. Cas. 357; 34 M. 366; 9 M. L. T. 47 (1910) M. W. N. 119.
(6) 8 Ind. Cas. 67; 34 M. 295; 8 M. L. T. 389; (1910) M. W. N. 595; 20 M. L. J. 823.
(7) 14 M. L. J. 350.

was Rs. 697-3-6. The Collector observed that the whole cost of the work would be made good in the first year, and from this the District Judge has, in more than one passage of his judgment, drawn the inference that it was the intention of the Collector to impose *kassar* on the *shrotriem* villages in spite of their objection. As, however, the *ayan* villages were to yield Rs. 746 and the total cost was only to be Rs. 697-3-6, it is obvious that no such inference arises. The Collector says nothing about levying *kassar* on the *shrotriem* villages and merely directs that one-quarter of the cost of construction, Rs. 174-5-0, should be levied from them, which was done. From this letter and the further fact that no attempt was made to levy cesses for sixty years the inference arises that the Collector accepted the terms of the *shrotriemdars* who, it must be remembered, were allowing the channel to be constructed in their lands for an extent of over two miles; and the further question arises whether Government must not be presumed to have ratified his action. There was a survey in 1857 and in one of the villages the extent of dry and wet is shown and it is admittedly the same as at present. In the other villages the extent of dry and wet was not shown because, as explained in the evidence, it was thought unnecessary to record them in the survey as the villages were *shrotriem*. Then we come to the evidence relating to the Inam Commission of 1861-62, which it may be noted, was some years before the passing of Act VII of 1865. According to the report of the Deputy Collector, dated 1st January 1861, the villages had been held from the time of former Rulers on hereditary tenure in the grantee's family, though the grant was registered in 1815 as including power to alienate, and a *jodi* of Rs. 827 had been imposed by the Carnatic Government. The Deputy Collector reported that there had been a simple *paimaish* or survey of the villages, but no *taravari* Settlement or classification of the lands, and that in the *paimaish* the villages of Kunjimedu and Karuperi were almost all classed as *punja* or dry and the wet as *tottakkal* or garden. "Such *punja* lands," the report proceeds, "have since been converted by *shrotriemdars* into *nunja* and the proper quota of the expenses of keeping up the irrigation channel which supplies water to these villages, in common with certain *ayan* villages is levied by Government. These particular lands are, therefore, now valued as dry according to the rates prevailing in the neighbouring villages, and the lands which have always been wet in the villages of Adur and Karuperi have been similarly assessed, that is, with reference to the wet rates in the adjoining Government villages." The *beriz* was then calculated for the purpose of fixing the additional quit-rent to be imposed at these dry and wet rates on the extents of dry and wet shown in the old accounts of the year 1827, which were apparently to be followed according to the Inam Rules, and the conversion of dry into wet was ignored for the purposes of the calculation. Thus calculated the *beriz* came to Rs. 4,653-4-7 as against Rs. 2,615, the registered *beriz* after deducting the *jodi* was Rs. 3,327-11-11 and a quit-rent of $\frac{1}{8}$th of this, or roughly Rs. 416, was imposed in addition to the *jodi*, making 1,741-7-8 in all. The title-deed, of which BB is a copy, acknowledged the title of the *inamdars* to *shrotriems* claimed to be of 290·40 acres of dry and 530 acres of wet and 9·76 of garden land besides *poramboke*, and in consideration of the additional quit-rent of Rs. 416 released the reversionary right of Government and enfranchised the *inam*.

It is contended on behalf of Government that the title-deed constitutes the appellants' engagement with Government under which they are entitled to water free of separate charge and that they are liable under the Act to be rated for any excess water taken, as this water is, from a Government source. Ordinarily this would be so and the mere fact that for more than forty years after the *inam*-deed Government had not exercised their statutory right of imposing water-cess, would be no bar to their doing so now. In this case, however, there is evidence that the question of extra water-cess was raised in 1840 at the time of the construction of the channel and decided in the plaintiffs' favour, that no attempt had been made to levy it before the time of Inam Commission and that in the Deputy Collector's report to the Commissioner, Exhibit A, the conversion of dry into wet

in consequence of the construction of the channel was referred to in terms which suggest that it had been done in pursuance of an arrangement with Government, under which the *shrotriemdars* contributed to its upkeeping and with which the Commission were not directly concerned, and though the *beriz* was calculated on the basis that the converted lands were dry as shown in the account of *Fasli* 1237, apparently under the rules passed for the guidance of the Commissioner (and the extent was shown as dry in the title-deed, Exhibit BB,) it is not clear that it was intended to affect the arrangement come to in 1840 and observed since that time. There are also the facts that the villages were allowed exemption for more than forty years subsequently under the impression, as appears abundantly from the correspondence exhibited, that their exemption was of right and that contributions for the repair of the channel have been levied on them under colour of the arrangement already referred to. Altogether, therefore, the plaintiffs have enjoyed exemption as of right for more than 60 years after the construction of the channel through their lands, when they stipulated for such exemption and were apparently granted it.

In these circumstances it seems to me, to borrow the language of their Lordships of the Judicial Committee in a somewhat similar case, *Rajrup Koer* v. *Syed Abdul Hossein* (1), "that any Court which has to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement.....by which the right was created". See also *Srinivasa Rau Saheb, Jagirdar of Arni* v. *Secretary of State for India* (2) where that case is followed and applied. For these reasons I think the appeal must be allowed and the decree will be modified as proposed in the judgment of my learned brother. In the view I have taken of the case it is unnecessary to refer to the cases which were cited at the Bar.

SESHAGIRI AIYAR, J.—The plaint villages were granted as *inam* more than 200 years ago by the then Nabob of Bijapur. They were subsequently confirmed by the Nabob of the Carnatic and were finally recognized by the British Government. The grant was to the ancestors of the plaintiffs and of defendants Nos. 2 to 51. In the year 1840 the Government opened their branch channel, known as Punjai Vaikkal, from the main channel, called Raja Vaikkal. This branch channel passes through a Government village at its commencement, then through the plaint villages and finally irrigates other Government villages.

The plaintiffs' case is that at the time of the excavation of the branch channel there was an undertaking by the Government not to levy water-cess upon their dry lands which may be brought under wet cultivation by the use of this channel water, that this agreement was in force till the year 1906 and that the Government in that year unlawfully levied water-cess from them. They, therefore, sue for a declaration that the 1st defendant is not entitled to impose extra cess upon their dry lands which have, since the excavation of that channel, been converted into wet, for an injunction against future levy and for the refund of the cess already collected from them. The Secretary of State, who is the first defendant, denied the alleged agreement and contended that under Act VII of 1865 he was entitled to levy the water-cess. The learned District Judge came to the conclusion that the agreement has not been proved and dismissed the suit.

The main question for decision is, whether there was an engagement as mentioned in the proviso to section 1 of Act VII of 1865 which exempts the plaintiffs from the payment of the water-cess. A few undisputed facts may be stated here:—

(*a*) When the excavation began in 1840 the Government paid no compensation for the lands taken up for the construction of the channel.

(*b*) No deduction in the amount of *jodi* payable by the plaintiffs was made for the lands which have ceased to belong to them in consequence of their being taken up for the channel-bed.

(*c*) The Government obtained from the *inamdars* in 1840 a fourth share of the expenses incurred in the excavation of the channel.

(*d*) Since that year the *inamdars* have been and are paying a certain amount of money for keeping the channel in good repair.

(*e*) For 66 years since the channel was dug (and for 40 years after the enactment of Act VII of 1865) no water-cess was levied from the plaintiffs for their having converted dry lands into wet.

On the other hand, it is admitted that the water comes from a Government source and consequently it belongs to Government. *Secondly*: in the Inam Settlement of 1862 (Exhibit BB) the dry lands which had been converted into wet were still entered as "dry" and there is no express undertaking in that title-deed to exempt such lands from water-cess.

I shall now proceed to consider some of the documents which have been filed in this case to ascertain whether the engagement pleaded by the plaintiffs has been established. There is no doubt that the burden is upon the plaintiffs to prove this exemption. The earliest document on record is Exhibit B, dated 24th June 1840, in which the Sheristadar of Mannargudi, writing to the Collector of South Arcot, says: "The *shrotriemdars* say that they will not pay *kassar* but that they are willing to contribute a portion of the estimate proportionately to the total extent to be irrigated in all the said five villages." I may remark that the term "*kassar*" admittedly means "excess water rate." Exhibit B1 is the reply of the Collector to the Sheristadar, in which he says: "The *shrotriem* villages must contribute one-fourth of the actual expenditure as their proportionate share. As, if the work is carried out, the whole of the estimated expenditure will be made good in the first year, the Treasurer has been ordered to send you Rs. 350, being about half of the estimate. * * * You will demand and collect from the *shrotriemdars* one-fourth of the estimate, *viz.* Rs. 174-5-0, and report its having been remitted to the Treasury." The learned District Judge is of opinion that by this document the Collector did not intend to give up the right of levying water-cess from the *inamdars* and that the reference to the expenditure being made good in the first year indicates that the water-cess was to be levied as soon as the channel was opened. I am of opinion that this interpretation of Exhibit B1 is not correct. The Collector in the sentence commented upon by the District Judge was considering the probability of the Government recouping the expenditure incurred by it. He refers to the estimate of the Civil Engineer and comes to the conclusion that the undertaking would be advantageous to the Government inasmuch as the very first year will be able to bring to the exchequer from Government lands the whole of the expenditure incurred in excavating the channel. It has reference to the levy of water-cess from the *ayan* lands belonging to the Government and not to an intention to hold the plaintiffs responsible for the payment of such cess. I regard the statement of the Sheristadar in Exhibit B as the proposal of the *inamdars* and the answer of the Collector as the acceptance of the terms proposed. There is no suggestion that the Collector was doing anything illegal in thus coming to terms with the *inamdars*. If it can be argued with reference to the observations of the learned Judges in *Chidambara Rao* v. *The Secretary of State for India in Council* (3) that the Collector exceeded his powers, I am prepared to hold that the action of the Government in acquiescing in this agreement for 66 years amounts to ratification of the original agreement.

The next document to which I shall refer is Exhibit EE. It is a report to the Government of the survey operations carried on in the villages in question. In it the extent of the dry lands is entered as 21 acres and 93 cents in one of the villages. Exhibit FF is for another village and the extent of dry land is there entered as 34 acres and 86 cents in extent. Thus in these two villages, at the time of the survey, the only dry lands which had not been converted into wet came to about 56 acres.

Then we come to Exhibit A, the Inam Register for these villages and the third village Adur. It preceded the actual grant and was on the 28th March 1862. The Deputy Collector, who made the recommendation for the enfranchisement of the villages, points out "that in the *paimaish* the villages of Kunjimedu and Karuperi were almost all classed as *punja* and the rest as

tottakkal. Such *punja* lands have been since converted by the *shrotriemdars* into *nunja* and the proper quota of the expenses of keeping up the irrigation channel, which supplies water to those villages in common with certain *ayan* villages, is levied by the Government. These particular lands are, therefore, now valued as dry according to the rates prevailing in neighbouring villages; and such lands as have been always wet in the villages of Adur and Karuperi have also been assessed similarly, that is with reference to the wet rates in the adjoining Government villages", and he recommended that the classification and extent of the lands which had existed before the survey should be continued thereafter. This may have been in pursuance of the Government Order No. 919, dated 11th July 1859, to which our attention was drawn on behalf of the Government Pleader, which directs the continuation of the original classification even after the survey. There is no doubt that at the time of the date of Exhibit A, all but 56 acres of the lands entered as dry had been converted into wet lands. Lastly, we have Exhibit BB, the *inam* title-deed. It was on the 9th April 1862. In this *inam* title-deed, Exhibit BB, 290·40 acres are entered as dry land and 533 acres as wet and 9·76 as garden land. There is no reference to water-cess in this document. It is in the usual form of *inam* title-deeds and confers a freehold upon the *inamdars* on certain conditions.

The documents to which I have referred at length convince me that the plaintiffs have established that there has been an engagement by the Government with them not to collect water-cess upon the lands which may be converted into wet lands by the use of the Punjai Vaikkal flowing within their limits.

It was argued for the Government that the entry in Exhibit BB is conclusive against the plaintiffs and that they are entitled to free irrigation only in respect of the 533 acres of *nunja* land. The argument was that other evidence is not admissible to show that there was an undertaking beyond what is contained in Exhibit BB. This argument cannot be accepted. It is now well settled that it is open to the parties to prove that the enjoyment contended for was either anterior to, or subsequent to, the Inam Settlement. See *per* Ayling, J., *Kandalam Rajagopalacharyulu* v. *Secretary of State for India* (8). No direct authority has been cited for the position that the *inam* title-deed is conclusive on the question of engagement. The decision in *Chidambara Rao* v. *Secretary of State for India in Council* (3) was greatly relied upon on behalf of the Government. It was contended that the observation of the learned Judge *viz.*, that "it was the duty of the Inam Commissioner to ascertain and record in the title-deed, not the extent of land which was actually under wet cultivation at the time of the Inam Settlement, but only the extent to which the *inamdar* was entitled to supply of water free of charge," shows that the parties are bound by the actual entry made in the title-deed. In an earlier passage they point out that it was not contended that the figures given were erroneous and that it had not been proved before them that there was any engagement subsequent to the grant. I take the observations of the learned Judges to mean no more than this, that if there is no other proof of an undertaking by the Governmet, the entry of the extent in the title-deed will conclude the parties. I do not take the learned Judges to lay down that evidence *aliunde* of an engagement is inadmissible. The case in *Lutchmee Doss* v. *Secretary of State for India* (4) was also relied upon. In that case the learned Judges point out that if at the time of the enfranchisement the Government levied quit-rent on the footing that certain lands had been either cultivated as wet or that upon certain lands double crop had been raised, to that extent at least the Government are bound to allow the *inamdar* supply of water free of water-cess. It is not an authority for the position that the entry in the *inam* title-deed is conclusive of the rights of the parties. The decision in *Secretary of State for India* v. *Ambalavana Pandara Sannidhi* (5) is a distinct authority for the position contended for by the plaintiffs. The learned Judges say that "the only undertaking which may be implied from a grant of land by Government is

(8) 22 Ind. Cas. 107; (1913) M. W. N. 937; 14 M. L. T. 454.

an undertaking to supply water free of charge to the extent of the accustomed flow at the time of the grant. Where the quantity of the customary flow cannot be ascertained, the area irrigated will be presumed to be the measure of the quantity of water used at the time of the grant." Applying this test to the present case, the plaintiffs are entitled to the accustomed flow of water which existed at the time of their grant in April 1862; and in order to ascertain this flow of water, the extent of wet cultivation at that time will furnish the required data; and looking back to the survey operations in the year 1857 we are in a position to arrive at the exact area of cultivation at the time of the Inam Sannad. In this appeal all that is claimed is exemption for the cultivation of the area which was under wet cultivation at the time of the *inam* grant. There can be no question that if the principle enunciated in *Secretary of State for India* v. *Ambalavana Pandara Sannidhi* (5) is applied to the facts of this case, the plaintiffs are entitled to succeed. The case in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (6) is not against this view. The decision in *Maria Susai Mudaliar* v. *Secretary of State for India in Council* (7) is in accordance with the later decision in *Secretary of State for India* v. *Ambalavana Pandara Sannidhi* (5).

Applying to the facts proved in this case the rules of construction adopted in regard to contracts between private parties, I must hold that there was an offer by the *shrotriemdars* to allow the channel to be cut across their fields on condition that they are allowed to irrigate cess-free such portion of their dry lands as could be brought under wet cultivation in the exercise of their ordinary rights, that the Collector accepted this proposal and that his action was ratified by the Government. I am also of opinion that there was an implied undertaking at the time of the Inam Sannad in 1862 that the plaintiffs should thenceforward be allowed the use of the accustomed flow of water which then irrigated their fields. The Inam Commissioner was aware from the report of the Deputy Collector of the extent of the wet cultivation. He knew that the entry of the extent of the dry and wet lands in the title-deed did not represent the actual state of affairs. He must be deemed, therefore, to have accepted the recommendation of the Deputy Collector to allow the classification to continue to keep up uniformity. As he did not specifically provide for excluding the converted dry lands for the use of the accustomed flow of water, I infer that he upheld the plaintiffs' right in that respect. It is not shown that the Inam Commissioner was not authorised to deal with this question. It is binding on the Government. My finding is that an engagement which precludes the levy of water-cess as indicated by me has been proved in this case. The appeal must be allowed. The decree of the District Judge will be modified by declaring the rights of the appellants and respondents Nos. 2 to 45 and 47 to 77 to irrigate free from the payment of water-cess, in addition to the wet lands entered in the *inam* title-deed, 233·61 acres of dry lands and by directing the refund of Rs. 1,187-15-0 out of the amount collected in *Fasli* 1317. There will be no injunction. Proportionate costs throughout. The Secretary of State will have three months' time to pay the amount to the appellants.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 521 OF 1913.

October 14, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

PANCHANADAM PILLAI—DEFENDANT No. 1—APPELLANT

versus

SELLA PILLAI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 82—Partial redemption—Suit to redeem one item of mortgaged properties, maintainability of—Different items purchased by several persons at auction sale, effect of.

Where several items of property are covered by a single mortgage, there cannot be a separate redemption of each of those items. Section 60 of the Transfer of Property Act cannot be read subject to section 82 and the fact that the several items were purchased piecemeal by different persons in Court auction cannot authorize a partial redemption by each of those purchasers.

Narayan v. *Ganpat*, 21 B. 619, dissented from.

MUNIA KONAN v. PERUMAL KONAN.

Second appeal against the decree of the Court of the Subordinate Judge of Mayavaram, in Appeal Suit No. 355 of 1911, preferred against that of the Court of the District Munsif of Shiyali, in Original Suit No. 107 of 1910.

Mr. *S. Muthiah Mudaliar*, for the Appellant.

Mr. *R. Kuppusawmy Aiyar*, for the Respondents.

JUDGMENT.—Appellant contends that the suit should be dismissed as one of partial redemption, which is not permissible under section 60, Transfer of Property Act. In our opinion this contention must be allowed. The point has not been dealt with in the judgment of the lower Appellate Court, though raised in the memorandum of grounds of appeal, but the District Munsif has decided against appellant, relying on *Narayan* v. *Ganpat* (1). The learned Judges therein say at page 626 that there can be no objection to allowing rateable distribution of the mortgage-debts, *inter alia*, "where the original contract itself recites that the mortgagors join together in mortgaging their separate shares." No reasons or authorities are quoted for this: and it seems to be at variance with section 60 of the Transfer of Property Act, which regulates the mortgagor's right of redemption and is not referred to by the learned Judges. With all respect we are not prepared to follow this decision, which apparently stands alone: and we may add that even if it applied, the suit must be for redemption of all the properties mortgaged by plaintiff's vendor.

We cannot admit respondents' contention that section 60, Transfer of Property Act, should be read subject to section 82 or that the fact that the various items of property mortgaged have been purchased through process of Court by different persons, makes any difference.

We must allow the appeal and dismiss the suit with costs.

Appeal allowed: Suit dismissed.

(1) 21 B. 619.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 499 OF 1910.

October 20, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

MUNIA KONAN—DEFENDANT NO. 1—APPELLANT

versus

PERUMAL KONAN AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Contract Act (IX of 1872), s. 11—Contract by minor—Minor, right of,—Property purchased for minor by some one else, minor's rights in—Sale of property by father, whether valid.

A contract by a minor is void and not merely voidable. Therefore, when a minor enters into a transaction where a contract by him is an essential condition preliminary to the transaction or contractual obligations on his part flow from the transaction, it must be regarded as void.

But where a contract by a minor is not a necessary condition for upholding the rights of the minor in property, his rights should be maintained.

Mohri Bibee v. *Dharmodas Ghose*, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.) *Navakotti Narayana Chetty* v. *Loyalinga Chetty*, 4 Ind. Cas. 383; 19 M. L. J. 752; 7 M. L. T. 233; 33 M. 312; *Kamta Prasad* v. *Sheo Gopal Lal*, 26 A. 342; A.W.N. (1904) 41; *Ulfat Rai* v. *Gauri Shankar*, 11 Ind. Cas. 20; 33 A. 657; 8 A. L. J. 670; *Meghan Dube* v. *Pran Singh*, 30 A. 63; at p. 65; 5 A. L. J. 14; A. W. N. (1908) 10, referred to.

Therefore, a purchase of property for the benefit of a minor by his maternal uncle is valid, and if the property is alienated by the minor's father, the minor is entitled to recover.

Second appeal against the decree of the District Judge of South Arcot, in Appeal No. 104 of 1909, preferred against that of the District Munsif of Tiruvannamalai in Original Suit No. 6 of 1909.

Mr. *K. R. Subramania Sastri*, for the Appellant.

Mr. *T. Rangachariar*, for Respondent No. 1.

JUDGMENT.—The facts found in this case are that certain immoveable property was purchased for the benefit of the plaintiff in the suit by one Ramaswami Konan, his maternal uncle, and that it was subsequently sold by the third defendant, the plaintiff's father, as if it belonged to the family of which he and the plaintiff were members. Defendants Nos. 1 and 2 claim under the sale by the third defendant. The contention on the merits in the lower Courts was that the parchase in the name of the minor was really *benami* for the third defendant or the family, and that, therefore, the plaintiff has no

exclusive right to the property, and the sale by the third defendant was valid.

On the finding of the District Court that the purchase was made by the maternal uncle for the benefit of the minor, the sale by the third defendant cannot be upheld and defendants Nos. 1 and 2 have no title. It is contended that on the finding that the sale was for the benefit of the minor, it must be held to be a void transaction, as a minor is incompetent to purchase property. The answer to this is substantially what is given by the District Judge, *viz.*, that the minor was not a contracting party in the transaction of purchase by Ramaswami Konan, although the minor became the beneficiary owner under the deed of purchase. This case is on all fours with *Kulla Pandithan* v. *Ramayi*, Second Appeal No. 881 of 1909 decided by Munro and Sankaran Nair, JJ. In that case a person executed a deed of sale of certain property in the name of his wife and when she sued for the recovery of the property, it was contended that the sale was void. The learned Judges answered this contention thus: "The decree is right, the contract being found to have been between the plaintiff's father (*i.e.*, father of the wife) and the appellant (*i.e.*, her husband)." We might be content to rest ourselves on the authority of this case, but out of deference to the arguments that have been urged on behalf of the appellant we shall state our reasons a little more fully.

According to the Indian Contract Act, a minor is incompetent to make a contract. The Judicial Committee of the Privy Council decided in *Mohri Bibee* v. *Dharmodas Ghose* (1) that a contract by a minor must, according to the Contract Act, be regarded as void and not merely voidable. The case before their Lordships was one of a mortgage made by a minor. Of course a mortgage by a minor is a contract by him to pay a sum of money which he borrows on the security of certain property. Many transactions resulting in the creation of rights over property arise out of contracts; and when a minor enters into any such transactions where a contract by him is an essential condition preliminary to the transaction or contractual obligations on his part flow from the transaction, it must be regarded as void.

In *Kamta Prasad* v. *Sheo Gopal Lal* (2) the decision of the Privy Council was followed and a mortgage by a minor was held to be void. On the other hand in *Ulfat Rai* v. *Gauri Shankar* (3) it was held that, where money is already due to a minor beneficiary by his trustee on accounts between them, a conveyance by the trustee in favour of the minor for the amount so due was valid. That case perhaps is not quite reconcilable with the decision of this Court in *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (4). There in answer to a suit for possession of certain property the defendant, a minor, set up a claim to the right obtained under a sale-deed. Benson and Krishnaswami Aiyar, JJ., held that the sale was void. It is there pointed out that the creation of a right in the property by a sale must necessarily be proceeded by an agreement between the minor and the vendor and the minor being incapable of entering into the agreement, the resulting transaction, the sale, must also be held void. Krishnaswami Aiyar, J., points out that even where the consideration money is already due to the minor and is used as consideration for the sale, it is necessary, in order that the sale may be upheld, that the minor should enter into an agreement that the debt already due to him should be appropriated as consideration for the sale and he being incompetent to enter into such an agreement, the sale must be void. But in all these cases where a transaction by a minor has been held to be void, the essential fact which rendered it void was that some agreement by the minor was necessarily an essential part of the transaction. Now it cannot be denied that a person may purchase property and hold it as a trustee for a minor. There is no reason why he should not create a trust by purchasing it in the name of the minor. No contractual obligations are undertaken by the minor in such a case. Any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor, *i.e.*, by Ramaswami

(1) 30 C. 539 (P. C.); 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114.

(2) 26 A. 342; A. W. N. (1904) 41.

(3) 11 Ind. Cas. 20; 8 A. L. J. 670; 33 A. 657.

(4) 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233.

Konan in this case. If there are obligations enforceable against the property purchased, no doubt the property in the hands of the minor would be liable for the satisfaction of such obligations. We can see no reason for holding that when a contract by the minor is not a necessary condition for upholding the rights of the minor in the property, his right should not be maintained. In *Meghan Dube* v. *Pran Singh* (5) where a mortgage was taken in the name of a minor but for the benefit of the joint family of which he was a member, Banerji and Richards, JJ., observed that "the contract in this case was made by persons of full age (*i.e.*, adult members of the joint family), but the person in whose favour the mortgage-deed was executed was a minor. The question of the validity of the mortgage does not, in our opinion, arise."

For the reasons mentioned above we are of opinion that the decision of the lower Appellate Court is right.

The finding of the lower Appellate Court on the merits was also attacked by the learned Vakil for the appellant, but we are unable to see any legal objection to it.

The second appeal is dismissed with costs.

Appeal dismissed.

(5) 30 A. 63 at p. 65; 5 A. L. J. 14; A. W. N. (1908) 10.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2227 OF 1911.

April 3, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BASANT KUMAR BOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHULNA LOAN COMPANY—PLAINTIFFS—RESPONDENTS.

Putni *tenure—Rent, whether first charge—Sale in execution of decree for arrears of rent—Rights of purchaser—Priority between landlord and mortgagee—Bengal Putni Talukdars Regulation (VIII of 1819).*

The rent payable by the *putnidar* to the *zemindar* for which a decree has already been obtained, is a first charge upon the tenure and takes precedence over all other charges even though they be prior in point of time.

A sale under such a decree passes the tenure to the purchaser who acquires it with liberty to annul all encumbrances.

Jog Narain Singh v. *Badri Das*, 13 Ind. Cas. 144; 16 C. L. J. 156, followed.

Where property has been sold in execution of a decree for arrears of rent, the mortgagee has a charge upon the surplus sale-proceeds, notwithstanding the fact that the mortgage-debt has been transformed into a judgment-debt as the security subsists till the mortgage-decree has been satisfied.

Surjiram Marwari v. *Barhamdeo Persad*, 2 C. L. J. 202 at p. 215; *Lowry* v. *Williams*, (1895) 1 I. R. 274; 29 I. L. T. R. 52; 1 Irish Law Reports 741; *Economic Life Assurance Society* v. *Usborne*, (1902) A. C. 147; 71 L. J. P. C. 34; 85 L. T. 587; *In re Jenning's Estate*, (1885) 15 L. R. Ir. 277, referred to.

Where a sale of a *putni* tenure takes place under the Putni Regulation and the sale-proceeds are deposited with the Collector, the landlord is entitled in the first place to appropriate a sufficient portion of the sale-proceeds before the mortgagee can proceed to realise his dues.

A tenure which has been lawfully sold for its own arrears cannot be again put to sale for the arrears due on account of a previous period.

Musammat Luteefun v. *Mean Jan*, 6 W. R. 112 and *Prangour Mozoomdar* v. *Himanta Kumari Debya*, 12 C. 597, followed.

Obiter dictum.—Section 65 of the Bengal Tenancy Act does not contradict section 17 of the Putni Regulation.

Appeal against the decree of the Subordinate Judge of Khulna, dated the 17th May 1911, confirming that of the Munsif of Khulna, dated the 16th September 1909.

Babus *Dwarka Nath Chuckerbutty* and *Kali Kinkar Chuckerbutty*, for the Appellants.

Babu *Surendra Chunder Sen*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal is a sum of money, the surplus proceeds of a *putni taluk* sold under the Putni Regulation of 1819. The rival claimants are the mortgagees from the *putnidar* and the landlords-*zemindars* who have obtained a decree for arrears of *putni* rent. The circumstances under which this conflict of claims has arisen may be briefly stated.

The mortgagees took a mortgage of the *putni taluk* on the 13th September 1897 and obtained a decree thereon on the 3rd November 1906. Meanwhile the *putnidar* had defaulted to pay rent to the *zemindars* and on the 19th January 1906 the latter obtained a decree for arrears of rent for the years 1308 to 1311 (B. S.). Default was subsequently made in the payment of rent for 1313, with the result that the landlords took proceedings under the Regulation and the *putni* was sol

on the 15th May 1907. After satisfaction of the dues of the *zemindars*, a sum of about Rs. 1,350 remained in deposit with the Collector. The *zemindars* proceeded against this sum to satisfy the rent decree they had previously obtained. The mortgagees also sought to avail themselves of this sum in satisfaction of the mortgage-decree they had obtained. A summary order was made on the 9th March 1908 in favour of the *zemindars* with the result that they took away the money in deposit with the Collector. On the 8th March 1909 the mortgagees instituted the present action for a declaration that they were lawfully entitled to the money taken away by the *zemindars*. The first three defendants to the suit are the landlords, the fourth defendant is the *putnidar* and the fifth defendant is the purchaser of the *putni* at the sale held under Regulation VIII of 1819. The question for determination is whether the mortgagees of the *zemindars* are entitled to preference in respect of the surplus sale-proceeds. The Courts below have concurrently decided in favour of the mortgagees and the present appeal has been preferred by the *zemindars*.

Before we deal with the question in controversy, it is necessary to advert for a moment to a preliminary argument addressed to us on behalf of the plaintiffs-respondents. It has been contended that there is no evidence to show that the *putni taluk* was of such a character as to be subject to the operation of the Bengal Tenancy Act; in other words, that as there is no evidence to show that the *putni* was granted for realisation of rent from agricultural tenants, the tenure is not governed by the provisions of the Bengal Tenancy Act. In support of this view, reliance has been placed upon the decisions in *Promotho Nath Mitter* v. *Kali Prosanna Chowdhry* (1); *Umrao Bibi* v. *Mahomed Rojabi* (2). In our opinion, the plaintiffs-respondents are not entitled to urge this ground for the first time in second appeal, as it involves the determination of a question of fact. The case proceeded in both the Courts below on the assumption that the provisions of the Bengal Tenancy Act were applicable to the particular tenure; and a reference to the description of the property given in the schedule to the plaint indicates that the property is situated in various villages which *prima facie* would contain agricultural lands. The respondents are, besides, not even able to assure us that there is a real foundation for the theory that this *putni* does not include any agricultural land at all. Under these circumstances, this appeal must be decided on the assumption on which the case was tried in both the Courts below.

As regards the question of priority of title between the two contesting claimants, the first point for determination is whether the rent payable to the *zemindars* by the *putnidar*, in respect of which a decree had already been obtained, was a first charge upon the tenure. Section 65 of the Bengal Tenancy Act provides that where a tenant is a permanent tenure-holder, he shall not be liable to ejectment for arrears of rent but his tenure shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon. Reliance, however, has been placed upon section 195, clause (*e*), of the Bengal Tenancy Act to support the argument that section 65 has no application to *putni* tenures. Section 195, clause (*e*), provides that nothing in the Act shall affect any enactment relating to *putni* tenures in so far as it relates to those tenures. To exclude the operation of section 65 in the case of a *putni* tenure, which is a permanent tenure, it must be shown consequently that section 65 affects any provision of the Putni Regulation. Our attention, however, has not been drawn to any such provision, except section 17 to which we shall presently refer. On the other hand, there are indications in the Putni Regulation to show that the rent payable by the *putnidar* to the *zemindar* is a first charge upon the tenure. Section 11 provides that any *taluk* or saleable tenure that may be disposed of at a public sale, under the rules of the Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by acts of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagement under which the said *taluk* may have been held. The section further provides that no transfer by sale, gift or otherwise, nor mortgage or other limited

(1) 28 C 744.
(2) 27 C. 205; 4 C. W. N. 76.

assignment shall be permitted to bar the indefeasible right of the *zemindar* to hold the tenure of his creation answerable, in the state in which he created it, *for the rent, which is in fact his reserved property in the tenure*, except that the transfer or assignment should have been made with a condition to that effect under express authority obtained from such *zemindar*. A similar provision finds a place in section 15, which states that the purchaser acquires the entire rights and privileges attached to this tenure of the late *putnidar* in the state in which it was originally derived by him from the *zemindar*. The status of the purchaser, thus described in the Regulation can be supported only on the theory that the rent payable by the *putnidar* to the *zemindar* is a first charge upon the property. We must hold consequently that not only is there nothing in the Putni Regulation contrary to the principle which underlies section 65 of the Bengal Tenancy Act, but that the Putni Regulation does in essence recognise that principle. We start then with the position that the rent payable by the *putnidar* to his *zemindar*, for which advance had already been obtained, is a first charge upon the tenure.

The next question for determination is, whether the rent which the *zemindars* now seek to realise from the surplus sale-proceeds constitutes a charge upon the *putni taluk*. Our attention has, in this connection, been drawn to section 17 of the Putni Regulation, which lays down rules for the disposal of the proceeds of a sale held under the Regulation. It is first provided that one per cent. shall be deducted and carried to the account of the Government. It is next provided that the balance due to the *zemindar*, either for the year immediately expired or for the current year, as the case may be, and also the expenses of sale are to be made good. The reason why the *zemindar* is restricted to the realization of the arrears for the year immediately expired or for the current year, as the case may be, is found in section 8 of the Regulation, which provides that the *zemindar* is entitled to have recourse to a summary sale in the beginning of the year for the realization of arrears due for the year immediately expired or in the middle of the year for the realization of the arrears of the current year. Section 17 next states explicitly that the former balance, that is the balance due for a period earlier than the year immediately expired, or the current year as the case may be, is not to be included, in the demands to be satisfied from the sale-proceeds. The reason for this exclusion is stated in the second paragraph of the third clause of section 17 in the following terms: "Such antecedent balances, if the *zemindar* shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become in fact mere personal debts of the individual *talukdar*, and must be recovered in the same way as other debts by a regular suit in the Court." With reference to this statement of the reason for the exclusion of the former balances from the process of summary realization, it has been argued that the Legislature intended that the antecedent balances should, after the Regulation sale, be relegated to the position of mere personal debts and should be capable of realization only in the same way as other debts by a regular suit in the Courts, in other words, that the Legislature intended that such balances should not be deemed a charge upon the property or the sale-proceeds, which represent the property after the sale has taken place. On this assumption it has been argued that there is a conflict between section 65 of the Bengal Tenancy Act and the second paragraph of the third clause of section 17 of the Putni Regulation and that consequently in view of section 195 (*e*) of the Bengal Tenancy Act, antecedent balances cannot be treated as constituting a charge either upon the property or upon the surplus sale-proceeds; in other words, that the effect of the Regulation sale is to destroy the charge which the *zemindar* previously had upon the property in respect of all arrears of rent. We are not impressed by the soundness of this argument. But we observe that there is a divergence of judicial opinion upon this question. In the case of *Peary Mohan Mukhopadhya* v. v. *Sreeram Chandra Bose* (3) the opinion was expressed that there is no conflict between section 65 of the Bengal Tenancy

(3) 6 C. W. N. 794.

Act and section 17 of the Putni Regulation. The contrary position, however, was adopted in the case of *Jogonath* v. *Mohi-ud-din Mirza* (4). In the view we propose to take, it is not necessary for us to pronounce a final opinion upon this matter. But we may state that our present inclination is in favour of the view that section 65 does not contradict section 17 of the Putni Regulation. The Legislature appears merely to have intended by section 17 to lay down that the *zemindar* cannot, by the summary method on his own *ex parte* statement, realise what is called the "former balances" and must sue in the ordinary Courts to establish his claim and to realize the arrears. But there is no intelligible reason why the *zemindar* should not have a charge for the realization of those balances, in addition to the personal remedy which he possesses under section 17. It is plain, however, that section 17 of the Regulation, even if it were construed in the way suggested by the respondents and were treated as contradictory to section 65, would have no possible application to the circumstances of the present case. The second paragraph of the third clause of section 17 contemplates a case in which a regular suit has to be brought for the recovery of the antecedent balances as the personal debt of the *putnidar*. In the case before us, the *zemindar* did obtain a rent decree against the *putnidar* on the 19th January 1906. The *putni* sale took place on the 15th May 1907. We are not prepared to accede to the contention of the respondents that the effect of the *putni* sale was to destroy the character of the decree previously obtained as a rent decree. That argument could prevail only if we were to ignore the clear language of the second paragraph of the third clause of section 17. The *zemindar* could not, after he had obtained a decree on the 19th January 1906, proceed, in terms of section 17, to institute a fresh regular suit for recovery of the antecedent balances as a personal debt of the *putnidar*. The second paragraph of the third clause of section 17 has clearly no application to the circumstances of the present case, and the rights of the parties must be determined independently thereof upon fairly elementary principles.

Let us now consider the relative situation of the two contestants. Before the 15th May 1907 the mortgagees held their decree obtained on the 3rd November 1906, and the *zemindars* held their rent decree made on the 19th January 1906. If the *zemindars* had executed their decree for rent, which was a first charge on the tenure, and brought it to sale, the purchaser would have taken the property with power to annul the mortgage encumbrance, though it had been already transformed into a judgment-debt: *Jog Narain Singh* v. *Badri Das* (5). The question consequently arises: was this relative situation altered as the result of the sale under Regulation VIII of 1819? Three alternative answers are possible, one of which must be accepted; *first*, that the parties retained their relative positions notwithstanding the sale under the Regulation; *secondly*, that as on the sale under the Regulation it had become impossible for both the decree-holders to realise their decrees by sale of the tenure, which could not be followed in the hands of the purchaser, both of them were relegated to the position of money decree-holders; or *thirdly*, that the Regulation sale placed the *zemindar* in the position of a money decree-holder, but did not affect the position of the mortgagee decree-holder. The third alternative has been, as might be expected, most strenuously pressed upon us by the respondents. It has been contended that under section 73 of the Transfer of Property Act where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the arrears for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part: *Gosto Behary* v. *Shib Nath Dut* (6). There is nothing to indicate in this case that the sale under the Regulation was occasioned by any default on the part of the mortgagees. Consequently it may be assumed that the mortgagees had a charge on the surplus sale-proceeds, notwithstanding the fact that the mortgage-debt had been

(4) 6 Ind. Cas. 371; 37 C. 747.

(5) 13 Ind. Cas. 144; 16 C. L. J. 156.

(6) 20 C. 241.

transformed into a judgment-debt, because, as was pointed out in the cases of *Surjiram Marwari* v. *Barhamdeo Persad* (7); *Lowry* v. *Williams* (8); *Economic Life Assurance Society* v. *Usborne* (9) and *In re Jenning's Estate* (10), the security subsists till the mortgage-decree has been satisfied. We may take it then that the mortgagee decree-holder has a lien upon the surplus sale-proceeds. But what is the position of the *zemindars* who hold the rent decree? It has been tenaciously argued on behalf of the respondents that even if it be assumed that the rent payable to the *zemindars*, for which a decree had already been obtained, is a first charge upon the tenure under section 65, that charge can be enforced only in the manner prescribed by the Bengal Tenancy Act; and in support of this view, reliance has been placed upon a passage from the judgment of Mr. Justice Banerjee in the case of *Soshi Bhusun Guha* v. *Gogun Chunder Shaha*(11). It may be conceded that if the landlord seeks to enforce his rent charge, the only method by which he can enforce that charge is by way of execution of a decree for rent with the resultant consequences set out in the Bengal Tenancy Act. But that is not the contingency which has happened in this case. The landlords have obtained a decree for rent. They are unable to execute that decree in the manner specified in the Bengal Tenancy Act because, as was pointed out in the cases of *Musammat Luteefun* v. *Mean Jan* (12) and *Prangour Mozoomdar* v. *Himanta Kumari Debya* (13), the tenure which has been lawfully sold for its own arrears cannot be again put up to sale for the arrears due on account of a previous period. The landlords, consequently, are not in a position to execute their decree against the tenure which has passed into the hands of a person entitled to hold the same free, not only from incumbrances, but also from the rent charge under a decree for arrears of any antecedent period. But it has been argued that if the landlords are in this position, the difficulty is entirely of their own creation and that they might have escaped from this situation if they had, year after year, taken recourse to summary proceedings under the Regulation. We are of opinion, however, that it was open to the landlords, as was pointed out by their Lordships of the Judicial Committee in the case of *Brindabun Chunder Sircar* v. *Brindabun Chunder Dey* (14), to seek their remedy by way of a suit in the Civil Court without repeated recourse to the summary procedure laid down in the Regulation. The decree which the landlords have obtained is a decree of a peculiar character. It is in one sense a money-decree, inasmuch as the landlords are not restricted to their remedy by sale of the defaulting tenure: they are also entitled to proceed personally against the judgment-debtors. But, notwithstanding this circumstance, the Legislature has provided that if the decree is executed as a rent-decree, the property will pass into the hands of the purchaser free from all encumbrances imposed thereon by any act of the defaulter. The question, consequently, arises, have the landlords lost this advantage, has the decree obtained by them been deprived of its fundamental character by reason of the circumstance that it can no longer be executed by a sale of the tenure? We are clearly of opinion that this question should be answered in the negative. In a case of this description, we must look to the substantial rights of the parties and not merely to forms of procedure. The landlords, under section 65 of the Bengal Tenancy Act, are in this position of advantage, namely, that the rent for which a decree has been made is a first charge on the tenure, and thereby takes precedence over all other charges, though they be prior in point of time. The landlords have, in essence, been awarded a decree which, though in form a decree for money, possesses a peculiar quality, namely, the sale thereunder passes the tenure to the purchaser who acquires it with liberty to annul all encumbrances. If the sale had taken place, not in execution of their decree, but in some other proceeding, there is no intelligible reason assigned why the landlords should, in respect of the sale-proceeds which essentially represent the tenure, be placed in

(7) 2 C. L. J. 202 at p. 215.
(8) (1895) 1 I. R. 274: 29 I. L. T. R. 52; 1 Irish Law Reports 741.
(9) (1902) A. C. 147; 71 L. J. P. C. 34; 85 L. T. 587.
(10) (1885) 15 L. R. Ir. 277.
(11) 22 C. 364 at p. 374.
(12) 6 W. R. 112.
(13) 12 C. 597.
(14) 1 I. A 178, 13 B.L.R. 403; 21 W.R. 324 (P. C.).

a worse position than what they would have unquestionably occupied if the sale had been held at their instance in execution of their decree. The parties may well be deemed to occupy the same relative situation as they would have occupied if the sale had taken place at the instance of either of them in execution of their respective decrees. There is thus no room for controversy that the landlords were entitled in the first place to appropriate a sufficient portion of the sale-proceeds before the mortgagees could proceed to realize their dues. This conclusion is not only based on sound legal principles, but also accords with rules of justice, equity and good conscience.

In the view we take, it becomes unnecessary for us to discuss another question which was argued before us at some length, namely, whether this suit is barred by limitation. Reliance was placed on behalf of the appellants on the fifth paragraph of section 17 of the Putni Regulation and it was argued that the suit should have been brought within two months from the date of the sale. This position was supported by reference to the case of *Surnomoye Dassya* v. *Land Mortgage Bank of India, Ltd.* (15). As the suit fails on the merits, it is needless to decide the question of limitation. But we may add that we are not satisfied with the expression of opinion in the case cited. We are rather inclined to adopt the view that the limitation of two months applies to a suit for compensation, as stated in section 17, and that this suit instituted by the mortgagees for declaration of their right to appropriate the surplus sale-proceeds in satisfaction of their decree is not a suit of that description.

The result is that this appeal is allowed, the decrees of the Courts below discharged and the suit dismissed with costs in all the Courts.

Appeal allowed.

(15) 7 C. 173; 8 C. L. R. 341.

MADRAS HIGH COURT.

CIVIL APPEAL No. 132 OF 1910.

July 28, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

VENKATESHA MALLIA—PLAINTIFF—APPELLANT

versus

BAMMAMPALLI RAMAYYA HEGADE AND OTHERS—DEFENDANTS—RESPONDENTS.

Religious Endowments Act (XX of 1863), s. 18—Sanction to institute suit—Sanction, object of—Construction—Suit by one while sanction given to two.

Sanctions for instituting suits against trustees of religious establishments should be construed strictly without enlarging their scope, the object of requiring sanction being to protect managers from vexatious suits.

Where sanction is given to two persons, one of them alone cannot sue without getting the sanction amended, the sanction being a condition precedent to the exercise of the right of suit.

Appeal from the decree of the District Court of South Canara, in Original Suit No. 62 of 1906.

Mr. *K. Ramanatha Shenai*, for the Appellant.

Messrs. *K. Narain Rao, B. Sitaram Rao* and *K. Y. Adiga*, for the Respondents.

JUDGMENT.—Under section 18 of Act XX of 1863 the District Judge gave sanction to two individuals to sue for the removal of the respondents, who are the Mokhassors of the Shri Anantha Padmanabha temple of Pudur, for misfeasance, breach of trust or neglect of duty.

Although the sanction was given jointly to both, only one of the individuals took action thereon and sued the trustees.

When the suit came on for trial before the same Judge who gave the original sanction, a preliminary objection was taken that the suit was bad because the joint sanction-holder had not joined in the suit. The Judge upheld this objection and dismissed the suit, holding that the plaintiff could not prosecute it alone. He further expressed a doubt as to the plaintiff's *bona fides*. The question before us, therefore, is whether one man should be allowed to sue under section 14 of this Act upon the strength of a sanction given to two men. Such sanctions are a condition precedent to the exercise of the right of suit [*In re Venkateswara* (1)]

(1) 10 M. 98.

and it is open to the Court to amend the order of sanction at any time [*Srinivasa* v. *Venkata* (2)], but the plaintiff seems to have made no attempt to move the Court to alter the sanction by getting it granted in his name only. In the case of *Mahomed Athar* v. *Ramjan Khan* (3) this point was considered and the learned Judges held that when sanction had been granted to three persons and two of them withdrew, and one of the three joining with him two new persons brought a suit under section 14 of the Act, the suit was not defective by reason of two of the three plaintiffs being persons to whom leave to sue had not been awarded. There, no objection was taken at the trial and no issue framed as to the maintainability of the suit.

It was observed by the High Court that as the same Judge who gave the leave under section 18 also entertained the suit, he must have tacitly given permission to the two new men to become plaintiffs along with Ranjakhan. So here as Mr. Hardinge granted sanction to two petitioners in his order of January 8th, 1906, and subsequently on March 1st, 1908, he himself dismissed the plaintiff's suit because the *Shivalli Brahmins* had not been joined as a party and at the same time doubted the *bona fides* of the plaintiff, it may be taken that he refused to allow the plaintiff to sue singly.

Such sanctions for instituting suits against trustees have to be construed strictly without enlarging their scope [*Sayad Hussein Miyan* v. *Collector of Kaira* (4)], the object of requiring sanction being to protect managers from vexatious suits.

The words in section 14 of the Act "any person or persons interested in any mosque, etc., may *without joining as plaintiff with any other person interested therein* sue before the Civil Court the trustee, manager, etc.," seem to be enabling words intended to give individuals a right to sue individually without the necessity of all the worshippers of the particular temple or religious institution joining as plaintiffs. With all respect to the learned Judges who decided *Mahomed Athar* v. *Ramjan Khan* (3), we do not consider that these words are intended to refer to the persons who hold the sanction granted under section 18.

Cases may occur in which it must be inadmissible to grant sanction to a particular individual, either on account of his character, personal motives or his solvency, and yet if he joined with some one whose very name would be a guarantee against the suit being improperly conducted, a Court would be justified in granting a joint sanction where it would have refused leave to the single applicant.

We are, therefore, of opinion that this suit was rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

(2) 11 M. 148.
(3) 34 C. 587.
(4) 21 B. 257.

CALCUTTA HIGH COURT.
CIVIL RULE No. 907 OF 1913.
November 25, 1913.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

BANSI SINGH—DEFENDANT—PETITIONER

versus

KISHUN LALL THAKUR—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Withdrawal of suit with liberty to bring freshsuit, order of—High Court, whether can interfere—Charter Act (24 & 25 Vic. c. 104), s. 15—Material irregularity.

To allow a suit to be withdrawn with liberty to bring a fresh suit is not deciding a case and therefore a High Court is not empowered either under section 115, Civil Procedure Code, or under the Charter Act to interfere with such an order of the lower Court.

Civil Rule against the order of the Subordinate Judge, Darbhanga, dated April 1st, 1913.

Babu *Lachmi Narain Singh*, for the Petitioner.

Babus *Umakali Mukerjee* and *Naresh Chandra Singha*, for the Opposite Party.

JUDGMENT.

COXE, J.—This is an application against an order allowing a suit to be withdrawn with liberty to bring a fresh suit. It must be conceded that the order against which complaint is made is hardly defensible. The suit was fought out to the bitter end, arguments of both sides had been heard and a few days previously the plaintiffs had been given an opportunity of amending their plaint. In

their petition for leave to withdraw the suit they said that many legal defects in the preparation of the plaint had occurred and certain documents had not been filed. They did not, however, specify what defects there were and what documents had not been filed. The learned Subordinate Judge only mentioned one defect, which does not appear to me to be a formal defect at all, and, moreover, he did not find that the suit must fail by reason of it.

Finally, the granting of application was not made conditional on the payment of the defendant's costs. This omission, in my opinion, was a grave injustice. But, however, irregular this order may be it appears to me very doubtful whether we have any right to interfere with it. Under section 115 of the Civil Procedure Code we may call for the record of any case which has been decided by a Subordinate Court and pass such order as we may think fit. It does not appear to me that this can be regarded as a case which has been decided. To allow a suit to be withdrawn with liberty to bring a fresh suit is not deciding a case. No doubt cases of this kind have been dealt with in revision under the Civil Procedure Code, but in none of the cases which have been shown to us was the question whether this Court has power to deal with such cases under section 115 fully considered. In *Kharda Co. Ltd.* v. *Durga Charan Chandra* (1) it was remarked that it was competent to this Court to interfere by way of revision. No reasons, however, were given and the proposition was rested on the authority of the cases of *Mary Dick* v. *Louisa Dick* (2) and *Tirupati* v. *Muthu* (3). But in neither of these cases, in my opinion, was this particular question really considered and decided. Also the case of *Kharda Co. Ltd.*, v. *Durga Charan Chandra*(1) was decided under section 622 of the Civil Procedure Code of 1882, the terms of which are not identical with the terms of section 115 of the present Code. Under the terms of the present Code the powers of this Court are, in my opinion, confined more expressly to cases which have been decided by the subordinate Courts.

It has been argued that we have power to interfere under the Charter. The Charter gives us the power of general superintendence over the subordinate Courts. But certainly I doubt whether that authorizes us to set aside a specific order of this nature, though I am aware that jurisdiction, at least as wide as this, has often been exercised by this Court.

Another point against the petition is that it was not presented until the 30th June 1913. The order complained of had been passed on the 1st April and we are informed, and it is not disputed, that at that time a fresh suit had been instituted against the present petitioners.

Having regard to these circumstances and also to the fact that I am very doubtful whether we have power to deal with this order, I am not prepared to grant this application. The Rule is accordingly discharged.

D. CHATTERJEE, J.—I agree in discharging the Rule on the ground that in this case there are not sufficient reasons for the exercise of our extraordinary jurisdiction. This was a case for setting aside a sale on the ground of fraud by an agent of the co-sharers and I think that these are cases in which every reasonable opportunity should be given to the plaintiff to prove the fraud that he alleges. Besides in this case the present application was made after the suit had been actually filed and summons served on the defendant. I also agree that in this case there is no decision in the Court below and that the case does not come within section 115 of the Civil Procedure Code.

Rule discharged.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 451 OF 1912.

June 24, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

LALJI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GANGA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Process-fee, filing of—Service of order, proof of—Attachment of immoveable property—Alienation, private,

(1) 5 Ind. Cas. 187; 11 C. L. J. 45.
(2) 15 A. 169; A. W. N (1893) 78.
(3) 11 M. 322.

LALJI *v.* GANGA PRASAD.

of immoveable property ordered to be attached—Civil Procedure Code (Act XIV of 1882), s. 274—Civil Procedure Code (Act V of 1908), O. XXI, r. 54—Evidence Act (I of 1872), s. 114—Presumption—Judicial acts, regularity of, to be presumed—Proceedings, presumption in respect of.

The filing of process-fee for the issue of an order of attachment of an immoveable property is not sufficient proof of service of that order.

A private alienation of an immoveable property effected after the passing of an order for its attachment not actually carried into effect, cannot be treated as invalid, unless proof is offered that all the preliminaries required by section 274, Civil Procedure Code (1882), *i.e.*, Order XXI, rule 54, Civil Procedure Code (1908), have been complied with.

Ganga Din v. *Khushali*, 7 A. 702; A. W. N. (1885) 179, referred to.

Section 114 of the Evidence Act authorises presumptions to be raised as to the regularity of judicial acts, but a presumption can be made in regard to the proceedings that may follow it.

Appeal from the decree of the District Judge, Hardoi, dated 1st August 1912, confirming that of the Subordinate Judge, Hardoi, dated 16th August 1911.

Babu *Basdev Lal*, for the Appellants.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—These three appeals arise out of certain suits brought by the plaintiffs-respondents for the recovery of money due on mortgages executed by Mohammad Husain and Ali Mazhar, in some of which *Musammat* Fatima, their mother, was also a co-executant. The mortgaged property was sold in execution of a simple money-decree held by Puttoo Lal against Mohammad Husain, Ali Mazhar and *Musammat* Fatima on the 20th March 1895 and was purchased by the decree-holder himself. The defendants-appellants are the sons and heirs of Puttoo Lal. Their defence was that the mortgages in question were effected after the attachment of the mortgaged property in the suit in which Puttoo Lal had obtained the above-mentioned decree, that the mortgagors were not fully competent to mortgage the entire property and that the widow and the daughters of Badal Khan were necessary parties to the suit filed in respect of the mortgage held by Badal Khan deceased.

The Courts below found that the defendants-appellants had failed to establish a previous attachment of the mortgaged property, that the sisters of Mohammad Husain and Ali Mazhar had no right to or interest in the mortgaged property as they were excluded by custom from inheritance, and that the widow and daughters of Badal Khan had similarly no right by reason of a custom excluding them from inheritance to the estate of Badal Khan deceased. These findings are contested in second appeal.

It appears that in 1890 Puttoo Lal filed a suit against Mohammad Husain, Ali Mazhar and *Musammat* Fatima for the recovery of a simple money debt and applied for the attachment of the defendants' *zemindari* share in village Paendapore and town Bilgram. The Court ordered an attachment to issue, but there is no trace on the record that an attachment was actually effected in the manner provided by section 274 of the old Code of Civil Procedure. The papers relating to the attachment ought to have been entered in the fly-index of the record of the suit in which the attachment was made. But beyond paper No. 17 bearing the application for attachment before judgment, dated the 13th September 1890, and paper No. 18 containing the injunction against alienation, dated the 19th September 1890, there is no mention in the fly-index of any other papers relevant to the attachment having been brought on the record. Section 274 of the Code of Civil Procedure then in force required, in addition to the service of an injunction on the judgment-debtor prohibiting him from transferring or charging the property in any way, that the order of attachment should be proclaimed at some place at or adjacent to the property attached by beat of drum or other customary mode and that a copy of the said order should be fixed up in a conspicuous part of the property and of the Court-house, and, where the property attached was land paying revenue to Government, in the office of the Collector of the District in which the property was situate. There is no proof in this case that the injunction was actually served. The filing of process-fee for the issue of an order of attachment is not sufficient proof of such service, because it is within the common experience of every Court that injunctions are very frequently returned unserved.

The mention of an injunction in the fly-index has been cited as proof of the fact that service of the said injunction had been duly effected, for it is

argued that in case of non-service the duplicates would have been returned unserved by the process-server and placed on the file. This argument does not take into account the possibility of the duplicates having been mislaid or placed by mistake on some other file. The omission of all reference in the fly-index to a report of the attaching officer certifying that the order of attachment had been proclaimed at some place at or adjacent to the property attached and that copies of the said order had been fixed in a conspicuous part of the property and of the Court-house and office of the Collector, has not been satisfactorily accounted for, and unless proof is offered that all the preliminaries required by section 274 had been complied with, an alienation effected after the passing of an order for attachment not actually carried into effect cannot be treated as invalid. In *Ganga Din* v. *Khushali* (1) Oldfield and Mahmood, JJ., held that it was necessary in order to set aside any private alienation to show that all the conditions mentioned in that section applicable to the case had been fulfilled. Section 256 of the old Code of Civil Procedure required that the attachment should be made by a written order, duly intimated and made known in the manner specified in section 274 of the Code, to be effective against a subsequent alienation of the property attached. The learned Counsel for the defendants-appellants has asked the Court to presume that the necessary preliminaries had been gone through; but, in the absence of any order showing that an attachment had been made, no inference as to the regularity of antecedent proceedings can legally be made. Section 114 of the Indian Evidence Act authorises presumptions to be raised as to the regularity of judicial acts performed, but a presumption can be made in regard to the proceedings that may follow it. In the application for execution of his decree Puttoo Lal did not mention that he had got an attachment effected before judgment. He asked for a fresh attachment and on the Sub-Registrar reporting the existence of the encumbrances now sought to be enforced, the Pleader for Puttoo Lal stated that he was unable to make any statement without consulting his client in regard to the same. The judgment-debtors were then summoned, and time was granted to the Pleader who appeared for Puttoo Lal to consult his client. Puttoo Lal meanwhile applied for a copy of the application for attachment made by him in the suit and of the injunction issued in response to that application, but the only statement, which the Pleader for Puttoo Lal made after consulting his client and presumably after examining those copies, was that the mortgages reported by the Sub-Registrar were correct. If an attachment before judgment had been duly effected, it is unlikely that the decree-holder or his Pleader would have omitted to mention that attachment or failed to impugn the mortgages said to have been made after the attachment. There is no reason, therefore, for questioning the propriety of the finding arrived at by the Courts below.

The sisters of Muhammed Husain and Ali Mazhar were found to have assented to the entry of the names of their brothers in the revenue papers in respect of the estate left by their father, Muhammad Mir, and to have renounced their interest in the said property. The mortgagors have been in possession of the property as ostensible owners thereof from more than 12 years, and the rights, if any, of the daughters of Muhammad Mir can no longer be enforced. The widow and daughters of Badal Khan have been examined. They disclaim any share in the mortgage-deed in suit.

The appeals, therefore, fail and are dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 268 OF 1912.

July 6, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MUNICIPAL BOARD OF AGRA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SUDARSHAN DAS SHASTRI—PLAINTIFF—RESPONDENT.

Public way, right of—Metalled or unmetalled parts of public road, whether public road.

(1) 7 A. 702; A. W. N. (1885) 179.

All the ground, forming part of a road, whether metalled or not, over which the public have the right of way is the public road.

First appeal from a decree of the Subordinate Judge of Agra.

Mr. *A. E. Ryves*, for the Appellants.

Dr. *Satish Chandra Banerji* and Mr. *Pearey Lal Banerji*, for the Respondent.

JUDGMENT.—The Court below framed an issue in the following terms:

"Is the plaintiff the owner and in possession of the lands in suit, or do the lands form part of the road belonging to the Board? If road, then what is its extent?"

The Court below has found on this issue that the place on which the plaintiff alleged that hawkers were accustomed to sit was no part of the road, at least this is what we understand the finding to be. The Court seems to have thought that the only part of the road which could be said to be the public road was the part that was actually metalled. In our opinion this is clearly wrong. We are unable from the maps, and from any information either party can give us, to ascertain with any accuracy the places in which the hawkers sit; but, in our opinion, all the ground, whether metalled or not, over which the public had a right of way is just as much the public road as the metalled part. The Court would be entitled to draw the inference that any land over which the public from time immemorial had been accustomed to travel was a public street or road, and the mere fact that a special part of it was metalled for the greater convenience of the traffic would not render the unmetalled portion on each side any the less a public road or street. With this explanation we refer an issue to the Court below, namely, whether or not the land in dispute is part of the public road.

The Court may take any additional evidence relevant to the above issues that the parties may adduce. On return of the finding the usual ten days will be allowed for filing objections. We direct the Court below in returning its finding to send a proper map marking distinctly the lands in dispute and their surroundings. The stand-pipes complained of may also be indicated in this map.

We need hardly say that we think it very desirable that the parties should, if possible, settle the question without spending their money in useless litigation.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2203 OF 1912.

August 26, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

CHERUKAT MADATHIL EDAKRAMANCHERI ILLOTH DAMODARAM NAMBUDRI—PLAINTIFF—APPELLANT

versus

MANGATHAYA DAMODARAM NAMBUDRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust – Suit by trustee to eject tenant—Co-trustees, party defendants — Suit filed without previous consultation, maintainability of.

Where a trustee of a temple sued to eject a tenant of the temple whom his co-trustees had granted a renewal of lease without consulting him sometime before suit and impleaded the co-trustees as defendants after giving them notice calling upon them to join him in the plaint:

Held, that the suit was maintainable and the fact that the plaintiff had not held a consultation with his co-trustees before suing would not vitiate it.

Kumban v. *Moorthi*, 7 Ind. Cas. 422; 34 M. 406 at p. 415; (1910) M. W. N. 359; 8 M. L. T. 208; 20 M. L. J. 951, referred to.

Parameshwaran v. *Shangaran*, 14 M. 489; *Paramathan Somayajipad* v. *Sankara Menon*, 23 M. 82, distinguished.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 141 of 1912, preferred against that of the Court of the Principal District Munsif of Calicut, in Original Suit No. 803 of 1910.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—In this case it is admitted that plaintiff is an *uralar* (trustee) suing (as he alleges) on behalf of the *devaswom* and that his co-*uralars*, who have been impleaded as defendants Nos. 4 to 9, had without consulting him a few days before suit granted a renewal of lease to 1st defendant, whom plaintiff sues to eject. It is further admitted that prior to filing suit plaintiff gave a notice to those co-*uralars* calling on them to join him in the plaint.

Under those circumstances we think the lower Courts were wrong in holding the suit to be not maintainable merely because plaintiff had not held a consultation with defendants Nos. 4 to 9 before suing. The distinction drawn by the District Judge between redemption suits and other

suits is not well founded. *Vide* the remarks of the learned Judges in *Kumban* v. *Moorthi* (1). The facts set out above differentiate this suit from those disposed of in *Parameshwaran* v. *Shangaran* (2) and *Paramathan Somayajipad* v. *Sankara Menon* (3).

It will be for the lower Appellate Court to decide whether the renewal of the lease to the 1st defendant (Exhibit II) was for the benefit of the institution.

We set aside the decree of the District Judge and remand the appeal to him for disposal according to law. The District Judge will provide for costs in his ultimate decree.

Decree set aside.

(1) 7 Ind. Cas. 422; 34 M. 406 at p. 415; (1910) M. W. N. 359; 8 M.L. T. 208; 20 M. L. J. 951.

(2) 14 M. 489.

(3) 23 M. 82.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1279 OF 1904.

September 19, 1907.

Present:—Mr. Justice Wallis and Mr. Justice Miller.

ARUNACHALA PILLAI *alias* MASILAMANI PILLAI—PLAINTIFF—APPELLANT

versus

SAMPURNA THACHI—DEFENDANT—RESPONDENT.

Hindu Law—Alienation by grandfather—Consent by guardians of minor—Benefit of minor—Alienation, validity of.

If for the benefit of a minor the guardians of the minor consent to an alienation of a portion of his undivided family properties with the object of avoiding a partition of those properties the alienation is binding on the minor.

Second appeal from the decree of the District Court of Tanjore, in Appeal Suit No. 1030 of 1903, presented against that of the Court of the Distrit Munsif of Valangiman, in Original Suit No. 8 of 1902.

Mr. *P. S. Sivaswami Aiyar*, for the Appellant.

Messrs. *P. R. Sundara Aiyar* and *T. V. Gopalasami Mudaliar*, for the Respondent.

JUDGMENT.—The appellant and his grandfather were members of a joint family and the grandfather had a third wife who had borne him three daughters. Exhibit I is an alienation by the grandfather of a portion of the family properties in favour of the third wife reserving the income to himself for life, and is expressed in the deed to be made out of the grandfather's share and excluding the plaintiff's share. The properties covered by Exhibit I were worth about Rs. 3,000 and the remaining properties which are now in the possession of the plaintiff are worth Rs. 7,000 or 8,000. According to the finding of both the lower Courts the deed, Exhibit I, was executed by the grandfather with the consent both of the mother and the maternal uncle of the plaintiff who was then a minor. There has been a good deal of argument before us as to whether Exhibit I itself effects a partition between the grandfather and the plaintiff but, in our opinion, it is unnecessary to consider this question. It is clear that it was open to the grandfather, if he had so chosen and without anyone's consent, to effect a partition and leave the whole of his half share to his 3rd wife and her daughters, and it was, in our opinion, clearly for the benefit of the minor for his guardians to avoid an eventuality so injurious to his interests by consenting to the alienation effected by Exhibit I. If the plaintiff had been of full age his consent would undoubtedly have been sufficient to validate Exhibit I and in the circumstances, we think his guardians were competent to consent for him. This is in effect the conclusion at which the District Judge has arrived and the second appeal must be dismissed with costs.

Appeal dismissed.

MANDAL & CO *v.* FAZUL ELLAHIE.

CALCUTTA HIGH COURT.

SMALL CAUSE COURT REFERENCE NO. 2 OF 1912.

February 3, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

MANDAL & CO.—PLAINTIFFS

versus

FAZUL ELLAHIE—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, object of—Cause of action, whether claims upon several contracts included in one—Contract for supply of goods by monthly instalment, breach of—Intention of parties —Damages, whether separate suits maintainable.

Order II, rule 2, is framed to avoid the splitting of claims and remedies and does not apply where there are several causes of action. The object of the rule is to protect the defendant from being twice vexed for one and the same cause.

A cause of action is not limited to claims arising upon one contract, but might include claims upon several contracts provided they form part of a continuous cause of dealing. This, however, can only be done where there is nothing to show that the transactions were intended to be kept distinct.

Where a contract for the supply of goods by monthly instalments expressly provides that each monthly instalment and item is to be treated as a separate contract, the plaintiff is entitled to bring separate suits for damages.

Reference to the High Court under section 69 of the Presidency Small Cause Courts Act made by the Chief Judge of the Court of Small Causes of Calcutta.

Mr. *Sircar* (with him Mr. *Surita*), for the Plaintiffs.

Mr. *S. P. Sinha* (with him Mr. *A. K. Sinha*), for the Defendants.

JUDGMENT.

WOODROFFE, J.—Under Order II, rule 2, that which is required to be included in the suit is the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; that is one and the same cause of action. The rule is framed to avoid the splitting of claims and remedies and does not apply where there are several causes of action. The object of the rule is to protect the defendant from being twice vexed for one and the same cause. But the parties themselves by the form of their convention determine whether the rule is applicable to them. The rule may operate to defeat a plaintiff with whom, as in the present case, the merits have been held to rest. I agree, therefore, with what Garth, C. J., said that care must be taken to give the section no wider construction than it would reasonably bear: *Pramada Dasi* v. *Lakhi Narain Mitter* (1). The words of the section are easier to understand than some of the cases decided under it. We need not, however, inquire into them as each case must depend on its own facts, and the reasons which Judges have assigned for their opinions have not the same degree of authority as the decisions themselves: *Caledonian Railway Co.* v. *Walker's Trustees* (2). I make these preliminary observations, for I do not regard any of the decisions cited as binding on us except in a case involving the same set of facts. The old section 43 as incorporated in Order II, rule 2, of the Code has been amended so as to include in the explanation the following words italicised: "For the purposes of this rule *successive claims arising under the same obligation* shall be deemed to constitute but one cause of action." Whatever meaning, therefore, may be given to the latter term (and on this matter varying views have been taken) the section expressly provides that the circumstances italicised shall be deemed to be but one cause of action, whatever might be the case in the absence of such enactment. Now if we exclude clause 13 of the contract to which I next refer, there can, I think, be no question that the case would fall within the words of the section quoted, for the case is then merely one of several instalments under one and the same contract without anything else to indicate that the rule should not apply. It is argued, however, that there were in fact in this case two contracts by virtue of the provisions of clause 13 of the contract which ran as follows: "Except as above stated this indent is to be deemed and construed as a separate indent in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent had been made out and signed in respect of each instalment." The learned Chief Judge in a former case held that this clause did not bring the case within the operation of the section, but being, he says, in considerable doubt whether his decision was correct he has made the present reference. It may be assumed to be a general rule that parties cannot by consent abrogate what is the law, but

(1) 12 C. 60 at p. 63.

(2) (1882) 7 A. C. 259; 46 L. T. 826; 30 W. R. 569 46 J. P. 676.

what they can do is to indicate their intention and it is on this that the law operates variously according as that intention may be expressed. In such cases it is not the law which is directly affected, but the materials on which it operates.

The parties may express their intention as they choose, and if they express it in such a way that the effect is that two contracts are made where otherwise there would have been one, the Court should give effect thereto. In *Sesha Ayyar* v. *Krishna Ayyangar* (3) the learned Judges say: "We do not think that when parties, for whatever reason, choose to agree that there should be two instruments and two obligations, the Courts are justified in saying that there is only one obligation." Then what is the effect of the words of clause 13? It is argued that they are inserted not for the purpose of creating two contracts but to declare that the breach of one part of a single contract is not to be deemed a breach of the entire contract. But I see nothing which warrants us in so restricting the sense of words which naturally bear a wider meaning. It seems to me that by these words the parties say in effect as follows:—"Here is what, but for our statement, would be regarded as one contract with successive claims thereunder. We desire to say that as regards each instalment we are contracting by separate contracts and in lieu of actually signing separate contracts we agree by this clause that each instalment shall be treated as such." The result of this is, in my opinion, that there are separate contracts in respect of the July and August shipments. But then it is said that even if that is the effect of the clause and even if two separate contracts had been in fact passed, still the order is a bar, as it has been held in *Anderson Wright & Co.* v. *Kalagarla Surjinarain* (4) that even where there are different contracts, yet if they form part of one transaction (whatever that may be) a breach of all of such contracts is only one cause of action. This was held in reliance upon the English cases establishing that a cause of action was not limited to claims arising upon one contract, but might include claims upon several contracts provided they formed a part of a continuous course of dealing. This has been held broadly in some cases, but as was argued before us this is now only so (according to the cases) where there is nothing to show that the transactions were intended to be kept distinct. The clause in question appears to me to evidence such an intention. Moreover, apart from the question whether the English decisions are appropriate authorities upon the construction of the section before us or not, it is to be noted that the case *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (4) was a case of several breaches under one contract and the question of several contracts as part of one continuous transaction was not in issue. So also *Duncan Brothers & Co.* v. *Jeetmull Greedharee Lall* (5) was a case of breach of one and the same contract. In *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar* (6), Farran, C. J., pointed out that these two cases which showed that all existing breaches of the same contract must be joined in the same suit although they may have arisen at different times, did not apply to the case before him, as there were then two separate contracts contained in the same instrument. As regards separate contracts *Umed Dholchand* v. *Pir Saheb Jiva Miya* (7) may be referr d to. In *Volkart* v. *Sabju Saheb* (8) the contract did expressly provide that each monthly shipment and item was to be treated as a separate contract and it was held that the terms of the contract being clear, the plaintiff was entitled to bring separate suits for damages. This case seems to me in point.

The learned Chief Judge appears, however, to have doubted whether they established the plaintiffs' contention having regard to the explanation appended to the rule. It is true that the scope of the identity of the cause of action has been extended by the addition of this explanation, but only in so far as it supersedes those cases in which it was held that a suit on a collateral security given for a debt would not bar a suit for the debt itself. This is generally not the case now. The added words to the explanation do not affect the case before us or alter the law from what it was, as appears from the illustration which is (subject to verbal alterations) the same now as it was under the Code of 1882. The added words only give express recognition to the law as it previously was.

(3) 24 M. 96 at p. 109; 12 M. L. J. 383.
(4) 12 C. 339.
(5) 19 C. 372 (F. B.).
(6) 21 B 267 at p. 271.
(7) 7 B. 134.
(8) 19 M. 304.

I would, therefore, answer the question put to us in the negative and would hold that the plaintiff is not, under the circumstances stated, debarred from bringing two suits. The result, in my opinion, is that the plaintiff is entitled to a decree and should be awarded the costs of this reference.

JENKINS, C. J.—Uniformity on questions of procedure under the Code is of such importance that I think I ought to follow the decision in the Madras High Court in *Volkart* v. *Sabju Saheb* (8), and more especially as it meets with the approval of my learned colleague. In deference, therefere, to that authority I agree with Woodroffe, J., as to the answer that should be returned to the reference.

Attorneys for the Plaintiffs: Messrs. *Fox* and *Mandal.*

Attorneys for the Defendants: Messrs. *Alum* and *Nan.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1512 AND 2229 OF 1912.

August 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IN SECOND APPEAL NO. 1512 OF 1912.

THANGAVELU PILLAI—PLAINTIFF—APPELLANT

IN SECOND APPEAL NO. 2229 OF 1912.

PURSHOTTAM REDDI—PLAINTIFF—APPELLANT

versus

DORAISAMI PILLAI AND ANOTHER—DEFENDANTS—RESPONDENTS IN BOTH.

Hindu Law—Assignment, right of—Gift of family property by father to son—Consideration—Natural love—Relinquishment by co-parcener, right of.

It is only a transfer to a stranger of natural rights which carry with them obligations to third parties that could not be assigned under the law, but every man is perfectly entitled to waive or release any rights in property belonging to himself.

Therefore a gift-deed, whereby a father relinquishes all his rights in the family property in favour of his only son, is valid and binding as it is supported by the consideration of natural love and affection.

A co-parcener can not only relinquish his share in favour of all the remaining co-parceners as a body, but he can do it in favour of even one of the several remaining co-parceners.

Second appeals from the decrees of the District Court of South Arcot, in Appeal Suits Nos. 176 and 175 of 1911 respectively, preferred against those of the District Munsif of Villipuram, in Original Suits Nos. 401 and 410 of 1909.

Messrs. *T. R. Ramachandra Aiyar* and *A. S. Venku Aiyar*, for the Appellants.

Mr. *R. Subramania Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant in both these appeals. The suit out of which Second Appeal No. 2229 arose was brought on a mortgage document executed in the plaintiff's favour by the defendants Nos. 1 and 2 on the 13th February 1905. The 2nd defendant is the son of 1st defendant. The lower Appellate Court finds (*a*) that the 2nd defendant was a minor when the 1st defendant induced him to join the 1st defendant in executing the mortgage document; (*b*) that the mortgaged property belonged solely to the son, the 2nd defendant, on the date of the mortgage-deed in 1905 as it had been gifted away by the father, the 1st defendant, to the 2nd defendant under the registered gift-deed, Exhibit IV, dated 1892; and (*c*) that the money which formed the consideration for the mortgage, Exhibit A, was not borrowed for the benefit of the 2nd defendant.

On these findings the plaintiff's suit was dismissed with the 2nd defendant's costs so far as it prayed for the sale of the mortgaged property though there was a personal decree passed against the 1st defendant.

The only contention argued in this second appeal is that the gift-deed dated 1892 by the 1st defendant to the 2nd defendant was not legally effective to transfer the 1st defendant's undivided half share in the plaint properties to his only son, the 2nd defendant, and that, therefore, the mortgage under Exhibit A affected at least the 1st defendant's said undivided half share and that a decree ought to have been passed by the lower Courts for the sale of the said moiety. One of the grounds on which the gift-deed is attacked is that the gift was not accepted by anybody on behalf of the 2nd defendant. The District Judge clearly finds that the defendants' witness No. 2 accepted the deed on behalf of the 2nd defendant and that he subsequently handed the document over to the 2nd defendant's mother. This finding is supported by the evidence of the said 2nd witness which proves that he acted as the agent of the 2nd defendant's mother and received the

gift-deed from the 1st defendant on her behalf. This indicates her acceptance of the gift-deed on behalf of the 2nd defendant.

The only other ground on which the gift-deed is attacked is that under the Hindu Law, an undivided co-parcener cannot validly make a gift of his share in the property so as to be binding even on himself. For this proposition reliance is placed on certain observations in *Appa Pillai* v. *Ranga Pillai* (1). In that case it was held on the facts appearing therein that plaintiff, a member of an undivided Hindu family, got no consideration *for the agreement* by which he relinquished his rights in the family property in favour of the remaining co-parceners, that his release, therefore, having been by an agreement without consideration, was not binding upon him and that he was, notwithstanding the agreement, entitled to sue for his share in the family properties. Thus the decision turned on the sole ground that there was no consideration for the relinquishment agreement relied upon by the defence. In that same case it is observed that if the relinquishment was in favour of persons who stood in such a relationship with the executant that natural love and affect on was evidently the motive of the transaction (See section 25 of the Contract Act), the relinquishment would be valid. The learned Judges in the particular case held, however, that the terms of the document clearly showed that natural love and affection was not the motive for the relinquishment and that, therefore, there was not even the consideration of natural love and affection and hence the agreement was not valid. In the present case, the gift is made by a father to his only son and the circumstances clearly show that if the gift-deed is treated as an agreement by which the father relinquished his rights in favour of his son, it would be a valid agreement supported by the consideration of natural love. It was then argued that the case in *Appa Pillai* v. *Ranga Pillai* (1) was really decided on the ground that a co-parcener cannot relinquish his share unless something trifling at least was given to him as consideration. Having carefully read that judgment I do not find that the learned Judges expressed any such view. They only refer to the contention of the respondent in that case that there could be no valid partition of the property without such a trifling present, because the law as laid down in Manu requires that even a co-parcener who does not desire to take a share must have something given him at the time of the partition, and then the learned Judges refer to the reply of the appellant to this contention put forward on behalf of the respondent. The learned Judges nowhere state that they accept the said contention of the respondent. In *Peddayya* v. *Ramalingam* (2) it has been held that a co-parcener can not only relinquish his share in favour of all the remaining co-parceners as a body, but he can do it in favour of even one of the several remaining co-parceners. The texts of Manu and Yagnavalkya which refer to the giving of some trifle to the person who so relinquished his share, were not considered as making the receipt of such trifle as a condition precedent to the validity of such relinquishment. In that case, two out of four co-parceners gave up their interest in favour of one of the remaining two co-parceners, merely in order to give effect to what they believed to be the wishes of their father and Muthusami Aiyar and Shephard, JJ., held that such a relinquishment was perfectly valid, following the decision in an unreported case (Regular Appeal No. 58 of 1884) where a gift made by an undivided son in fulfilment of a natural obligation founded upon the consent of the father to the severance of the alienor's interest in the co-parcenary was upheld. The reference in the texts to the giving of a trifle to the relinquishing co-parcener must be treated rather as an antiquated formality which was prescribed as conclusive evidence of the deliberate and final character of the relinquishment than as forming an indispensable condition to the validity of such a relinquishment.

It is only a transfer to a stranger of natural rights which carry with them obligations to third parties that could not be assigned under the law, but every man is perfectly entitled to waive or release any rights in property belonging to himself. I do not think that there is anything in the judgment in the case of *Appa Pillai* v. *Ranga Pillai* (1) which throws doubt upon the existence of such a power of relinquish-

(1) 6 M. 71.

(2) 11 M. 406.

ment and if there are any, those observations must be held to have been not followed in the later case in *Peddayya* v. *Ramalingam* (2).

Lastly, it is clear in the present case that the gift by the 1st defendant to his only son was part of an arrangement brought about by mediators to effect a division between the 1st defendant (who was squandering his ancestral property in evil ways) and his minor son, the 2nd defendant. Though Exhibit A is in form a gift, it was really an allotment of the plaint properties for the son's share, the father taking the other properties for his share, which properties on the same date were conveyed by him to a friend of his in trust to discharge his debts and to re-pay the balance left to himself (the father). Such an arrangement is clearly binding on the 1st defendant. In the result the Second Appeal No. 2229 fails and is dismissed with costs. For similar reasons Second Appeal No. 1512 is also dimissed with costs.

NAPIER, J.—I concur.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3840 OF 1912.

May 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

JIBANANDA CHAKRABARTI AND OTHERS —DEFENDANTS—APPELLANTS

versus

KALIDAS MALLIK AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Easement—Prescription—Right to take water—Servient owner, whether can change the path—Right of way, how exercised—User—Extent—Motive.

When a right of way by a particular tract has been caquired by a dominant owner, the servient owner acnnot force upon him, in lieu thereof, a different track, any more than the dominant owner himself can, at his discretion, take recourse to a different path.

The extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period.

Therefore a prescriptive right to take water in a particular way and at a particular place infers no right to take the supply of water in any other way and at any other place.

Obiter dicta.—Water, as it issues on excavation of a well or a tank, is not to be considered as produce of the soil and a right to enter on land and to take such water may be acquired as an easement. The elements of this right are: a right to go on the land of the servient owner; and a right to take the water.

In so far as a right of way is concerned, it is necessary to establish a private right of way by prescription that in going across the lands to any particular point or for any particular purpose, a particular route must be used.

The owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other.

No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.

Appeal against the decree of the Subordinate Judge of Burdwan, dated 2nd September 1912, affirming that of the Munsif of Burdwan, dated the 8th April 1911.

Babus *Bepin Behary Ghose* and *Ramoni Mohan Chatterjee*, for the Appellants.

Babu *Gaur Chandra Pal*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendants in a suit for declaration of the prescriptive right of the plaintiffs to take water from a tank, for removal of the obstruction erected by the defendants to the exercise of such right, and for an injunction to restrain interference in future. The facts are not in controversy at this stage and may be briefly narrated. The defendants are the owners of a tank which stands on their land. The plaintiffs are neighbours and have their residence at some distance towards the east of the tank. They and the members of their family have, for more than 20 years peaceably and openly as of right, and without interruption, used the water of the tank, claiming title thereto as an easement. They used to obtain access to the water by a path across the east bank and down a flight of steps on the eastern slope of the bank. In 1908, the defendants re-excavated the tank, repaired the slopes on all sides and built a flight of masonry steps on the northern slope. Since then, the defendants have prevented the plaintiffs from access to the water in the accustomed manner by what has been described as the eastern *ghat*. The defendants, however, do not deny that the plaintiffs have acquired a right of easement in the water of the tank, and they are agreeable to the use of the water by them by means of the new flight of steps built on the northern slope. But the plaintiffs are not satisfied with this and insist on their right to reach the water by what formed the eastern *ghat* and has now been obliterated by the defendants. The question, consequently, arises, whether when the

owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access, or may the servient owner, at his own discretion, substitute for his use some other means of access. No authority directly in point has been placed before us by either the appellants or the respondents in support of their respective contentions. But we are of opinion that on principle the question must be answered in favour of the dominant owner.

It is plain, as was pointed out by Lord Campbell, C. J., in *Race* v. *Ward* (1), that water, as it issues on excavation of a well or a tank, is not to be considered as produce of the soil and that a right to enter on land and to take such water may be acquired as an easement: *Manning* v. *Wasdale* (2), *Constable* v. *Nicholson* (3), *Macnaughten* v. *Baird* (4) and *Gardner* v. *Hodgson's Kingston Brewery Co. Ltd.* (5). This right, it is obvious, may be analysed into two constituent elements, namely, a right to go on the land of the servient owner and a right to take the water which stands on his land and so long as it stands there is his property. The two constituent rights are acquired simultaneously, but each must nevertheless be acquired in conformity with the Statute. Now, in so far as a right of way is concerned, it is clear that to establish a private right of way by prescription, it is necessary that in going across the lands to any particular point or for any particular purpose, a particular route must be used. As Morton, J., puts it on behalf of the Full Bench in *Hyot* v. *Kennedy*(6), "to establish a way by prescription, the use must be not only open, adverse, uninterrupted, peaceable, continuous and under a claim of right, but must be confined substantially to the same route and to substantially the same purpose for which the way was designed originally, unless the way is one for all purposes." This is plain, for a way imports of necessity a right of passing along a particular route between certain termini: *Jones* v. *Percival* (7), *Holmes* v. *Seely* (8) and *Rogers* v. *Duncan* (9). On this principle, it has been ruled that the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been accustomed to pass from the field to the way and to make a new entrance at a fresh place: *Woolyer* v. *Hadden* (10), *Berridge* v. *Ward* (11) and *Marshall* v. *Ulleswater S. N. Coy* (12). The rule is based on obvious good sense, for though the servient owner may not object to a person entering his land at a particular spot—for that may not cause him any inconvenience—it may be very much against his inclination, and it may be detrimental to his property that the dominant owner should enter it at any other place. But the position is clearly mutual, and if the right of way has been acquired from one point to another in a particular direction, the servient owner cannot, at his choice, substitute another way between the same points but by a different route which might be less convenient to the dominant owner. It is for the protection as well of the dominant as of the servient owner that the right acquired should be limited to the part of the area of the servient tenement over which it has been actually exercised: *Clifford* v. *Hoare* (13), *Wood* v. *Stourbridge Ry. Co.* (14) and *Strick* v. *City Offices Coy.* (15). To put the matter briefly, the extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period: or, as Lord

(1) (1855) 4 El. & Bl. 702; 99 R. R. 702; 3 C. L. R. 744; 24 L. J. Q. B. 153; 1 Jur. (N.S.) 704; 53 W. R. 240; 24 L. T. (O. S.) 270; 119 E. R. 259.

(2) (1836) 1 N. & P. 172; 5 A. & E. 758; 2 H. & W. 431; 6 L.J.K.B. 59; 44 R. R. 576; 111 Eng. Rep. 1353.

(3) (1863) 14 C. B. (N. S.) 230; 32 L. J. C. P. 240; 11 W. R. 698; 143 E. R. 434; 135 R. R. 672.

(4) (1903) 2 I. R. 731; 37 I. L. T. R. 80; 7 Irish Law Reports 595.

(5) (1901) 2 Ch. 198; 70 L. J. Ch. 504; 84 L. T. 373; 17 T. L. R. 380; 49 W. R. 421.

(6) (1898) 170 Mass. 54.

(7) (1827) 5 Pic. 485; 16 Am. Dec. 415.

(8) (1828) 19 Wendell 507.

(9) (1890) 18 Can. Sup. Ct. 710

(10) (1813) 5 Taunton 125 at p. 132; 14 R. R. 706; 128 Eng. Rep. 634; 14 R. R. 706.

(11) (1860) 2 Fos. & Fin. 208; 10 C. B. (N. S.) 400; 30 L. J. C. P. 218; 7 Jur. (N. S.) 876; 142 E. R. 507; 128 R. R. 764

(12) (1871) 7 Q. B. 166; 41 L. J. Q. B. 41; 25 L. T. 793; 20 W. R. 144.

(13) (1874) 9 C. P. 362; 43 L. J. C. P. 225; 30 L. T. 465; 22 W. R. 828.

(14) (1864) 16 C. B. (N. S.) 222; 143 Eng. Rep. 1111; 139 R. R. 473.

(15) (1906) 22 T. L. R. 667.

Watson stated it in *McIntyre* v. *MacGavin* (16), a prescriptive right to take water in a particular way and at a particular place infers no right to take the supply of water in any other way and at any other place: *Blackburne* v. *Somer* (17) and *Muhamad Husain Rowther* v. *Muhamad Abubakar Rowther* (18). We are not here concerned with the question of the alteration of the mode of enjoyment of a right of easement by mutual consent of parties, nor are we called upon to examine the question of the right of the dominant owner to deviate from the way acquired by prescription, when such way has been obstructed by the servient owner himself: *Selby* v. *Nettlefold* (19) and *Hawkins* v. *Carbines* (20). The general rule is that when a right of way by a particular track has been acquired by a dominant owner, the servient owner cannot force upon him, in lieu thereof, a different track, any more than the dominant owner himself can, at his discretion, take recourse to a different path. Tested in the light of this principle, the claim of the plaintiffs is unanswerable. They have proved to the satisfaction of the Courts below, that, for much longer than the statutory period, they have had free access to the water of the tank of the defendants by a track across the eastern bank and by a flight of steps down the eastern slope. The prescriptive right they have acquired has become indefeasible, and the defendants were not entitled to improve the tank so as to interrupt and make impossible the exercise of the right of the defendants in the particular mode they had adopted for many years. The position might have been different if the plaintiffs had merely proved that they had appropriated the water of the tank for the statutory period and had failed to show that they had used a definite means of access to reach the water; in such a contingency, while the plaintiffs would have acquired a prescriptive right to use the water, they could not have claimed access to the tank by a particular path, they would have had no ground for complaint so long as the defendants allowed them reasonable facilities of approach to the tank. In the case before us, however the plaintiffs, as we have seen, stand in a position of much greater advantage: they have acquired a right to reach the water by a definite path and also a right to use the water. We may add that the conduct of the plaintiffs is really not quite so unreasonable as has been characterised by the defendants. The access to the water of the tank by way of the flight of new masonry steps on the northern slope involves the use of a longer and more circuitous way and, what is more important, a loss of privacy, to which so much importance is attached by females in this country. But it is immaterial what motive animates the plaintiffs, for as Lord Halsubry, L.C., said in *Mayor of Bradford* v. *Pickles* (21) no use of property, which would be legal if due to a proper motive, can become illegal, because it is prompted by a motive which is improper or even malicious. We are of opinion that as the plaintiffs have acquired a right, not merely to the use of the water of the tank of the defendants but also to have access to the water in a particular mode, the Court of first instance rightly decreed the suit; and as that decree has been confirmed by the Subordinate Judge, this appeal must be dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

(16) (1893) A. C. 268 at p. 277; 1 R. 246; 69 L. T. 389; 57 J. P. 548.

(17) (1879) 5 Ir. 1.

(18) 2 Ind. Cas. 427; 20 M. L. J. 699; 8 M L. T. 399

(19) (1873) 9 Ch. App. 111 at p. 114; 43 L. J. Ch 359; 29 L. T. 661; 22 W. R. 142.

(20) (1857) 27 L. J. Ex. 44; 114 R. R. 1002.

(21) (1895) A. C. 587; 64 L. J. Ch. 759; 11 R. 286; 73 L. T. 353; 44 W. R. 190; 60 J. P. 3.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1765 OF 1909.

January 29, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MUKTAKESHI DASI—PLAINTIFF—APPELLANT

versus

SRINATH DAS—DEFENDANT—RESPONDENT.

Bengal Alluvial Land Settlement Act (XXXI of 1858), *ss.* 1, 2- *-Alluvial Land—Resumption by Government—Settlement with one of original proprietors—New tenure—Pre-existing contract of lease—Suit for recovery of rent—Necessary parties—Fair rate, determination of—Civil Procedure Code (Act V of* 1908), *s.* 103.

Alluvial lands formed by the recession of a river were resumed by the Government and settled with one of the original proprietors, who was a co-sharer to the extent of two-thirds and who had along with the other co-sharers executed a lease before resumption in favour of the defendant. He sued for the recovery of arrears of rent for the whole land without making the original co-sharers parties to the suit;

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Held, that the plaintiff was bound by the terms of the pre-existing contract to the extent of a two-thirds share, of which he was a proprietor, of the original estate, but that in respect of the remaining one-third he was in the position of a stranger and was entitled to realise rent at the rate assessed by the Settlement Authorities as payable by the under-tenure-holder of the original estate;

that the co-sharers of the plaintiff were not necessary parties to the suit; and

that since the rent payable by the under-tenure-holder was not determined by the Settlement Authorities, the High Court had power to do so under section 103, Civil Procedure Code.

Appeal against the decree of the Subordinate Judge of Khulna, dated the 18th May 1909, reversing that of the Munsif of Khulna, dated the 7th May 1908.

Dr. *Rash Behary Ghose*, Babus *Haribhusan Mookerjee* and *Surendra Nath Das Gupta*, for the Appellant.

Babus *Tarakishore Chowdhry* and *Bepin Chandra Mullick*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent in respect of 170 *bighas* 19 *cottahs* and 8 *chittaks* of alluvial land at an annual rate of Rs. 296-8 together with cesses, interest and costs. The case for the plaintiff is that these lands were formed by gradual accretion, by recession of the river Jumna, that the Government resumed these lands and on the 9th April 1903 settled them with the plaintiff and that the defendant, who is in occupation of these lands, is consequently liable to pay rent at the rate assessed by the Settlement Authorities. The defendant, who has died during the pendency of this litigation and is now represented by his successors-in-interest, denied the title of the plaintiff. His case substantially was that he held the lands under a lease granted to him by the plaintiff and her co-sharers on the 19th February 1884 and that the suit is accordingly not maintainable in the absence of those co-sharers. The defendant also contended that under the lease he was bound to pay rent only at the rate of 15 annas per *Bigha*. The Court of first instance held that the plaintiff was entitled to recover rent, but not at the rate claimed by her. In this view the Court made a decree in favour of the plaintiff for rent at the rate of 15 annas per *bigha*. Both parties were dissatisfied with this decision and preferred appeals to the Subordinate Judge, who has dismissed the appeal of the plaintiff and allowed the appeal of the defendant, with the result that the suit has been dismissed in its entirety. The view taken by the Subordinate Judge is that the lands are covered by the lease of the 19th February 1884 and that the plaintiff is not entitled to claim rent in respect thereof, until she joins her co-sharers as parties plaintiffs or defendants to the suit. In support of this view, the Subordinate Judge has placed reliance upon the case of *Assanullah Bahadur* v. *Mohini Mohan Das* (1). In the present appeal, it has been contended on behalf of the plaintiff that the view taken by the Subordinate Judge is erroneous and the case upon which he relies is distinguishable. The argument on behalf of the plaintiff in substance is that the effect of the resumption by the Government of these alluvial lands and their settlement with the plaintiff was to constitute a new tenure and that the plaintiff as tenure-holder under the Government is alone entitled to collect rent, in the suit as framed, from the defendant. On behalf of the respondent it has been argued that as the plaintiff, before resumption by the Government, was one of the persons who had granted settlement to the defendant, the resumption and the settlement with the plaintiff did not affect the pre-existing contract between the parties. In support of this view reliance has been placed upon the decision already mentioned, while on behalf of the appellant reference has been made to the observation of the Judicial Committee in the case of *Pria Nath Das* v. *Ramtaran Chatterjee* (2). In our opinion, the extreme contention put forward by each of the parties is unsound and cannot prevail.

To determine the fundamental question in the case, namely, the effect of the resumption by the Government and the settlement of the lands with the plaintiff, reference must be made to the provisions of the Land Settlement Act of 1858. The first section, which provides for the addition of revenue assessed upon alluvial land to the *jama* of the original estate, is in these terms: "When land added by alluvial accession to an estate paying revenue to Government becomes liable to assessment, if it be so agreed on between the Revenue Authorities and the proprietor or proprietors, the revenue

(1) 26 C. 739.

(2) 30 C. 811; 7 C. W. N. 601 (P. C.).

assessed upon the alluvial land may be added to the *jama* of the original estate; and in such a case, a new engagement shall be executed for the payment of the aggregate amount, and that amount shall be substituted in the Collector's rent-roll for the former *jama* of the original estate." The second part of the section deals with the case when a separate settlement is made and is in these terms: "If the proprietor or proprietors object to such an arrangement, or if the Revenue Authorities are of opinion that a settlement of the alluvial land cannot properly be made for the same term as the existing settlement of the original estate, the alluvial land shall be assessed and settled as a separate estate with a separate *jama* and shall thenceforward be regarded and treated as in all respects separate from and independent of the original estate, whether the separate settlement be made with the proprietor or proprietors or the land be let in farm in consequence of the refusal of the proprietor or proprietors to accept the terms of settlement. The separate Settlement may be permanent if the Settlement of the original estate is permanent." The second section of the Act deals with the question of the rights of under-tenants in alluvial land. The first part provides that: "Nothing contained in the first section shall affect the rights of any under-tenant in any alluvial land under the provisions of clause I, section 4, of Regulation XI of 1825." The second part lays down that "it shall be the duty of all officers making settlements of such land, whether the land be settled separately or incorporated with the original estate, to ascertain and record all such rights according to the rules prescribed in Regulation VII of 1822, and to determine whether any and what additional rent shall be payable in respect of the alluvial land by the person or persons entitled to any under-tenure in the original estate."

In the case before us the alluvial land has not been settled with the entire body of proprietors of the original estate, but with only one of them. This is the feature which differentiates the present case from the cases of *Assanullah Bahadur* v. *Mohini Mohan Das* (1), *Pria Nath Das* v. *Ramtaran Chatterji* (2) and *Mohendra Nath Biswas* v. *Shyamlal Banerjee* (3). In each of these cases, the settlement was with the original proprietors. It has been contended before us, on the one hand, that as the settlement has been made with one only of the entire body of persons who had proprietorship of the original estate, he is in the same position as an entire stranger. It has been contended, on the other hand, that the fact that the settlement has been made with a part proprietor, places him in the same position as if he had been the sole proprietor of the original estate. We are not prepared to accept either of these contentions as well-founded. The plaintiff was a proprietor of the original estate to the extent of a two-thirds share. To that extent, she is bound by the terms of the pre-existing contract. But to the extent that she was a stranger to the original estate, namely, to the extent of one-third share, she is in the same position as a stranger would have been, if the stranger had taken the settlement from Government in respect of that particular share. This view is supported to some extent by the observation of the Judicial Committee in the case of *Pria Nath Das* v. *Ramtaran Chatterjee* (2). The passage to which we refer is in these terms: "If it had seemed good to the Government to take the land into their own *khas* possession, or to settle it on strangers to the contract with the respondent Chatterjee, then the recorded rent would have been the rate of payment by that respondent. But the lands having been settled on the heirs of the Raja who granted the *pattah*, the Act does not interfere with the contractual rights of the subordinate holder," because "the resumption by Government did not disturb the possession either of the Raja's heirs or of Chatterjee. The mere fact of resumption cannot be held to have brought to an end the rights of the respondent Chatterjee under the *pattah*, for the *pattah* itself recognises the precarious nature of the grantor's title, and provides against the loss of possession should that be the result." Consequently, the true position is that in respect of a two-thirds share, the plaintiff is bound by the terms of the contract, that is, she is entitled to realise rent at the rate of 15 annas a *bigha*, while in respect of the remaining one-third share, she is in the position of a stranger and is entitled to realise rent at the rate assessed by the Settlement Authorities as payable by the under-tenure-holder of the original estate.

(3) 23 Ind. Cas. 16; 19 C. L. J. 308; 18 C.W. N. 907.

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Before we deal with the question of the actual amount of rent payable by the defendant to the plaintiff, one contention of the respondent requires consideration, namely, that the plaintiff is not entitled to maintain the present suit in the absence of her co-sharers. In the Court of first instance, the objection was taken that the co-sharers of the plaintiff were necessary parties to the litigation, but in the written statement no reason was assigned why their presence was necessary. The objection appears to have been based on the ground that notwithstanding the resumption, the defendant was entitled to hold this land as an accretion to the land of the original estate granted to him by the lease of the 19th February 1884. That contention, as we have already held, cannot be maintained: the land in respect of which settlement was made by the Government formed a separate tenure. From this point of view, the co-sharers of the plainitff are not necessary parties to this suit. It has been argued, however, that the co-sharers are necessary parties from a different standpoint. Our attention has been invited to a passage in the judgment of the Subordinate Judge in which he states that the evidence on both sides shows that the process of accretion has been in operation since a quarter of a century back and even earlier, and reference has been made to the deposition of a witness who stated that accretion had already commenced when the lease of the 19th February 1884 was granted. It has been argued that from this point of view the presence of the co-sharers of the plaintiff would be necessary, in order to determine the boundary between the land gained before 1884 and the land gained subsequently. But this objection is clearly not available to the respondent at this stage. The objection was undoubtedly not contemplated by the written statement and if it were now entertained, a remand to the Court of first instance for investigation of a question of fact would be needed.

We hold that the plaintiff is entitled to rent from the defendant at the rate of 15 annas a *bigha* in respect of two-thirds of the land and at the rate determined by the Settlement Authorities under section 2 of Act XXXI of 1858 for the remaining one-third. Here, however, the plaintiff has to face a difficulty for which she alone is responsible. The plaintiff stated in the plaint that the rate as determined by the Settlement Authorities was Rs. 296-8 for 182 *bighas* 19 *cottahs* and 8 *chittaks* of land. An examination of the materials on the record indicates that this statement was erroneous. The papers, in so far as they have been produced, show that Rs. 296-8 is the fair rent payable by the actual cultivators of the soil in respect of the lands held by them. The plaintiff consequently is not entitled to realise rent from the defendant at this rate. The plaintiff has thus failed to prove the rate determined as fair by the Settlement Authorities. We are consequently obliged to deal with the matter under section 103 of the Code of Civil Procedure and investigate what would be the fair rate payable by the defendant to the plaintiff in respect of an one-third share of the land in dispute. If we make an allowance of 10 per cent. for collection charges and reserve to the defendant a profit of 10 per cent. on the remainder as contemplated by section 7 of the Bengal Tenancy Act, the rent payable by the defendant as tenure-holder would be approximately at the rate of Re. 1-6-0 per *bigha*.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. We hold that the plaintiff is entitled to rent in respect of two-thirds of the land at the rate of annas 15 per *bigha*, and in respect of the remaining one-third at the rate of Re. 1-6-0 per *bigha*. She will further be entitled to cesses and interest on the amount decreed as rent, as also costs in proportion to her success in all the Courts. The defendant must bear his own costs throughout the litigation. A self-contained decree will be drawn up in this Court for the amount allowed.

We desire to make one reservation with regard to the one-third share of the land in respect whereof the plaintiff is not bound by the terms of the contract of 1884. We leave it open to the parties to show in a future litigation what is the rent, if any, settled by the Settlement Authorities under section 2 of Act XXXI of 1858. The fact that we have in this suit allowed the plaintiff rent at the rate of Re. 1-6-0 in respect of that one-third share, will not affect the determination of this question between the parties hereafter.

Appeal allowed.

BAIZNATH LALA *v.* RAMADOSS.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2026 OF 1912.

October 21, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

BAIZNATH LALA—PLAINTIFF—APPELLANT

versus

RAMADOSS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73—Limitation Act (IX of 1908), s. 14, Sch. I, Arts. 62, 120—Suit to recover money paid to defendant under s. 73, Code of Civil Procedure—Limitation—Revision when other remedy open, time taken in, whether excluded to save limitation.

A suit by a plaintiff to recover from a defendant money paid to him under section 73 of the Code of Civil Procedure is a suit to recover from the defendant money paid to him for plaintiff's use and should, therefore, be brought within three years from the date when the defendant received the money, and not within six years under Article 120 of the Limitation Act.

Vishnu Bhikaji Phadke v. *Achut Jagannath Ghati*, 15 B. 438; *Shankar Sarup* v. *Mejo Mal*, 23 A. 313; 3 Bom. L. R. 713; 5 C. W. N. 649; 28 I. A. 203 (P. C.); *Mahomed Wahib* v. *Mahomed Ameer*, 32 C. 527; 1 C. L. J. 167; *Shanmuga Vela Pillai* v. *Govindasami* 30 M. 459; 17 M. L. J. 452 at p. 453, *Bhagwan Das* v. *Karam Husain*, 11 Ind. Cas. 145; 33 A. 708 at p. 719; 8 A. L. J. 854; *Sankunni Menon* v. *Govinda Menon*, 14 Ind. Cas. 254, 22 M. L. J. 485; 11 M. L. T. 325; (1912) M. W. N 516; 37 M. 381, followed.

Moses v. *Macpherlan*, 97 Eng. Rep. 676; 2 Burr. 1005; 1 W. Bl. 219, referred to.

Gurudas Pyne v. *Ram Narain Sahu*, 10 C. 860; at p. 864 (P. C.); 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548, *Ramasawmy Chettiar* v. *Hari Krishna Chettiar*, 10 Ind. Cas. 658; 21 M. L. J. 705; 9 M. L. T. 465; (1911) 2 M. W. N. 220; distinguished.

Where a person files a revision petition to the High Court against an order of a Subordinate Court when he had another remedy open to him, he is not entitled to a deduction of the time occupied in prosecuting the revision petition under section 14 of the Limitation Act.

Raj Krishto Roy v. *Beer Chunder Joobraj*, 6 W. R. 308, distinguished.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 255 of 1911, preferred against that of the Court of the District Munsif of Tirupathi, in Original Suit No. 402 of 1910.

FACTS.—The plaintiff and the defendant are both judgment-creditors of the same debtor. The latter having deposited a certain sum of money in Court the plaintiff applied for rateable distribution of the said sum. The District Judge of North Arcot dismissed the plaintiff's application on 18th October 1905 and the money in Court was paid to the defendant on 19th October 1905. The plaintiff thereupon applied to the High Court on 21st December 1905 to revise the said order of the District Court, but the civil revision petition was dismissed on 12th December 1906, on the ground that the plaintiff's remedy was by suit. The plaintiff filed the present suit on 11th December 1909 for a refund of the amount wrongfully paid to the defendant on the 19th October 1905. Both the lower Courts held that the suit was barred by Article 62 of the Limitation Act and dismissed the suit. The plaintiff thereupon preferred this second appeal.

Mr. *C. V. Ananthakirshna Aiyar*, for the Appellant:—The suit is governed by Article 120, and not by Article 62, and the period of limitation is six years. In none of the cases referred to by the Court below is the question considered whether Article 62 or Article 120 applied. The learned Judges had not to consider that question. *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghati* (1) only holds that Article 13 is inapplicable.

[AYLING, J.—It does not hold that Article 62 is applicable.]

Shankar Sarup v. *Mejo Mal* (2) also considers the applicability of Article 13 *Gurudas Pyne* v. *Ram Narain Sahu* (3) throws light on the effect of Article 62.

[AYLING, J.—It is not natural to speak of a person, to whom a sum is paid by an order of Court as against a person who claims it, as one who receives money for the use of his rival claimant within the meaning of Article 62.]

There was no provision for a suit in the Code of 1859. It was introduced for the first time in that of 1871. But the Article had been in the Limitation Act even before that. Hence the suit by an unsuccessful applicant for rateable distribution cannot be said to be one covered by Article 62 *Ramasawmy Chettiar* v. *Hari Krishna Chettiar* (4) and *Bhagwan Das* v. *Karam Husain* (5). Even if Article 120 is held inapplicable, the appellant is entitled to a deduction of the period between 18th October 1905 (the date

(1) 15 B. 438.

(2) 23 A. 313; 3 Bom. L. R. 713; 5 C. W. N. 649; 28 I. A. 203 (P. C.).

(3) 10 C. 860 at p. 864 (P. C.); 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548.

(4) 10 Ind. Cas. 658; 21 M. L. J. 705; 9 M. L. T. 465; (1911) 2 M. W. N. 220.

(5) 11 Ind. Cas. 145; 33 A. 708 at p. 719; 8 A. L. J. 854.

of the District Judge's order dismissing his petition) and 12th December 1906 (the date of the High Court order dismissing the civil revision petition): section 14 of the Limitation Act and *Raj Krishto Roy* v. *Beer Chunder Joobraj* (6). Appeal in section 14 of the Limitation Act includes revision. The appellant is entitled to a deduction of the time between 18th October 1905 and 21st December 1905, as that was necessary for obtaining a copy of the order of the Court below for taking proceedings in revision in this Court. Provided that appellant was diligent in applying for copies that period must be deducted. In cases where a suit was wrongly instituted and wrongly prosecuted in appeal, it has been held that the plaintiff is entitled to a deduction not merely of the time during which the suit and the appeal were actually pending but also the time taken up for obtaining copies. The principle of those cases is applicable to the present case. *Raghu Nath Bhagat* v. *Syed Samad Shah* (7) is authority for the position that the mere fact that the deduction of time is not claimed in the plaint is not a ground for disallowing it.

Mr. *L. A. Govindraghava Aiyar*, for the Respondent:—The lower Courts are right in holding that Article 62 is applicable. Article 120 is not applicable if any of the specific Articles mentioned before is applicable. *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghati* (1) is an express decision on the applicability of Article 62. The test is, is the defendant entitled in equity to keep the money with him in safe conscience, though by positive law the other party is barred from recovering it? *Moses* v. *Macpherlan* (8). The nature of action is for money "had and received." *Smith* v. *Lewis* (9), *Shanmuga Vela Pillai* v. *Govindasami* (10) and *Mahomed Wahib* v. *Mahomed Ameer* (11) hold that Article 62 and not Article 120 is applicable.

[AYLING, J.—It is very funny that if the Legislature intended in Article 62 to provide for the case of "had and received", it should not have introduced the whole of the expression "had and received".]

(6) 6 W. R. 308.
(7) 7 C. L. J. 560; 12 C. W. N. 617.
(8) 2 Bur. 1005; 1 W. Bl. 219; 97 Eng. Rep. 676 at p. 680.
(9) (1902) 2 Ch. 667; 71 L. J. Ch. 885; 51 W. R. 11.
(10) 17 M. L. J. 452 at p. 453; 30 M. 459.
(11) 32 C. 527; 1 C. L. J. 167.

Hanuman Kamat v. *Hanuman Vandur* (12) interprets "received" in Article 62 as "had and received." It is not the defendant's intention and the nature of the claim set up by him that determine the applicability of Article 62. The case of *Mahomed Wahib* v. *Mahomed Ameer* (11), which is exactly in point, explains the decision of the Privy Council in *Gurudas Pyne* v. *Ram Narain Sahu* (3) referred to on the other side. *Shankar Sarup* v. *Mejo Mal* (2) approves of *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghati* (1). In *Bhagwan Das* v. *Karam Husain* (5) the majority of the Full Bench applied Article 62, though Richards, C.J., was doubtful as to the Article which was applicable. See also *Bithal Das* v. *Nand Kishore* (13); *Rajputana Malwa Railway Co-operative Stores, Ltd.* v. *Ajmer Municipal Board* (14); *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (15); *Sankunni Menon* v. *Govinda Menon* (16); *Avancha Lakshminarasamma* v. *Avancha Lakshamma* (17); *Ramaswamy Chettiah* v. *Hari Krishna Chettiar* (4) and *Nilakanta* v. *Imam Sahib* (18). No revision lies where another remedy is open. *Subramanya Chettiar* v. *Arunachelam Chettiar* (19). A suit is always open to the plaintiff. Hence the time taken up in revision cannot be deducted. Further, the language of section 14 of the Limitation Act is not unrestricted.

[AYLING, J.—Section 14 speaks of "prosecuting" and not of thinking to prosecute.]

Raj Krishto Roy v *Beer Chunder Joobraj* (6) cannot be held to be good law now. In the old law, there was no explanation.

Mr. *C. V. Ananthakrishna Aiyar*, in reply:—Most of the cases quoted on Article 62 are cases in which there was some circumstance or other to show that the defendant was acting improperly in withholding the money, such as dishonesty. In none of them was there an adjudication by a Court in pursuance of which the defendant received the money. There is plenty of authority to show that

(12) 19 C. 123 at p. 126 (P. C.); 18 I. A. 158.
(13) 23 A. 106 at p. 110; A. W. N. (1901) 4.
(14) 6 Ind. Cas. 401; 32 A. 491; 7 A. L. J. 496.
(15) 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 94.
(16) 14 Ind. Cas. 254; 22 M. L. J. 485; 11 M. L. T. 325; (1912) M. W. N. 516; 37 M. 381.
(17) 21 Ind. Cas. 394; 14 M. L. T. 325; (1913) M. W. N. 836; 25 M. L. J. 531.
(18) 16 M. 361; 3 M. L. J. 364.
(19) 16 Ind. Cas. 692; (1912) M. W. N. 956.

when a right of suit is given by a Statute, Article 62 is inapplicable to it. *Nilakanta* v. *Imam Sahib* (18) is in my favour. Mitra on Limitation, Volume 2, p. 1061. Suit for the recovery of money paid for a consideration which has subsequently failed, is a suit for "money received." The present case is not like that. *Barhamdeo Prasad* v. *Tarachand* (20).

JUDGMENT.—The questions for decision in this second appeal are (1) whether the lower Courts are right in holding that Article 62, and not Article 120, of the Schedule to the Limitation Act applies to the facts of this case, (2) whether even if Article 62 applies, the suit is still in time by virtue of a deduction to which the plaintiff claims to be entitled with reference to section 14 of the Limitation Act, and (3) whether the lower Courts should have allowed the plaint to be amended so as to enable plaintiff to raise the second point.

The plaintiff, who is the appellant before us, brought the suit from which this second appeal arises under section 73 of the Code of Civil Procedure, his application for rateable distribution as against the defendant in respect of certain assets in Court deposited by a third party, against whom plaintiff and defendant had obtained decrees, having been refused by the District Court of North Arcot on 18th October 1905. The defendant drew the money in question from Court on 19th October 1905. The plaintiff filed a revision petition in the High Court to set aside the order of the District Court on 21st December 1905. That petition was dismissed on 12th December 1906. The present suit was filed on 11th December 1909. If Article 120 applies to the case the suit is in time in any view, but if Article 62 is to be applied it will be barred unless the plaintiff can show he is entitled to deduct the excess period by virtue of section 14 of the Limitation Act.

Now, Article 120 can only be applied when there is no other Article of the Limitation Act applicable. In support of the view that Article 62 is the proper one to apply, the cases of *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghati* (1); *Shankar Sarup* v. *Mejo Mal* (2) *Mahomed Wahib* v. *Mahomed Ameer* (11) and *Shanmuga Vela Pillay* v. *Govindasami* (10) have been relied on both here and in the lower Court. The first case is direct authority on the point. The suit in that case was brought under section 295 of the Code of 1882, which corresponds to section 73 of the present Code, and it was held that such a suit falls under Article 62, the case of *Moses* v. *Macfarlane* (8) being referred to evidently as authority for the position that the suit was one for money received for the plaintiff's use. The decision in *Vishnu Bhikaji* v. *Achut Jagannath Ghati* (1) is referred to with approval by the Privy Council in *Shankar Sarup* v. *Mejo Mal* (2) upon the question whether a suit under section 295 is a suit to set aside the order of the Court passed under that section, and it was held that it was not such a suit and that, therefore, Article 13 of the Limitation Act would not apply. It was only upon that point that the case was referred to and the decision of that point was sufficient for the purposes of the case. Their Lordships expressed no opinion as to whether the proper Article to apply was Article 62 or Article 120 and the case (though so far as it goes it supports the lower Courts' view) cannot be regarded as direct authority upon that point.

The cases of *Mahomed Wahib* v. *Mahomed Ameer* (11) and *Shanmuga Vela Pillai* v. *Govindasami* (10) were not cases of suits under section 73 of the Code. But the true nature of the class of suits described in Article 62 of the Limitation Act is considered in the former decision and Sir Subramania Iyer in the latter case expresses his agreement with the views laid down by the learned Judges of the Calcutta High Court. The conclusion arrived at in the Calcutta case was that the description of the suits mentioned in Article 62 as suits for money received by the defendant for the plaintiff's use pointed to the well-known English action in that form and that consequently, the Article ought to apply wherever the defendant has received money, which in justice and equity belongs to the plaintiff, in circumstances which in law render the receipt of it by the defendant a receipt for the use of the plaintiff. This view has been followed by the Allahabad High Court in *Bhagwan Das* v. *Karam Husain* (5) and by this Court in *Sankunni Menon* v. *Govinda Menon* (16). We agree with the opinion of Mr. Justice Mookerjee in the Calcutta case that the inten-

(20) 21 Ind. Cas. 961; 15 M. L. T. 62 at p. 65; (1914) M W. N. 38; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R. 89; 26 M. L. J. 243 41 C. 654.

tion of the defendant at the time of receipt of the money to receive it for himself and not for the plaintiff is not the test by which the question, whether the money was in fact received for the plaintiff's use, has to be decided. As observed by the Privy Council in *Shankar Sarup* v. *Mejo Mal* (2): "The scheme of section 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seems at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present." If on such a re-adjustment being made the plaintiff in a suit under section 73 is found to be entitled to a portion of the assets which have been paid to the defendant, we are of opinion that the latter must be regarded as having received the portion so paid to him "for the use of the plaintiff." In this connection we may refer to the extract from Blackstone's Commentaries cited by Mr. Justice Harrington in *Mahomed Wahib* v. *Mahomed Ameer* (11): "This species of action lies when one has had and received money belonging to another without any valuable consideration given on the Receiver's part; for the law construes this to be money had and received for the use of the owner only." We think these words fitly apply to the facts of the present case.

The appellant relies upon the cases of *Gurudas Pyne* v. *Ram Narain Sahu* (3) and *Ramasawmy Chettiar* v. *Hari Krishna Chettiar* (4). As regards the former, it had been pointed out both in *Mahomed Wahib* v. *Mahomed Ameer* (11) and *Bhagwan Das* v. *Karam Husain* (5) that the money received by the defendant in that case did not belong to the plaintiff, but a third party, and that the plaintiff had a mere equitable claim to follow that money in the hands of the defendant. It was in these circumstances that Article 62 was held inapplicable by the Privy Council. It is plain that the facts of that case were, therefore, quite different from the present. In the second case [*Ramasawmy Chettiar* v. *Hari Krishna Chettiar* (4)] the plaintiff claimed as assignee of a decree but at the time when the money claimed by him was realized by the defendant, the plaintiff's suit to establish his right as assignee had been dismissed. The Court in these circumstances held that as at the time when the defendant realized the money, the plaintiff could not himself have collected the amount by reason of the dismissal of his suit to establish his title as assignee, the defendant could not be said to have received the money for his use in any sense. With all respect we are unable to follow that decision. The plaintiff in this case was eventually found entitled to share in the assets realized by the defendant and that being so, we do not see why the mere fact that the plaintiff's suit to establish his rights as assignee had been dismissed at the time when the money was realized by the defendant, should suffice to take the case out of the purview of Article 62.

In the result, therefore, we think the lower Court was right in holding that Article 62 should be applied to the facts of the present case.

The second point depends upon the question whether the plaintiff would be entitled, by virtue of section 14 of the Limitation Act, to deduct the time between the order of the District Court disallowing his petition for rateable distribution and the disposal of his revision petition by the High Court (*i.e.*, from 19th October 1905 till 12th December 1906) or only the time from the presentation of the revision petition until its disposal (*i. e.*, from 21st December 1905 till 12th December 1906). The plaintiff relies upon the decision in *Raj Krishto Roy* v. *Beer Chunder Joobraj* (6) in support of the first alternative. We think that case is not in point here. It was a case where the plaintiff's suit was dismissed for want of jurisdiction and the plaintiff then tried unsuccessfully to remedy his failure by appeal. In these circumstances, it was held that as the law allows a fixed time for appeal in order to allow the unsuccessful party to consider whether he will appeal or not, if a party appeals within the time so fixed, he ought to be considered as proceeding with due diligence between the decision of the suit and the filing of the appeal. Here, there was no question of appeal. Though the plaintiff had a right of suit under section 73 of the Code, he elected to proceed by revision in the High Court and the law does not fix any period within which petitions for revision are required to be brought. In these circumstances it seems to us that the case cited is not in point

and that it cannot be said that the plaintiff was prosecuting a proceeding at all while he was merely making up his mind to apply for revision. In this view the time which expired between the order of the District Court and the filing of the revision petition in the High Court (*viz.*, from 19th October 1905 till 21st December 1905) cannot be excluded, as the plaintiff contends, under section 14 of the Limitation Act. It is conceded that if this period be not excluded, the suit is still out of time. We think, further, that the respondent is entitled to rely upon the contention that in any event plaintiff cannot be said to have prosecuted the revision petition in good faith, within the meaning of section 14 of the Limitation Act, inasmuch as it has been frequenty held by this and other High Courts that the High Court will not exercise its revisional powers when there is any other remedy open. Here the plaintiff had his remedy by suit.

It is unnecessary in these circumstances to consider the third point raised regarding amendment of the plaint.

The second appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2610 OF 1913.

November 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

GOPALA AIYAR—PLAINTIFF—APPELLANT

versus

RAMA VENKATASUBBA IYER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64 - Attachment of mortgagee's rights—Subsequent alienation by mortgagee of his mortgage rights—Money reserved with alienee to pay off attaching creditors Attachment by another creditor of moneys in assignee's hands—Payment by alienee to prior attaching creditors Subsequent attachment, effect of, on such payment Assignor and assignee—Direction in assignment deed to pay debt, if can be revoked before payment - Revocation, power of, how affected by character of debt, secured or unsecured.

A direction in an assignment-deed that the assignee should discharge certain debts due by the assignor to third parties, out of the moneys forming the consideration for the assignment, may be revoked by the assignor at any time before the debts are actually paid by the assignee if the debts are unsecured, but it cannot be so revoked if the debts are secured.

Where, pending attachment by two creditors of his rights under certain mortgages, the mortgagee assigned his rights therein to the 1st defendant and directed him to pay the consideration for the assignment to the attaching creditors and the assignee afterwards paid them off, but not before the money in his hands had been attached at the instance of the plaintiff, another creditor of the assignor:

Held, that the assignee was entitled to protect himself by paying off the prior attaching creditors, and that such payment did not offend against the provisions of section 64 of the Civil Procedure Code and could not be impeached by the plaintiff.

Raghunatha Chariar v. *Sadagopa Chariar*, 12 Ind. Cas 353; (1911) 2 M. W. N. 227; 10 M. L. T. 300; 36 M. 348; 21 M. L. J. 983 at p. 987, followed.

Second appeal against the decree of the Subordinate Judge of Tinnevelly, in Appeal Suit No. 111 of 1912, preferred against that of the Additional District Munsif of Tinnevelly, in Original Suit No. 298 of 1910.

FACTS.—The rights possessed by the 2nd defendant in two mortgage-deeds standing in his name having been attached by two of his creditors, *N* and *S*, under decrees obtained by them, he assigned his rights under the said mortgages in favour of the 1st defendant, on the latter undertaking to pay the decree-debts of *N* and *S*. Before, however, the 1st defendant paid the sum reserved with him to *N* and *S*, plaintiff had it attached in execution of a decree he had obtained against the 2nd defendant. Subsequent to the plaintiff's attachment, 1st defendant paid *N* and *S* the moneys reserved with him as per assignment-deed and due to *N* and *S* under their decrees. The plaintiff, thereupon, got himself appointed as Receiver in the proceedings in execution of the decree which he had obtained against the 2nd defendant and filed the present suit against the defendants to recover the sum for which he had effected the attachment, on the ground that the 2nd defendant had fraudulently executed the assignments in question after he had notice of the prohibitory order issued in execution of plaintiff's decree and that the assignments were void under section 64 of the Civil Procedure Code and could not prevail as against his rights under the attachment. The 1st defendant contended that as under the assignment the sum which had been reserved for payment to *N* and *S* ceased to be the property of the 2nd defendant, the attachment by the plaintiff was ineffectual and that he was entitled to protect himself by

paying off *N* and *S*, in spite of the plaintiff's attachment. The Court of first instance found that the 1st defendant did not pay off *N* and *S* and gave the plaintiff a decree for Rs. 750. On appeal the Subordinate Judge found that *N* and *S* had been paid by the 1st defendant, and that notwithstanding that the payments had been made after notice of the prohibitory order issued at the instance of the plaintiff, the said payments were valid and binding on the plaintiff. He, therefore, dismissed the plaintiff's suit. Plaintiff, thereupon, preferred this second appeal to the High Court.

Mr. *T. R. Krishnaswamy Aiyar*, for the Appellant:—The finding is that the 1st defendant paid the amount reserved with him under the assignment after receipt of notice of the prohibitory order issued at the instance of the plaintiff. The payments are, therefore, invalid and cannot prevail against the right of the plaintiff under his attachment. See section 64, Civil Procedure Code. Notwithstanding the conditions of the assignment the amount reserved continued to belong to the 2nd defendant, the assignor.

Mr. *C. V. Ananthkrishna Aiyar*, for the Respondents:—Under the assignment the amount was directed to be paid to the attaching creditors. The assignor could not, therefore, revoke the direction and the 1st defendant was entitled to protect himself by paying them off. See *Raghunatha Chariar* v. *Sadagopa Chariar* (1). Section 64 of the Code of Civil Procedure does not apply to this case. On the date of service on the 1st defendant of the prohibitory order, he had no money of the assignor in his hands.

JUDGMENT.—The plaintiff is the appellant in this second appeal. He attached in January 1908 the balance of the purchase-money due by the 1st defendant to the 2nd defendant who had sold to the 1st defendant his (2nd defendant's) rights as mortgagee under two mortgage-deeds. The sales by the 2nd defendant of the said mortgage rights were in November 1907. On the date of the sale of the said mortgage rights of the 2nd defendant to the 1st defendant, those rights were under attachment in execution of two other decrees of the District Munsif's Court of Ambasamudram passed against the 2nd defendant, the decree-holders in those two suits being Narasier and Subramania Pandaram. The sale-deed, therefore, by the 2nd defendant directed portions of the purchase money to be paid by the 1st defendant to those two decree-holders. The 1st defendant did not pay those portions to those two decree-holders till the plaintiff attached those moneys in January 1908 and he paid them in February and June 1908.

The question is whether the 1st defendant was so entitled to pay up those sums to the decree-holders who had attached his vendor's mortgage rights after those sums had been attached by the plaintiff.

The learned Subordinate Judge in appeal held that as those sums were mentioned in the sale-deeds (or assignment-deeds), Exhibit I and Exhibit I (*a*), as payable to those two decree-holders, those decree-holders themselves obtained title to those sums and that the 2nd defendant lost his title to those sums. We shall assume without deciding that the learned Subordinate Judge's said view is erroneous. See *Iswaram Pillai* v. *Taregan* (2). It is contended by the appellant's learned Vakil on that basis that as the purchase-moneys retained by the 1st defendant still belonged to the 2nd defendant, the plaintiff's attachment of those moneys in the 1st defendant's hands cannot be defeated by the 1st defendant paying them up to the former decree-holders.

The answer to this contention seems to be that the 2nd defendant had not an absolute title to the moneys left in the hands of the 1st defendant. In the ordinary cases, where the vendor leaves the purchase-money in the hands of the purchaser to be paid to the vendor's simple creditors (who have got no incumbrance over the property sold), it may be that the vendor can revoke the direction to pay to his creditors and claim the unpaid purchase-money himself. He cannot, of course, do it if the creditors to be paid have incumbrances on the property sold. [See section 55, clause 5 (*b*), of the Transfer of Property Act].

In this case, it seems to us that where the purchaser (1st defendant) has purchased

(1) 12 Ind. Cas. 353; (1911) 2 M. W. N. 227; 10 M. L. T. 300; 36 M. 348; 21 M. L. J. 983 at p. 987.

(2) 23 Ind. Cas. 951; 26 M. L. J. 127.

the property (in this case, the 2nd defendant's mortgage rights) while under attachment and he cannot get a clear title to the property free from the claims enforceable under the attachments unless the amounts of the purchase-money retained by him were paid up in satisfaction of the decrees for which the attachments were issued (see section 64 of the Code of Civil Procedure), the vendor cannot claim an absolute right to the amounts retained by the vendee to be paid to the said decree-holders.

If then the 2nd defendant had no right to prevent the 1st defendant from paying up Narasier's and Subramania Pandaram's debts, in other words, if his right to those moneys could, at the 1st defendant's pleasure, be defeated by the 1st defendant's exercising the rights which he has, as against the 2nd defendant, to pay up those moneys to the former decree-holders in order to obtain a clear title to the property which he purchased [See *Raghunatha Chariar* v. *Sadagopa Chariar* (1)], the plaintiff's attachment of the 2nd defendant's rights in those moneys must also be subject to the same paramount right of the 1st defendant to protect his title as vendee by paying up the amounts for which the property sold to him was under attachment at the time of his purchase.

This is the only point of law arising in the case and as we decide it against the appellant, we dismiss the second appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 20 OF 1914.
August 4, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

PREM NARAIN—PLAINTIFF—APPELLANT

versus

RAM LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Jurisdiction—Partnership business—Accounts, rendition of, suit for—Cause of action, meaning of Proper Court—Place of suing—Civil Procedure Code (Act V of 1908), s. 20.

The term "cause of action" comprises every fact which is material to be proved to entitle the plaintiff to succeed and includes an assertion of the right infringed, and of the manner in which the infringement is made.

The carrying on of a partnership business being, as a material part of the cause of action for a suit for rendition of the partnership accounts, sufficient to give the plaintiff a right to sue at the place where the business is carried on, the mere fact that the consolidated accounts of the business are kept at another place would not by itself, in view of the provisions of section 20, Civil Procedure Code, oust the Court at the former place of the jurisdiction.

Luckmee Chund v. *Zorawur Mull*, 8 M. I. A. 291; 1 W. R. 35 (P. C.); 1 Suth. P. C. J. 425; 1 Sar. P. C. J. 763; 19 E. R. 541, referred to.

A suit for the adjustment of partnership accounts can conveniently lie at any of the places where the partnership business is substantially carried on although the contract of partnership took place somewhere else, for the place where an obligation is to be performed is its main seat and place of jurisdiction.

Barah Meah Saib v. *Khajee Meah Saib*, 4 M. H. C. R. 218, referred to.

Appeal against the order of the Subordinate Judge, Lucknow, dated 1st June 1914.

Mr. *A. P. Sen*, Babu *Salig Ram* and Syed *Shahinshah Husain*, for the Appellant.

Babu *Bisheshwar Nath*, for the Respondents.

JUDGMENT.—This is an appeal from an order passed by the Subordinate Judge of Lucknow, returning a plaint for presentation to the proper Court. The suit related to a partnership, the business of which was carried on partly at Lucknow and partly at other places. The allegation of the plaintiff was that the contract of partnership was entered into at Lucknow between Ram Prasad, the father of the plaintiff, and Jagan Nath, the Manager of the family to which the defendants belong, for dealing in the import and export of *kattha*, that a shop was started at Lucknow for the said purpose, that the accounts of the actual dealings which took place at Lucknow used to be entered in the account-books kept at the Lucknow shop and that the accounts of the profit and loss of the entire business used to be kept by Jagan Nath at Cawnpore. The partnership came to an end on the 15th February 1911 owing to the death of Ram Prasad, one of the partners.

The present suit was filed by the plaintiff on the 2nd January 1913 for rendition of accounts. The defendants denied that the contract of partnership took place at Lucknow and pleaded that the suit was not cognizable by the Court of the Subordinate Judge of Lucknow. The learned Subordinate

Judge held that the contract of partnership was entered into at Cawnpore and returned the plaint for presentation to the proper Court.

It is admitted by Ram Lal, defendant, in his evidence that a shop was maintained at Lucknow for carrying on the partnership business and that no shop appertaining to the partnership was opened at Cawnpore. The cause of action for a suit for the adjustment of accounts of a partnership arises at the place where the contract of partnership is entered into or where the business of the partnership is carried on, unless there is a special agreement that the accounts would be rendered only at a particular place. The term "cause of action" comprises every fact which is material to be proved to entitle the plaintiff to succeed and includes an assertion of the right infringed and of the manner in which the infringement is made. A cause of action may thus be composed of several parts, and if one material part, namely, the carrying on of the partnership business which gives rise to a claim for accounts, is sufficient to give the plaintiff a right to sue at the place where the business is carried on, the mere fact that the consolidated accounts of the business are kept at another place would not by itself oust the Court at the former place of its jurisdiction. Section 20 of the Code of Civil Procedure accordingly permits a suit to be instituted in a Court within the local limits of whose jurisdiction a cause of action wholly or in part arises. In *Luckmee Chund* v. *Zorawur Mull* (1) their Lordships of the Privy Council, in dealing with a case in which the contract of partnership was entered into at Rutlam for the purchase and sale of opium principally at Muthra, observed: "Now, where can it be said that the cause of action, supposing it exists for that balance, properly arose? Muthra was, undoubtedly, the central place of business; at Muthra the partnership books were kept; at Muthra the partners would have recourse to those books for the purpose of ascertaining the state of the transaction between them; and if, in the result, a balance was due to the appellants, Muthra would be the place where the payment of that balance would have to be made. It, therefore, appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership tranactions, that cause of action arose at Muthra." The adjustment of partnership accounts involves an examination of the credits, property and effects due and belonging to the partnership, and in some cases the appointment of a Receiver to collect the outstanding debts and assets. The outstanding debts in this case are mostly recoverable at Lucknow or through the Courts situated here. The accounts of the dealings at the Lucknow shop and the residue of the partnership property are also at Lucknow and, as pointed out in *Barah Meah Saib* v. *Khajee Meah Saib* (2), a suit for the adjustment of the partnership accounts can conveniently lie at any of the places where the business of partnership is substantially carried on. It is immaterial to inquire where the contract of partnership took place, for the place where an obligation is to be performed is its main seat and place of jurisdiction. The accounts were probably kept in this case both at Lucknow and Cawnpore, as found by the learned Subordinate Judge, but each partner now wishes to throw the responsibility of rendering the accounts on the other. The defendants do not allege that the agreement was to render the accounts only at Cawnpore. The contract, according to them, was that the father of the plaintiff was to keep the accounts of the entire partnership business and was alone to be responsible therefor.

We allow the appeal accordingly, set aside the order of the Court below and direct that the plaint be restored to its original number in the register and proceeded with according to law.

The costs will abide the result.

Appeal allowed.

(1) 8 M. I. A. 291; 1 W. R. 35 (P. C.); 1 Suth. P. C. J. 425; 1 Sar. P. C. J. 763; 19 E. R. 541.

(2) 4 M. H. C. R. 218.

MADRAS HIGH COURT.

FULL BENCH.

LETTERS PATENT APPEAL No. 37 OF 1914.

September 24, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, Mr. Justice Aiyling and Mr. Justice Seshagiri Aiyar.

VELLORE TALUQ BOARD BY ITS PRESIDENT—PETITIONER—APPELLANT

versus

GOPALASAMI NAIDU—RESPONDENT.

Contract Act (IX of 1872), s. 74—Earnest money—

VELLORE TALUQ BOARD *v.* GOPALASAMI NAIDU.

Breach of contract—Damages, in excess of earnest money.

Where a clause is entered in a contract providing for the forfeiture of a deposit made by the contractor, and the person for whose benefit the clause is entered in the contract does not content himself with retaining the deposit as a forfeiture but sues for actual loss incurred by him through the default of the other party, on the ground that the deposit amount is insufficient to cover such a loss or on the ground that the contract provides for both the forfeiture of the deposit and also for the right to recover the loss, *he cannot recover more than the difference between the loss incurred by him and the deposit money.*

Ockenden v. *Henley*, (1858) E. B. & E. 485; 27 L. J. Q. B. 361; 4 Jur. (N. S.) 999; 120 Eng. Rep. 590; 113 R. R. 740, *Essex* v. *Daniell*, 10 C. P. 538; 38 L. T. 476, *Howe* v. *Smith*, 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773, *Shuttleworth* v. *Clews*, (1910) 1 Ch. 176; 79 L. J. Ch. 121; 101 L. T. 708, followed.

Appeal under section 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Sadasiva Aiyar in Civil Revision Petition No. 596 of 1909 (reported in 21 Ind. Cas. 759), preferred against that of the Court of the District Munsif of Vellore in Small Cause Suit No. 133 of 1909.

FACTS.—The facts of the case appear fully from the judgments of Spencer and Sadasiva Iyer, JJ., reported in 21 Ind. Cas. 759. The appellant was the President of the Taluq Board of Vellore. The respondent was a contractor under the said Board of the right to collect market fees at the weekly fairs held at Karadigudi. As an earnest of his intention to perform the contract, he deposited a sum of Rs. 36-2-8, being two months' rent in advance. In case of default he agreed, "not only shall I (the defaulter) be deprived of the lease for the remaining months, but there shall be a re-sale at my risk and any loss resulting therefrom shall be made good from the moveable or immoveable properties belonging to me, and I shall also forfeit the aforesaid deposit of Rs. 36-2-8 paid by me." He did make default in the regular payment of the monthly rents on the due dates, and acting on the terms of the contract, the Taluq Board re-sold the right at his risk and sued to enforce the contract. The District Munsif before whom the suit was brought allowed the plaintiff's claim for loss less the deposit amount. On revision by the Taluq Board Spencer, J., found that the suit was to enforce two of the stipulations in the contract, *viz.*, (1) "that any loss resulting from a re-sale held in consequence of the defendant's default should be recovered from his properties, (2) the defendant should forfeit his deposit of Rs. 36-2-8", and held that the person suffering loss on default is entitled to recover the actual loss over and above the amount of deposit forfeited, while Sadasiva Aiyar, J., found that the suit was not to enforce both the stipulations in the contrace referred to above but to enforce only the first of those stipulations, the plaintiff Board having, before bringing the suit, treated the deposit of Rs. 35-2-8 which was with it as already forfeited, and held that plaintiff could not recover more than the difference between the loss incurred by him and the deposit money. In the result the petition was dismissed and the plaintiff Board appealed under clause 15, Letters Patent.

Mr. *S. Varadachariar* for Mr. *L. A. Govinda Raghava Iyer*, for the Appellant:—According to the view of his Lordship Justice Sadasiva Aiyar, no difference is made between the cases where the date of payment is expressly provided for and where no date is fixed. *Essex* v. *Daniell* (1) is clear on that point.

[Sir JOHN WALLIS., OFFG. C. J.—Was that case cited below?]

Mr. *S. Varadachariar.*—No, it was not. In the English case, there is a distinct provision that the deficiency should be paid out of the re-sale.

In the present case, also, there is a reference to the re-sale.

Cornwall v. *Henson* (2).

[Sir JOHN WALLIS, OFFG. C.J. – Where is the rule that when property is deposited it becomes the property of the depositee?]

Mr. *S. Varadachariar.*—I say by reason of the breach.

[Mr. AYLING, J.—Do you mean to say that by reason of the breach, it becomes his?]

[Sir JOHN WALLIS, OFFG. C. J.—How does *Howe* v. *Smith* (3) decide the case? It only concerns itself whether the amount deposited could be recovered back.]

Mr. *S. Varadachariar.*—Fry, J., makes special reference to *Howe* v. *Smith* (3). The basis of *Ockenden* v. *Henley* (4) is inconsistent with *Howe* v. *Smith* (3).

(1) L. R. 10 C. P. 538; 38 L. T. 476.

(2) (1899) 2 Ch. D. 710; 68 L. J. Ch. 749; 48 W. R. 42; 81 L. T. 113; 15 T. L. R. 544.

(3) 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

(4) (1858) E. B. & E. 485; 27 L. J. Q. B. 361; 4 Jur. (N. S.) 999; 120 Eng. Rep. 590; 113 R. R. 740.

[Sir JOHN WALLIS, OFFG. C. J.—Sometimes the earnest takes the form of a plate, something which will not give anything.]

Mr. S. *Varadachariar*.—At bottom of page 104, he refers to the same observations.

[Sir WALLIS, OFFG. C. J.—How do you explain Fry, J.'s observations?]

Mr. S. *Varadachariar*.—There are two other cases, *Griffiths* v. *Vezey* (5) and *Shuttleworth* v. *Clews* (6). Both of them are inconsistent with each other. The second case is a judgment of Joyce, J. In the argument, reference is made to *Ockenden* v. *Henley* (4).

[Sir JOHN WALLIS, OFFG. C. J.—Payment of deposit is a part payment of purchase-money.]

Mr. *C. R. Subramania Aiyer*, for the Respondent, was not called upon.

JUDGMENT.—We think the case is covered by the authority of *Ockenden* v. *Henley* (4), which was distinguished in *Essex* v. *Daniell* (1), and referred to with approval by Fry, J., in *Howe* v. *Smith* (3) and was apparently followed by Joyce, J., in the most recent case of *Shuttleworth* v. *Clews* (6).

We accordingly agree with Sadasiva Aiyar, J., and dismiss the appeal with costs.

Appeal dismissed.

(5) (1906) 1 Ch. D. 796; 75 L. J. Ch. 462.

(6) (1910) 1 Ch. 176; 79 L. J. Ch. 121; 101 L. T. 708.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF CEYLON.

December 16, 1913.

Present:—Lord Dunedin, Lord Shaw and Lord Moulton.

SAMINATHAN CHETTY AND ANOTHER —APPELLANTS

versus

PLANAIAPPA CHETTY—RESPONDENT.

Ceylon Civil Procedure Code, s. 34—Civil Procedure Code (Act V of 1908), O. II, r. 2—Causes of action—Arbitration, dispute between two partners of money lending firm settled by—Award—"Receipt"—Accord and satisfaction by substituted agreement—Pro-notes in lieu of "receipt"—Pro-notes altered—Suit on pro-note dismissed—Fresh suit for amount in receipt, whether maintainable—Causes of action, inclusion of.

A dispute between the two partners of a money-lending firm was referred to arbitrators, who after the completion of the investigation drew up a "receipt" which the appellant signed, the arbitrators witnessed and the respondent accepted and acted upon. In accordance with the "receipt" the appellant paid to the respondent Rs. 224-5/32 and handed to him two promissary notes for Rs. 14,000 each in which no rate of interest was inserted by an oversight, although the parties intended that they should bear Chetty interest. The respondent thereupon went to one of the arbitrators and persuaded him to alter the pro-notes by inserting therein 9 per cent. as the rate of interest. He then sued on the two notes, but his suit was dismissed on the ground that a material alteration had been made in them. He then brought another suit for two items referred to in the "receipt" which with other items were the basis of the two pro-notes:

Held, (1) that the proceedings of the arbitrators, though informally conducted, were in the nature of an arbitration, that the so-called "receipt" expressed the finding of the arbitrators and the mode in which it was to be performed and that the case was a clear example of "accord and satisfaction by a substituted agreement" by which the prior rights of the parties were extinguished; and

(2) that the form of the claim was faulty, inasmuch as the sole existing liability was under the agreement set out in the receipts, while the arrangement for the discharge of the amount found due by means of the promissory notes only expressed the mode of payment contemplated and arranged for at the time, and that the respondent could bring an action for the unpaid balance of the sum found due.

Section 24 of the Ceylon Civil Procedure Code, which corresponds to Order II, rule 2, of the Indian Civil Procedure Code, 1908, is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph is not intended to be an illustration of the foregoing provisions, but a substantive enactment making an obligation and a collateral security for its performance one cause of action for the purposes of the section.

Therefore, a claim on the bills and a claim for the amount found due under the award and for which payment was provided by the agreement are not the same cause of action, but are inconsistent and mutually exclusive causes of action, and thus the sum sued for is recoverable by the respondent but he cannot bring a fresh action for the remainder.

Appeal from a judgment of the Supreme Court of Ceylon (reported in 15 New Law Reports 161) reversing that of the District Court of Colombo.

Messrs. *P. O. Lawrence, K. C., Harace E. Miller* and *E. J. Samerawickerame* (of the Ceylon Bar), for the Appellants.

Messrs. *F. Dornhurst, K. C.* (of the Ceylon Bar) and *R. W. Lee*, for the Respondent.

JUDGMENT

LORD MOULTON.—The respondent is a money-lender carrying on business in Colombo, and the first appellant was for a time his agent and manager. He was at the same time carrying on business as

a money-lender in partnership with the second appellant.

For about 3½ years prior to June 1909 the respondent was absent from Ceylon and the first appellant carried on his business during his absence. On his return serious disputes arose between them. The respondent alleged that there was a large balance due to him from the first appellant and also that the first appellant had not credited the respondent with certain profits made by discounting promissory notes at the Banks for firms in which the second appellant was a partner. Ultimately all the parties to the present suit agreed that these disputes should be referred to two other money-lenders named Ramanathan Chetty and Muturaman Chetty, who after the completion of the investigation drew up, on the 30th August 1909, what has been termed "a receipt," which the appellants signed, the arbitrators witnessed and the respondent accepted and acted upon. This document deals *seriatim* with seven sums thereby admitted to be due from the appellants to the respondent amounting in all to Rs. 28,224-5/32, and it then proceeds as follows:—

"And this sum of Rs. 28,224-5/32 we have this day settled with you in the following manner: Rupees 224-5/32 paid to you by us this day in cash, Rs. 14,000 by an on-demand promissory note, payable with interest on 15th September, and Rs. 14,000 by another on-demand promissory note given on the same date payable with interest on 30th November, all aggregating to Rs. 28,224-5/32.

"And this matter having been thus arranged and settled in respect of all the accounts between us, this receipt shall be the witness that there is no other claim against us by you or by us against you."

Accordingly Rs. 224-5/32 were thereupon paid by the appellants to the respondent, and two promissory notes, each for a sum of Rs. 14,000, were handed to him. Their Lordships entertain no doubt that, although informally conducted, the proceeding was in the nature of an arbitration, and the so-called "receipt" expresses the finding of the arbitrators, and the mode in which it was to be performed. But the question, whether or not it should so be regarded, is immaterial for the decision of the present appeal. The "receipt" given by the appellants, and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the "receipt." It is a clear example of what used to be well known in Common Law Pleading as "accord and satisfaction by a substituted agreement." No matter what were the respective rights of the parties *inter se*, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place, the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.

There appears to be no doubt that it was the intention of all the parties that the sums for which the promissory notes were given should bear what is known as Chetty interest, which is at a rate dependent on the current Bank rate, and would in the present case have been between 6 per cent. and 7 per. cent. But, probably by an oversight, no rate of interest was inserted in the promissory notes, and the respondent, without communication with the appellants, went to one of the arbitrators and persuaded him to alter both promissory-notes by inserting therein 9 per cent. as the rate of interest. Though this was an irregularity of a grave kind, their Lordships do not understand that it was done with bad faith either on the part of the arbitrator or the respondent. It appears to have been the result of a misunderstanding, and accordingly their Lordships treat it as a material alteration innocently made.

On the 18th October 1909, the respondent commenced an action in the District Court of Colombo upon the two promissory notes so given to him. The appellants raised as a defence that a material alteration had been made in them, and on this ground the action was dismissed on February 8th, 1910.

On the 20th April 1910, the respondent commenced the present action for the two sums of Rs. 11,526-7-32 and Rs. 771. These were two out of six items referred to in the receipt, all going towards making up the total of Rs. 28,224-5-32 which was the basis of the new agreement. The form of the plaint is such that it is clear that the respondent was attempting to assert in the action two of the claims which were included in the award and settled by the new agreement. This he was not entitled to do since they had been extinguished by the acceptance of the new agreement.

At the trial of the action, the District Judge found in favour of the appellants, on the ground that the two promissory notes were given in absolute payment of the debt, and that, therefore, no remedy remained to the respondent excepting upon those notes. On appeal, the Judges of the Supreme Court held that the notes were only accepted as a conditional discharge, so that they only amounted to payment if paid, and that, inasmuch as they had not been paid, the original debt of Rs. 28,000 remained. They accordingly allowed the appeal. It is from this decision that the present appeal is brought.

Their Lordships are of opinion, as has already been stated, that the form of the claim was faulty, inasmuch as the sole existing liability was under the agreement set out in the receipt. But they are also of opinion that the arrangement for the discharge of the amount found due by means of the promissory notes only expressed the mode of payment contemplated and arranged for at the time. This was essentially a matter of form only, the substance of the award being that the specified amount was actually due from the appellants to the respondent. Through an innocent act the promissory notes have become incapable of being enforced, and the appellants have availed themselves of this and have refused to pay the notes so that payment in the form contemplated has failed. But this does not affect the substance of the award or the basis of the arrangement which was liability, and, therefore, it was open to the respondent to bring an action for the unpaid balance of the sum found due, *i. e.*, for the amount of the promissory notes. He has brought his action for an amount less than this and based it on wrong grounds, but, on the other hand, the appellants omitted to raise their true defence in their pleadings, when there would have been an opportunity for the respondent to correct the grounds of his claim.

The learned Judge at the trial held that this action was barred by section 34 of the Ceylon Civil Procedure Act and Counsel for the appellants relied strongly upon this section in the argument before us. On account of the importance of the point it is desirable to cite the section in full:—

"Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.

"If a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies: but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

"For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

Their Lordships are of opinion that the learned Judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragragh, in their Lordships' opinion, is not intended

to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section.

Viewed thus, it is evident that a claim on the bills and a claim for the amount found due under the award and for which payment was provided by the agreement are not the same cause of action, but are in truth inconsistent and mutually exclusive causes of action. So long as the bills were outstanding there was no right of action otherwise than upon the bills. It is, therefore, impossible, in their Lordships' opinion, to hold that the claim for the amount due was the same cause of action as the claim upon the bills and ought to have been included in the prior action.

Their Lordships, therefore, think that justice will be done by treating the sum sued for as being part of the amount found due by the arbitrators, the payment of which was provided for by the agreement and in respect of which the promissory notes were given. They hold that, as such, it is recoverable by the respondent, and that the appeal should be dismissed. But this amendment will entail the consequence that inasmuch as the respondent has sued for a part only of the total sum due, he cannot bring a fresh action for the remainder

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed but without costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Blyth, Dutton, Hartley & Blyth.*

Solicitors for the Respondents: Messrs. *Holman, Birdwood & Co.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL NO. 18 OF 1914.

August 11, 1914.

Present:—Mr. Kendall, A. J. C.

SAHEB DIN—DEFENDANT—APPELLANT

versus

JANG BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Jurisdiction of Civil and Revenue Courts—Ejectment—Possession—Graveyard.

The plaintiff succeeded in ejecting the defendant through the Rent Court from 5 out of 13 *biswas* of land, and was referred to the Civil Court in respect of the remaining 8 *biswas* which were found to be a graveyard as alleged by the defendant. Subsequently on the plaintiff's suing the defendant in the Civil Court for possession of these 8 *biswas*, the defendant pleaded that the Court had no jurisdiction to entertain the suit, inasmuch as he was the plaintiff's tenant in respect of the 13 *biswas* and as in respect of these 8 *biswas* all that remained to be determined was the nature of the tenancy:

Held, that the defendant not having admitted his tenancy with respect to the 8 *biswas* in suit, no question of the determination of tenancy was involved in the case, and that the real question for decision being the existence or non-existence of a custom of burying bodies in the 8 *biswas*, interfering with the exercise of the plaintiff's proprietary rights, the suit was properly brought in the Civil Court.

Appeal against the order of the Subordinate Judge, Bara Banki, dated 16th April 1914, reversing that of the Munsif, Fatehpur, District Bara Banki, dated 14th November 1913.

Babu *Rajeshwari Prasad*, for the Appellant.

Pandit *Gokaran Nath Misra* and Babu *Sarju Prasad* holding brief of Mr. *E. Manual*, for the Respondent.

JUDGMENT.—The plaintiff, now respondent, attempted to eject the defendant, now appellant, in the Rent Court from 13 *biswas* of land. To the extent of 5 *biswas* he was successful. As for the other 8 *biswas* the defendant pleaded that it was a graveyard in possession of himself and his ancestors from the time they were themselves *zemindars* of the village, and the Revenue Courts declined to eject him but referred the plaintiff to the Civil Court. The view which the Revenue Courts took will be clearly seen from the copy of the Commissioner's judgment, which is upon this record. The plaintiff then brought this suit in the Civil Court for possession. The defendant has replied that he was a tenant of the plaintiff in respect of the 13 *biswas* and that in respect of these 8 *biswas* all that remains to be determined is the nature of the tenancy which he alleges is a matter for the Revenue Courts. The Court of first instance upheld his contention, and dismissed the suit. The lower Appellate Court found that the suit was properly brought in the Civil Court and remanded the case for trial on the merits. Hence this appeal.

The finding at which the lower Appellate Court has arrived is correct. It is a mere perversion of words to say that the defendant admits his tenancy and that a declaration at

to the nature of that tenancy alone is called for. What the defendant has in effect pleaded is the existence of a custom by which he and his ancestors from the time when they were proprietors themselves have had the right to bury bodies in this piece of land in the village, and the existence or non-existence of such a custom, interfering with the exercise of proprietary rights by the *zemindar*, is the question which is before the Court to determine in this suit.

The appeal is dismissed with costs.

Appeal dimissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 372 OF 1913.

September 2, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

GANDLA PEDDA NAGANNA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SIVANAPPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42, object of—Declaratory decree, when granted—Discretion—Civil Procedure Code (Act V of 1908), O. II, r. 2—Cause of action for declaratory suits Suits based on different titles, if separately maintainable.

It is a matter entirely within the discretion of the Court to grant or refuse declarations under section 42 of the Specific Relief Act.

The object of the section is merely to perpetuate and strengthen testimony regarding the title of the plaintiff so that adverse attacks on it may not weaken it.

Whenever evidence is being created which might ultimately result in disturbing the title of the plaintiff, he will have a cause of action to sue under section 42.

Where a suit with regard to certain property is based on a certain title, the plaintiff is not debarred by Order II, r. 2, from suing to recover some other property on some other ground.

Thakurain Jaipal Kunwar v. Bhaiya Indar Bahadur Singh, 31 I. A. 67; 8 C. W. N. 465; 14 M. L. J. 149; 6 Bom. L.R. 495; 26 A. 238(P.C.); *Kathama Natchiar v. Dorasinga Tevar*, 2 I. A. 169; 23 W. R. 314; 15 B.L.R. 83 (P.C.); *Chinnasawmy Mudaliar v. Ambalavana Mudaliar*, 29 M. 48; *Harendra Lal Roy Chowdhry v. Nawab Salim-ul-lah Bahadur*, 7 Ind. Cas. 21; 12 C. L. J. 336, *Shiv Ram Chintaman v. Jiru*, 13 B. 34, *Gray v. Mathias*, (1800) 31 Eng. Rep. 591; 5 Ves. Jr.) 286; 5 R. R. 48, *Bromley v. Holland*, (1802) 7 Ves. (Jr.) 3 at pp. 21, 22; 32 Eng. Rep. 2 at p. 9; 6 R. R. 58 at p. 65, followed.

Raja Nilmony Singh Deo Bahadur v. Kalee Churn Bhattacharjee, 4 B. L. R. 382 (P.C.); 23 W. R. 150; 3 Sar. P. C. J. 447; 3 Suth P. C. J. 77; 2 I. A. 83; *Deokali Koer v. Kedar Nath*, 15 Ind. Cas. 427; 16 C. W. N. 838; 39 C. 704; *Vijiasamy Tevar v. Sasivarma Tevar*, 28 M. 560; 15 M. L. J. 469, *Nurdin v. Allardin*, 12 M. 134; *Pirthi Pal Kunwar v. Guman Kunwar*, 17 C. 933 (P. C.); 17 I. A. 107, distinguished.

Bhujendro Bushan Chatterjee v. Trigunanath Mookerjee, 8 C. 761; *Sheo Singh Rai v. Dakho*, 5 I. A. 87; 1 A. 688; 2 C. L. R. 193; 3 Suth. P. C. J. 529; 3 Saraswati's P. C. J. 807, *Sree Narain Mitter v. Srimutty Kishen Sundari Dassee*, 11 B. L. R. 171 (P. C.); 19 W. R. 133; Supp. I. A. 149, referred to.

Second appeal against the decree of the Court of the District Judge of Kurnool, in Appeal Suit No. 162 of 1912, preferred against that of the District Munsif of Kurnool, in Original Suit No. 1041 of 1911.

Mr. *M. O. Parthasarathy Aiyangar*, for the Appellants.

Mr. *N. A. Vaidyanatha Aiyar* for Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The lower Appellate Court has dismissed this suit on the pleadings on the grounds that (1) it is barred under Order II, rule 2, of the Code of Civil Procedure, (2) that it is not maintainable as framed.

The material facts are as follows: The plaintiffs claim the suit property and are in possession of it as reversioners of Nagisetti. The (1st and 2nd) defendants' husband and wife have also been claiming it as reversioners, but under a different title derived from one Veeranna. In Original Suit No. 651 of 1910 the 1st defendant obtained a decree against the 2nd defendant for a declaration of his title as Veeranna's reversioner, her mother having been the last person in possession of the property. In Original Suit No. 298 of 1911 the present plaintiffs obtained a decree against the present defendants, declaring their right as reversioners of Nagisetti to certain properties other than those now in suit. Original Suit 651 was pending when Original Suit No. 298 was filed, but was decided before it.

The objection to the suit with reference to Order II, rule 2, is based on the fact that the properties now sued for were in the defendants' possession when Original Suit No. 298 was filed, but have, as the plaintiffs allege, come into their own possession subsequently. The plaintiffs' suit is for a declaration that the decree in Original Suit No. 651 was collusive and has no effect so far as they and the suit properties in their hands are concerned; and the contention is that they should have asked for this relief in Orignial Suit No. 298 of 1911 and, therefore, cannot ask for it now. The learned District Judge argued that,

because they were out of possession of these as well as the other properties, for which they did sue, their cause of action was available for both, and they should have sued for possession of the whole estate. But they are not suing now on any cause of action directly connected with possession, since they have succeeded in enforcing their right to it otherwise. Their present cause of action, the alleged cloud on their title created by the decree in Original Suit No. 651, is a distinct grievance, which moreover arose after Original Suit No. 298 was filed, and, therefore, could not have been pleaded in it. In these circumstances there can be no objection to the plaintiffs claiming now what they could not have claimed before. This objection accordingly is invalid.

This conclusion affects the learned District Judge's argument regarding the maintainability of the suit, because he explained plaintiffs' failure to ask for what he considered the appropriate relief, a general declaration of their title, by reference to his finding that Order II, rule 2, debarred them from doing so. This explanation would, however, have in any case been useless, because their suit, as brought, must necessarily have involved their establishing (1) their title, since their right to sue must be conditional on their establishing it, and (2) other particular facts entitling them to have the decree declared of no effect.

The more serious objection to the suit is stated by the learned District Judge as being that the "decree in Original Suit No. 651 cannot and does not purport to bind the plaintiffs and that they cannot ask the Court to grant a bootless declaration in respect of a matter which is self-evident." Before dealing with the correctness of this conclusion, I observe that no authority has been shown for treating it, as the learned District Judge has done, as negativing the right to sue directly and not merely as ground for the exercise of the Court's discretion to refuse the declaratory relief asked for. It is in fact relevant only as the latter.

That the decree in Original Suit No. 651 binds only the parties to it, the defendants, is, of course, self-evident. But it does not follow that the declaration asked for by the plaintiffs regarding it will be without effect. For it will enable them, if they obtain it, to frustrate the efforts which the 1st defendant may be expected to make to obtain delivery of the property in execution against the 2nd defendant and prevent their being left, if the 1st defendant is successful, to regain possession by an application under Order XXI, rule 100, of the Code of Civil Procedure, or perhaps eventually by a suit. It is relevant that the 1st defendant's pleading in no way disclaims his right to take such action. Vide *Thakurain Jaipal Kunwar* v. *Bhaiya Indar Bahadur Singh* (1). For he alleged the validity of his decree and of his title under Veeranna, denying the validity of the plaintiffs' title under Nagisetti. And apart from this indication of the defendants' intentions, the presumption must be against them, since they are in no better position than the holder of an instrument alleged to be void, of whom it has been said, "if an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose." (*Vide* Story's Equity Jurisprudence, 13th Edition, I, 10.) And this is not to be restricted to transactions to which the plaintiff is a party. For the learned author proceeds: "If it is a negotiable instrument, it may be used for a fraudulent and improper purpose to the injury of a third party."

Most of the decisions relating to declarations deal with claims to relief in that form in order to the protection of an existing title against repetition of direct denials of it, which have already taken place, and turn on the plaintiff's possession of an interest entitling him to sue or on the possibility of his asking for consequential relief; and they are not of assistance here, where it must be assumed that the plaintiffs have title and possession and there can be no question of their duty to ask for the latter. Here the sole question is whether the possible danger to be averted by the declaration asked for is so clear and immediate that the Court should use its discretion to grant it. The cases do not suggest any test of general application, but have been decided on the particular circumstances of each; and it is natural that this should be so. It is then

(1) 31 I. A. 67; 8 C. W. N. 465; 14 M. L. J. 149; 6 Bom. L. R. 495; 26 A. 238 (P. C.).

possible only to consider how the Court's discretion was exercised in those the circumstances of which resemble most closely those before us.

In the case of *Raja Nilmony Singh Deo Bahadur* v. *Kalee Churn Bhuttacharjee* (2) it was observed that plaintiff could not have a declaration for future use in consequence of a mere assertion, which might (for all that appeared) have been oral, but that one might have been granted if he had been applying for the cancellation of a deed impugning his title; and in *Kathama Natchiar* v. *Dorasinga Tevar* (3) the Court, whilst refusing a declaration, when the defendant had merely evinced hostility by granting power-of-attorney to an agent in order that he might assist in frustrating the plaintiff's claim to a *zemindari*, said that its decision would not preclude his impeaching any actual diversion of the succession to his prejudice. In *Chinnasawmy Mudaliar* v. *Ambalavana Mudaliar* (4) a declaration was granted regarding an adoption, though it had not been alleged by any party to it in any proceedings by or against the plaintiff. In *Harendra Lal Roy Chowdhry* v. *Nawab Salimullah Bahadur* (5) the Court made a declaration re- garding a revenue sale, though the plaintiff was not the defaulter, and observed: "It has been suggested that the plaintiff . . . might have waitedtill his title was challenged. In our opinion the plaintiff was not bound to wait till he actually found himself in jeopardy.....It is perfectly true that . . . . . the cloud (on his title) must be cast, before he can ask for its removal; he must allege and prove hostility on the part of the defendant, for no Court will move on purely speculative grounds," and held that the sale had been brought about to annul the encumbrances of the tenure-holders, of whom the plaintiff was one, and that he was, therefore, entitled to relief. None of these cases, in which the Court interfered or would have interfered, was stronger than the present.

I refer next to two cases, in which the facts were very similar to those now in question. The defendants in each were the persons responsible for a sale under a mortgage decree, to which the plaintiff was not a party, of property which he claimed and of which he was in possession. It is not a valid ground of distinction that in those cases the danger apprehended was a delivery after a sale, whilst here it is one under a decree. For in them also the delivery would be made without notice to the plaintiff. In one of these cases, *Deokali Koer* v. *Kedar Nath* (6), it was said that "none of the declarations claimed were expressed as declarations of the plaintiff's right to property and that, though the proposition, at which he aimed, might be in some measure involved in those declarations, that was not what is sanctioned by section 42." This would, it might have been supposed, have been reason for dismissing the suit for declaration alone. It was, however, treated only as entailing only that the plaintiff had implicitly asked for an injunction and must pay Court-fee for that relief. In these circumstances it is not clear what the Court intended to lay down in the statement quoted, and I, therefore, prefer to follow *Shivram Chintaman* v. *Jivu* (7) in which it was held that, when the plaintiff's title was denied in proceedings to which he was a stranger, he was entitled to sue and need not wait till he was dispossessed.

Lastly *Vijiasamy Tevar* v. *Sasivarma Tevar* (8) has been much relied on by the defendants for the position that a declaration should not be granted when the transaction to be declared invalid would on plaintiff's own allegations be but a *brutum fulmen* against him. That decision turned mainly on the vexatious nature of the plaintiff's suit and the Court's inherent right to prevent abuse of its process by dismissing it. But, so far as it proceeded on the ground referred to, it is distinguishable from the case before us. There the Court recognized that if the party alleging an adoption pretended that the conditions, which would validate it, existed, the person affected by it should be allowed to impeach it; but it held that the adoption attacked by the plaintiff was so totally nugatory from his point of view that it would be futile to make it the subject of judicial investigation. Here the decree

(2) 2 I. A. 83; 14 B. L. R. 382 (P.C.); 23 W. R. 150; 3 Sar. P. C. J. 447; 3 Suth. P. C. J. 77.
(3) 2 I. A. 169; 23 W. R. 314; 15 B. L. R. 83(P. C.).
(4) 29 M. 48.
(5) 7 Ind. Cas. 21; 12 C. L. J. 336.
(6) 15 Ind. Cas. 427; 16 C. W. N. 838; 39 C. 704.
(7) 13 B. 34.
(8) 28 M. 560; 15 M. L. J. 469.

between the defendants will be in no way nugatory with reference to the plaintiffs' right, notwithstanding that they were not parties to it. For, as already pointed out, the Court will have no choice but to order a delivery under it, and will have no right to hear the plaintiffs' objection before doing so. In the one class of cases it cannot be supposed that the Court would act on the transaction at all; in the other it is clear that it would be able and likely to do so to the prejudice of a third party, the plaintiff, until it could hear him. I may point the distinction by reference to *Gray* v. *Mathias* (9) and *Bromley* v. *Holland* (10), the Court observing in the latter: "It is not just to consider the instrument, merely having regard to the question, whether the demand can be directly founded on it; for an instrument, which apparently, though not really, (which must be shown by circumstances, *dehors*) creates an incumbrance, may by being produced defeat the ends of justice.....I do not go to the length, that if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party who can make no use of it beneficial to himself: but if a use may be made of it prejudicial to another, I should have an inclination to support the jurisdiction transfer the possession of it."

The law standing thus I hold that the lower Court might properly, on proof of the plaintiffs' allegations, use its discretion to grant the declaration they claim. The appeal must, therefore, be allowed and the lower Courts' decree set aside, the appeal being remanded for re-admission and disposal on the merits in the light of the foregoing.

Costs in this Court will be costs in the case.

SESHAGIRI AIYAR, J.—The facts in this second appeal are fully stated in the judgment of my learned colleague which I have had the advantage of reading. I shall deal very briefly with the two questions of law which were argued before us.

The first suit was based on the title of the plaintiffs to succeed as reversioners and it admittedly did not include the present property. If the plaintiffs sued upon the same title to recover possession of the plaint property, there is no doubt that Order II, rule 2, would be a bar. But they got possession afterwards and their present complaint is that the defendants are setting up a false title to it which has necessitated their seeking the aid of the Court. If the contention of the respondents were to prevail, it would involve this, namely, that a plaintiff claiming to recover possession of the property must also pray that he should be protected against all possible violations of his right in future in respect of that property. It would be futile to file a suit of that nature and the Court would have rejected it at once. The lower Appellate Court was, therefore, wrong in holding that the suit was barred by Order II, rule 2.

The more important question which the Judge has dealt with in less detail relates to the maintainability of the suit under section 42 of the Specific Relief Act. I do not agree with his view of the averments in the plaint. He is apparently inclined to hold that if the plaintiffs sued for a declaration regarding their title, the suit would lie; but he reads the plaint as not asking for such a declaration. Reading prayers (1) and (2) of the plaint, I have no doubt that the plaintiffs asked for declarations that the property in suit belongs to them as the reversioners of Nagi Setti, that the defendants have no manner of title thereto, and that the decree collusively obtained behind their backs by the 1st defendant against defendants Nos. 2 and 3 is not binding on them. The real point for decision is whether a suit of this nature is competent. I shall refer very briefly to the history of the legislation which resulted in the enactment of section 42 of the Specific Relief Act, as that will show what classes of cases the Legislature intended to bring within its operation.

As was pointed out by Wilson, J., in *Bhujendro Bushan Chatterjee* v. *Trigunanath Mookerjee* (11), under the English Law a suit for a bare declaration did not lie, unless the party suing could show that he was entitled to some further relief as a result of the declaration. The rule of English Law was in force as a rule of equity and good

(9) (1800) 5 Ves. (Jr.) 286; 5 R. R. 48; 31 Eng. Rep. 591.

(10) (1802) 7 Ves. (Jr.) 3 atpp. 21, 22; 32 Eng. Rep. 2 at p. 9; 6 R. R. 58 at p. 65.

(11) 8 C. 761.

conscience in this country, until the enactment of section 15 of Act VIII of 1859; that section ran thus:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby: and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Even after this section the earlier decisions were to the effect, following the principle of English Law already referred to that unless there was a right to some consequential relief which if asked for might have been given by the same Court or unless it was required as a preliminary to obtaining reliefs in some other Court, the Courts should refuse to grant a bare declaration. See *Kathama Natchiar* v. *Dorasinga Tevar* (3); *Sheo Singh Rai* v. *Dakho* (12); *Sree Narain Mitter* v. *Sreemutty Kishen Sundari Dassee* (13).

The Specific Relief Act was afterwards passed which undoubtedly widened the scope of the remedy. Under section 42 of that Act the plaintiff has only to show that he has some legal character or some right to property and that his opponent is either denying or interested in denying such legal character or title. The object of the section is really to perpetuate and strengthen testimony regarding the title of the plaintiff so that adverse attacks upon it may not weaken it. The policy of the Legislature is not only to secure to a wronged party possession of the property taken away from him, but also to see that he is allowed to enjoy that property peacefully. In other words, if a cloud is cast upon his title or legal character, he is entitled to seek the aid of the Court to dispel that cloud.

What we have to consider in this case is whether the decree obtained by the 1st defendant against the 2nd defendant denies the plaintiff's title to his property. It has been said that it is not the function of the Court to enunciate abstract truisms of law. Following that reasoning it may be argued that as the fraudulent decree can in no way affect plaintiffs' rights, the Court should not lend itself to the task of declaring what is obviously indisputable. But although the decree may not affect plaintiffs' rights *in præsenti*, it is evidence which, if allowed to stand, may result at some future time in disturbing plaintiffs' title. I think that is a sufficient grievance which the Courts should remedy under section 42 of the Specific Relief Act.

Coming to decided cases, in *Nurdin* v. *Allardin* (14) a *patta* was antedated and affixed to the plaintiff's house. The learned Judges held this was not an infringement of the plaintiff's title and that he had no cause of action to sue. This case sounds as if it were an echo of the rulings under section 15 of Act VIII of 1859. The decision in *Vijiasamy Tevar* v. *Sasivarma Tevar* (8) cannot be explained away on the same ground. It lays down that it is not every fabrication of evidence that would enable a plaintiff to come before a Court of Law to claim a declaration. But the learned Judges who decided this case were parties to the decision reported as *Chinnasawmy Mudaliar* v. *Ambalavana Mudaliar* (4). In the latter case, an adoption was set up which had not the immediate effect of injuring the plaintiff's title. The adoptee was creating evidence which might at some future time throw doubts upon the plaintiff's title. The learned Judges held that that was a proper case for granting a declaration under the Specific Relief Act. Thus, so far as Madras is concerned, the latest authority is in favour of the position that wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff, he will have a cause of action to sue under section 42. The decision of the Judicial Committee in *Pirthi Pal Kunwar* v. *Guman Kunwar* (15) looks on the face of it as if it is opposed to the view taken in *Chinnasawmy Mudaliar* v. *Ambalavana Mudaliar*(4). In that case a *Talukdar* died leaving a son and widow, this son afterwards died leaving a widow who succeeded to the estate. It was held by the Privy Council that the suit of the widow in possession for declaration that an adoption made by her mother-in-law was invalid, should be dismissed. Sir Barnes Peacock in delivering the judgment of the Committee referred with approval to the statement of law contained in *Sree Narain Mitter* v. *Sreemutty Kishen Sundari Dassee* (13) and stated that "all that is suggested by the learned Counsel on

(12) 5 I. A. 87; 1 A. 688; 2 C. L. R. 193; 3 Suth. P. C. J. 529; 3 Saraswati's P. C. J. 807.

(13) 11 B. L. R 171; 19 W. R. 133 (P. C.); Supp. I. A. 149.

(14) 12 M. 134.

(15) 17 C. 933 (P. C.); 17 I. A. 107.

the part of the appellant in support of a declaratory decree is this: that at some time or other after the death of the present plaintiff the person, who according to the plaintiff's contention is not an adopted son, may by some means, either by an act of the Government or otherwise, obtain possession as an adopted son." This was held not to be a sufficient ground for granting the declaration prayed for. Reading the judgment carefully I am of opinion that what the Judicial Committee intended to lay down was that it was a matter of discretion in such cases whether a declaration should be granted or not. The decision cannot be regarded as laying down that a suit to avert a possible apprehended danger will not lie.

I, therefore, agree in the conclusion of my learned colleague that the suit is maintainable.

Appeal allowed; Suit remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEALS NOS. 6 TO 48 OF 1914.

June 25, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

Musammat MAHADEI KUAR—PLAINTIFF—APPELLANT

versus

SANT BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 126, 138—Intervenor—Good faith—Rent, payment of—Joint tenants—Co-sharer, right of, to collect his share of rent separately—Recovery of co-sharer's fractional share of rent, suit for, not maintainable—Division of joint lands or tenants necessary—Tenant paying rent to one co-sharer alone, released from further liability.

In cases under section 138 of the Oudh Rent Act the main question for consideration is, whether the tenants paid the rents for the period in suit to the intervenor in good faith and whether the intervenor was in actual receipt and enjoyment of the rents from the tenants previous to the receipt of the rents sued for.

In the case of joint tenants, it is not open to a co-sharer to collect his share of the rents separately till the lands or tenants are divided. A suit by a co-sharer to recover his fractional share of rents is not maintainable under section 126 of the Oudh Rent Act.

Mahadeo Singh v. *Bachu Singh*, 11 A. 224; A. W. N. (1889) 87, referred to.

Unless an arrangement between the co-sharers of a village amounts to a division of the joint lands or of the tenants concerned, the payment of rents by the tenants to any of the co-sharers, on whose behalf they are cultivating the joint lands, is sufficient to release them from further liability.

Appeals from the decrees of the District Judge, Lucknow, dated 23rd December 1913, reversing the orders of the Assistant Collector, Bara Banki, dated 26th September 1913.

Pandit *Gokaran Nath Misra* and Mr. *Mohammad Wasim*, for the Appellant.

Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—These appeals arise out of certain suits brought by *Musammat* Mahadei Kuar for her half share of the rents due by certain tenants of *Mauza* Sardaha for 1317 to 1319 *Fasli*. The tenants pleaded payment to *Musammat* Bahu Rani, who was impleaded under section 138 of the Oudh Rent Act. The Court of first instance found that the rents of seven tenants used to be realized by *Musammat* Mahadei Kuar and of the rest by *Musammat* Bahu Rani. It gave a decree to the plaintiff for the rents claimed as against the remainder. Both the parties appealed to the District Judge of Lucknow, who came to the finding that *Musammat* Mahadei Kuar had no interest in the village and no right to collect the rents and dismissed her suits.

He found that there were indications of an arrangement having been at one time arrived at between the ladies, informally permitting each of them to collect half the rents of the village, but there was nothing to prevent *Musammat* Bahu Rani from asserting her exclusive right afterwards in defiance of that arrangement. *Musammat* Mahadei Kuar appeals.

In cases under section 138 of the Oudh Rent Act the main question for consideration is, whether the tenants paid the rents for the periods in suit to the intervenor in good faith and whether the intervenor was in actual receipt and enjoyment of the rents from the tenants previous to the receipt of the rents sued for.

The finding of the learned District Judge on the point is not quite clear, but it is not necessary to remand the case, for there is no allegation that the tenants or plots were divided.

The history of this family dates from as far back as 1857, when the estate of Raja Hardat

Singh of Bandi was confiscated by the British Government for complicity in the Mutiny.

The Raja died shortly afterwards leaving two sons, Mahesh Bakhsh Singh and Mahabir Bakhsh Singh, who left Bahraich and settled in Fyzabad. In 1880, Raja Sarabjit Singh, Taluqdar of Ramnagar, who was related to the Raja of Bandi, took pity on them and invited them to live in *Mauza* Sardaha, District Bahraich, and made a grant of that village to Raja Mahesh Bakhsh Singh, the eldest member of the family, for the purpose of maintenance. Whether that grant was personal to Raja Mahesh Bakhsh Singh or to the members of the family is a matter on which the parties are now at contest. Mahesh Bakhsh Singh and Mahabir Singh were then living jointly and it is not disputed that they continued to do so till their deaths. Mahesh Bakhsh Singh died in 1896, leaving a widow *Musammat* Bahu Rani and a son Swami Bakhsh Singh, who was then a minor. The management of the estate was carried on, after the death of Mahesh Bakhsh Singh, by Mahabir Bakhsh Singh. Swami Bakhsh Singh died shortly afterwards in 1309 *Fasli*, and Mahabir Bakhsh Singh died four years later. For some time *Musammat* Bahu Rani, the mother of Swami Bakhsh Singh, and widow of Mahabir Bakhsh Singh jointly carried on the management of the estate and co-operated in filing suits for arrears of rent against defaulting tenants and applying for their ejectment in their joint names. Some disputes appear, however, to have cropped up between them afterwards, and each of these ladies tried to collect rents separately from such tenants as each could influence. Criminal proceedings were then started under section 107 of the Code of Criminal Procedure by the tenants, supporting the claims of each of the ladies, against the agents and servants of the other, charging them with making forcible attempts to collect rents.

On the 22nd May 1907 the servants of *Musammat* Mahadei Kuar were bound over to prevent a breach of the peace and a certain amount of quietude was restored. The nature of claims, which each of these ladies was then setting up, is not quite clear, but it seems probable that each of them was claiming the whole estate, *Musammat* Bahu Rani claiming it as the mother of her deceased son Swami Bakhsh Singh, and *Musammat* Mahadei Kuar as the widow of the last surviving male member of the family. The arrangement referred to by the learned District Judge is said to have been made at or about that time with the object of settling the dispute by permitting each of these ladies to collect a half share of the rents or to divide the collections in equal shares. But the arrangement does not appear to have been afterwards adhered to. The learned District Judge observed that *Musammat* Bahu Rani collected her half share of the rents for 1317 *Fasli* to 1319 *Fasli*, but attempts by *Musammat* Mahadei Kuar to collect her half share for those years were resisted. *Musammat* Bahu Rani now professes to have collected that share herself. It is significant that the tenants in the village did not receive their holding either from *Musammat* Mahadei Kuar or from *Musammat* Bahu Rani. They were cultivating the lands from before, and in view of the disputed rights of inheritance as between the ladies, it is extremely undesirable that they should be allowed to suffer or made to pay the rent twice over. One of these tenants, Sant Bakhsh Singh, had, by a compromise filed by him in an ejectment proceeding taken out by *Musammat* Bahu Rani and *Musammat* Mahadei Kuar, expressly agreed that he would hold the land on behalf of the said ladies in the same way as he originally held on behalf of Raja Sarabjit Singh, and his disavowal of the rights of *Musammat* Mahadei Kuar, under the circumstances, appears to be inexcusable. In the case of joint tenants, it is not, however, open to a co-sharer to collect his share of the rents separately till the land or tenants are divided. A suit by a co-sharer to recover his fractional share of rent is not maintainable under section 126 of the Oudh Rent Act. In *Mahadeo Singh* v. *Bachu Singh* (1), a suit by some of the co-sharers in a joint and undivided *mahal* for a declaration of their title to receive a proportionate share of the rent payable by the tenants and for the recovery of such proportionate share of rent was held to be barred by the provisions of section 106 of the N. W. P. Rent Act, in the absence of a local custom or express contract authorising

(1) 11 A. 224; A. W. N. (1889) 87.

such suits. The arrangement of which the learned District Judge found indications, was an arrangement made by the ladies themselves, to which the tenants were no parties, and, unless such an arrangement amounted to a division of the joint lands or of the tenants concerned, the payment of rents by tenants to any of the co-sharers, on whose behalf they were cultivating the joint land, was sufficient to release them from further liability. The tenants pleaded payment of the rents claimed to *Musammat* Bahu Rani who admitted their receipt. The remedy of the plaintiff under the circumstances is to sue *Musammat* Bahu Rani for her share of the rents.

The appeals are, therefore, dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2669 OF 1913.

November 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

KUTTAYAKATH VIRA VARMA VALIA RAJAH AVERGAL—PLAINTIFF—APPELLANT

versus

ERINHAL KARUVANTA VALAPPIL AYISOUMMA, BY HER *Muktiarnamadar* KUNHI MAYAN, AND OTHERS—DEFENDANTS Nos. 1 TO 8 AND 11 TO 14—RESPONDENTS.

Religious trust Trustee, power of, to alienate corpus *of trust fund for repairs—Manager of joint Hindu family and trustee, powers of, if similar.*

There is no difference between the rights of the alienee from the manager of a joint Hindu family and one from the trustee of a religious trust. Though ordinarily a trustee of a temple should not alienate the *corpus* of the trust fund by way of mortgage or sale, but should try his best to raise the sum required for the necessary purposes of the temple, such as repairs, by public subscriptions or by curtailment of other expenditure, yet an alienation made by the trustee for such a purpose is perfectly valid, if the alienee advances the money after making *bona fide* inquiries and satisfying himself as to the necessity for raising the funds required by the alienation in question.

Nallayappa Pillian v. *Ambalavana Pandara Sannadhi*, 27 M. 465 at p. 472 (F. B.); 14 M. L. J. 81, referred to.

Konwar Doorganath Roy v. *Ram Chunder Sen*, 4 I. A. 52 at pp. 62, 63; 2 C. 341 (P. C.), followed.

Second appeal against the decree of the Court of the Subordinte Judge of North Malabar, in Appeal Suit No. 25 of 1912, preferred against that of the District Munsif of Cannanore, in Original Suit No. 526 of 1910.

FACTS.—The suit was instituted by the Valia Raja and manager of the Kattayam Kizhake Kovilagam to set aside a *kanom*-deed executed by plaintiff's predecessor to defendants Nos. 1 to 8 in respect of the plaint properties which belonged to the Kuzhimbil, *devasom* owned by the plaintiff's Kovilagam and to recover possession of the same. The question in the case was whether the *kanom* demise was for proper *devasom* purposes and binding on the properties of the *devasom*. The first Court held that no proper necessity had been made out and gave the plaintiff a decree as sued for. On appeal, the Subordinate Judge found that the Kuzhimbil temple stood in need of urgent repairs and that the *kanom* was executed for raising the amount required for effecting such repairs and held that it was binding on the temple. He further held that, even if the amount so raised was utilised by plaintiff's predecessor for his own private purposes, yet inasmuch as the defendants believed in good faith that the amount was required for repairing the temple and advanced the same in that belief, the *kanom* was binding on the temple. He, therefore, dismissed the suit. From this latter decree the plaintiff preferred the above second appeal.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant:—According to Malabar Law, the *corpus* of the property belonging to a *devasom* cannot be encumbered at all. Even such pressing necessity as repairs to the temple is no excuse, as the same must be met from the current income. *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi* (1).

Mr. *J. L. Rosario*, for the Respondents:—The observations in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi* (1) are very wide. The alienee from the trustee or manager of a temple stands in exactly the same position as an alienee from the manager of a joint Hindu family. The only requisite is that *bona fide* enquiries should have been made by the alienee and he must have satisfied himself as to the existence of necessity. *Kanwar*

(1) 27 M. 465 at p. 472 (F. B.); 14 M. L. J. 81.

Doorganath Roy v. *Ram Chunder Sen* (2). The lower Appellate Court has found the existence of necessity. The alienation must, therefore, be upheld.

JUDGMENT.—While the observations in *Nalliyappa Pillian* v. *Ambalavana Pandara Sannadi* (1) are entitled to very great respect and while trustees of religious temple trust property should not ordinarily alienate by mortgage or sale any portion of the *corpus* of the properties belonging to the temple, but ought to try their best to raise public subscriptions or to curtail expenditure in order to obtain moneys required for repairs of the temple, we think that we are bound by the observations of their Lordships of the Privy Council in *Kanwar Doorganath Roy* v. *Ram Chunder Sen* (2) that there is no difference between the rights of the alienee from the manager of a Hindu joint family and the alienee from the trustee of a religious trust, and that provided *bona fide* inquiries as to the necessity of the repairs of the temple were made by the alienee and he was satisfied on such inquiries as to the necessity for raising money for such repairs by the alienation proposed to him, the alienation in his favour must be upheld.

The second appeal is dismissed with costs.

Appeal dismissed

(2) 4 I. A. 52 at pp. 62, 63; 2 C. 341 (P. C.).

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 99 OF 1913.

November 13, 1914.

Present:—Sir Charles Fox, KT., Chief Judge.

MA THA AND OTHERS—DEFENDANTS—APPELLANTS

versus

P. L. M. M. CHETTY FIRM—PLAINTIFFS—RESPONDENTS.

Appeal, second—Concurrent findings of Lower Courts based on no evidence—High Court, power of interference—Plaint, signing and verification of—Practice—Parties not getting summons served on witnesses—Court, power of—Procedure.

Where the lower Appellate Court gives a decree not based on evidence, it is a substantial defect or error in the procedure of that Court which entitles the High Court to interfere in second appeal.

Hamanta Kumari Debi v. *Brojendra Kishore Roy Chowdhry*, 17 C. 875; 17 I. A. 65 (P. C.), followed.

Judges are bound to see that plaints are signed by persons authorised to sign them and that verifications are not treated as mere formalities.

When parties do not get summonses served on their witnesses in time for them to appear on the day of hearing, the Judge should proceed to deal with the case on the materials at the time before him.

Mr. *Anklesaria*, for the Appellant.

Mr. *Chari*, for the Respondents.

JUDGMENT.—The suit was for Rs. 950 due on a promissory note for Rs. 500, dated the 20th November 1905, and was filed on the 20th July 1910. It is *prima facie* time-barred, but two sums of interest were alleged to have been paid by the defendants *viz.*, Rs. 60 on the 19th May 1906 and Rs. 50 on the 21st July 1907, the latter of which saved the bar of limitation.

Much carelessness in procedure is displayed by the record. In the plaint, the plaintiff or plaintiffs is or are described as P. L. M. M. Muthayah Chetty, a firm carrying on business of money-lender in partnership at Pyapon by the managing partner Sattappah Chetty, residing in Dedaye now at Pyapon.

Sattappah Chetty was not examined at any stage of the case. He signed the plaint as "Power-holder" and he alone signed the verification which is as follows:—

"We the plaintiffs declare that what is stated in the plaint paragraphs Nos. 1, 2, 3 are true to our knowledge and paragraphs Nos. 4 and 5 true to our belief." If this was correct he must have been called as a witness, but he was not; he was not even called upon to produce the power-of-attorney which his signature be-tokened he held. Judges are bound to see that plaints are signed by persons authorized to sign them, and that verifications are not treated as mere formalities.

The promissory note sued on was not produced in Court until nearly eleven months after the suit was filed; this was another non-observance of prescribed procedure which should not have been allowed by the Judge if he had been careful. Many postponements and adjournments were allowed which should not have been allowed. Most of them were because witnesses had not appeared. When the parties had not taken the trouble to get summonses served on their witnesses in time for them to appear on the day of hearing, the Judge should have proceeded to deal with the

case on the materials at the time before him. One long adjournment was granted to suit the convenience of the parties and witnesses and because the plaintiff (presumably Sattappa) was going to India on businsss. Three witnesses were examined for the plaintiff on the 9th June 1911. One was examined as to the Burmese handwriting on the promissory note. He said that he did not think the handwriting and signature on the note were those of the male defendant; yet the note was admitted in evidence. The 2nd witness knows nothing about the case. The 3rd said he had made a translation from some account books produced before the Court. No one was called to say what these books were or whose they were, or whether they were books kept in the ordinary course of business, yet the translations were admitted in evidence. Another witness was examined on the 1st November 1911. He spoke not to the execution of the promissory note, but to the later payment of interest. At the time of payment he was a clerk in another Chetty firm and had been shown the promissory note by the plaintiff's Pleader shortly before he was called to give evidence. He professed to remember that the male defendant had written an endorsement on the note about the payment of the sum and that one of the female defendants had touched the pen. This man's evidence was obviously worthless.

On the 1st November 1911, that is nearly sixteen months after the suit was filed, a petition by one Chona Tamby, described as agent of P. L. M. M. Sattappa Chetty, was presented asking that a commission might be issued to Sivagunga District in Madras to take the evidence of P. L. M. M. Moothayah Chetty, the man who was alleged to have lent the money and taken the promissory note from the defendants, and of Murgappah Chetty, the man who wrote the note. Perhaps the strongest occurrence in the case is that the Advocate for the defendants did not object to the issue of the commission at that stage. The promissory note was not sent with the commission. There is no record of its having left the Court and neither Muthayah nor Moorgappah in the evidence said that the defendants signed or in any other way executed this promissory note then before them. No evidence has been given in the case proving the execution by the defendants of the particular note sued upon entitling it to admission in evidence. Yet both Courts have given a decree for the amount sued for on it.

This very simple suit in the Sub-Divisional Court dragged on from the 20th July 1910 until the 14th May 1912 or for nearly two years. The Divisional Judge confirmed the decree of the Sub-Divisional Judge. The course of thought of the Divisional Judge in his consideration of the case is difficult to follow. Most of his remarks tend to a conclusion that the suit should be dismissed, but finally he dismissed the appeal on the ground that he considered forgery of the note unlikely. He did not deal directly with the 2nd ground of appeal, which was that the lower Court erred in holding that the plaintiff had discharged the burden lying on him of proving that the promissory note had been executed by the defendants.

The defendants have filed an appeal to this Court from the decree of the Divisional Court only on the limited grounds set out in section 100. The defendants' Pleader relies on those stated in clause (*c*) *viz*:— "Substantial error or defect in the procedure provided by this Code or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case on the merits." In my view there was no evidence given in the case which justified a Court in giving a decree for the amount due in the note; because execution of the note sued on was not spoken to or proved by any one.

In *Hemanta Kumari Debi* v. *Brojendro Kishore Roy Chowdhry* (1) their Lordships of the Privy Council held that where the lower Appellate Court had given a decree not based on evidence, this was a substantial error or defect in the procedure of that Court which entitled the High Court to interfere in second appeal under the provision in the Code of 1882 corresponding to section 100 of the present Code. This view of the scope of the provision justifies me in holding that where as in this case, there is absence of necessary evidence of execution of a document sued on and not admitted, clause (*c*) of section 100

(1) 17 C. 575; 17 I. A. 65 (P. C.).

LALA SINGH v. HAZARI SINGH.

of the Code justifies interference with the decrees of the lower Courts.

For these reasons I allow the appeal and reverse the decrees of both the lower Courts and dismiss the suit with costs.

The plaintiff firm must pay the defendants' costs in all the Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 4 OF 1914.

June 16, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

LALA SINGH—DEFENDANT – APPELLANT

versus

HAZARI SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 108 (2), 127 —Consent of landlord to tenant's occupation, absence of —Occupation, unauthorised—Rent, recovery of, suit for —Fair and equitable rent to be determined—Lawful occupation subsequently becoming unlawful, effect of—Withdrawal of consent previously given, effect of—Landlord's impossibility to have given consent at commencement of tenant's occupation, effect of—"Occupied," interpretation of—Suit for determination and recovery of rent, maintainability of.

In section 127 of the Oudh Rent Act the absence of consent refers to the period for which the rent is claimed, but where the occupation was by previous consent or was otherwise lawful, a mere withdrawal of the consent by the landlord does not bring the case within the purview of that section.

The object of section 127 of the Oudh Rent Act is to give a landlord the option of suing a trespasser in the Civil Court for possession and damages, or treating him for the period of his unauthorised occupation as a tenant and suing him for the recovery of rent at such rate as the Rent Court may consider fair and equitable.

An occupation which was lawful in its inception is not excluded from the operation of section 127 of the Oudh Rent Act if it subsequently became unlawful, in the same way as an occupation which began by consent cannot be included in it merely by the spasmodic withdrawal of that consent.

The defendant, while a co-sharer in a village, himself cultivated some land, and continued to do so without payment of any rent after his share was sold to the plaintiff, the land being such as could not have become an ex-proprietary holding. The plaintiff sued the defendant for arrears of rent for the period subsequent to the sale, under sections 127 and 108 of the Oudh Rent Act. It was not alleged that the plaintiff had given his consent to the defendant's occupation at or after the purchase:

Held, that, as the defendant's right as against the plaintiff to use and occupy the land and the plaintiff's right to claim rent therefor came into existence for the first time after the sale and as there was no occasion for the plaintiff to have given his consent to the defendant's occupation at its commencement, the plaintiff was entitled to have the rent determined under section 127 of the Oudh Rent Act and claim its recovery under section 108 (2) of that Act in one and the same suit.

Deputy Commissioner of Pertab Garh, Manager of Baragaon v. *Sheoambar*, 1 O. C. 28; *Rani Jaibans Kuar* v. *Girdhari Tewari*, 1 O. C. 40; and *Deputy Commissioner of Fyzabad for Nanemau Estate* v. *Gur Dayal Singh*, 17 Ind. Cas. 464; 15 O. C. 311, distinguished from.

Bhabhuti v. *Kuar Sumer Singh*, Select Decision No. 20 of 1892, referred to.

Appeal from the decree of the District Judge, Hardoi, dated 21st January 1914, upholding that of the Assistant Collector, Hardoi.

Babu *Salig Ram*, for the Appellant.

Babu *Basdev Lal*, for the Respondent.

JUDGMENT.

KANHAIYA LAL, A. J. C. The defendant was co-sharer of *Mouza* Bhadaicha. His share of the village was sold by auction prior to 1910 and was purchased by the plaintiff. At the time of the auction-sale he was cultivating some land from 1903 and he continued to cultivate the same thereafter without payment of any rent. His cultivation not having been of 12 years' standing, ex-proprietary rights could not have been acquired in respect of it. The present suit was brought by the plaintiff for arrears of rent for 1317 to 1319 *Fasli* in respect of that land under sections 108 and 127 of the Oudh Rent Act. The Courts below decreed the claims, holding that the defendant was in occupation of the land without the consent of the landlord. In appeal it is contended that the possession of the defendant dated from before the auction sale and, therefore, section 127 of the Oudh Rent Act was not applicable, and reliance is placed in support of the contention on *Deputy Commissioner of Pertab Garh, Manager of Baragaon Estate* v. *Sheoambar* (1), which was followed in *Rani Jaibans Kuar* v. *Girdhari Tewari* (2). Section 127 of the Oudh Rent Act provides for assessment of rent on persons occupying land without the consent of the landlord. The absence of consent

(1) 1 O. C. 28.
(2) 1 O. C. 40.

refers to the period for which the rent is claimed, but where the occupation was by previous consent, or was otherwise lawful, a mere withdrawal of the consent by the landlord would not bring the case within the purview of section 127 of the Oudh Rent Act.

There might be cases where an occupation which originated by consent may lose its character as such and become unlawful, as by ejectment in the manner provided by law, but in such a case the resumption of possession after ejectment constitutes a re-entry and gives rise to a fresh cause of action.

The object of section 127 is to give a landlord the option of suing a trespasser in the Civil Court for possession and damages or treating him for the period of his unauthorized occupation as a tenant and suing him for the recovery of rent at such rate as the Rent Court may consider fair and equitable. There was no occasion in this case for the plaintiff to have given his consent to the occupation of the defendant at its commencement, because he was not then the owner of the land, and it is not alleged that he gave his consent to the defendant's occupation after the purchase.

In *Deputy Commissioner of Pertab Garh, Manager of Baragaon Estate* v. *Sheoambar* (1), Spankie, A. J. C., observed that section 127 of the Oudh Rent Act was not intended to meet the case of a person entering upon the land with the landlord's consent but remaining on it as against his will. But *qua* the plaintiff, the occupation of the defendant began from the date on which the property was sold and the sale confirmed, and if on that date or on any date subsequent to it, no consent was given by the landlord to the occupation of the defendant, rent could be claimed against him for the use and occupation of the land under section 127 of the Oudh Rent Act. An occupation which was lawful in its inception is not excluded from the operation of section 127 of the Act if it subsequently became unlawful, in the same way as an occupation which began by consent cannot be included in it merely by the spasmodic withdrawal of that consent.

In *Rani Jaibans Kuar* v. *Girdhari Tewari* (2) the defendant had been for years in the possession of certain plots in excess of those to which he was entitled, and on its being afterwards discovered by an Assistant Settlement Officer that he was in possession of more than he was entitled to, the landlord sought to treat him as a trespasser in regard to the portion of the land of which he was in possession in excess. Those plots having by long association and treatment became a part of the tenant's holding, section 127 of the Oudh Rent Act was held not to apply. In *Deputy Commissioner of Fyzabad, for Nanemau Estate* v. *Gur Dayal Singh* (3) negotiations were going on during the ejectment proceedings between the land-holder and the tenants for settling terms on which the tenants could be allowed to continue in occupation and counter-parts of leases were actually taken by the landlord from the tenants on the faith of which the tenants had withdrawn their objections to the ejectment, while formal leases were also prepared, though not signed, by the landlord. An ejectment taken out under those circumstances by the landlord was held to be a mere formality, which did not alter the character of the tenants' possession or make them a trespasser so as to bring the case within section 127 of the Oudh Rent Act.

The circumstances of the present case are entirely different and none of the above decisions, therefore, apply.

The right of the landlord to claim rent for the use and occupation of the land came into existence for the first time after the sale was confirmed, and as no consent was given by him at that time or afterwards, he is entitled to have the rent determined under section 127 and claim its recovery under section 108 of the Rent Act in one and the same suit. The appeal is, therefore, dismissed with costs.

KENDALL, A. J. C.—I agree. Considering the wording of the section, it cannot be said that "occupied" means merely "held" or "retained." If such a meaning were contemplated for it, it would be superfluous. But the occupation of the appellant, as against a landlord, commenced after the confirmation of the sale, and it so commenced without the landlord's consent. Section 127 has been properly applied.

(3) 17 Ind. Cas. 464; 15 O. C. 311.

VENKATAMMA v. MANIKKAM NAYANI VARU.

There are two other grounds remaining for disposal. It is argued that the Courts below were wrong in treating an order in mutation as a final adjudication upon the question of whether or not appellant had acquired ex-proprietary rights in these plots. They have not done so. The lower Appellate Court, emphasizing the existence of the mutation order of the 27th October 1911, upheld the finding of the Court of first instance, and that finding was based upon evidence recorded.

It is also argued that a suit for determination of rent must have preceded this suit for arrears of rent. This is concluded by our finding on the first ground, that section 127 does apply to the case. For we agree with the view taken in *Bhabhuti* v. *Kuar Sumer Singh* (4) that the fair and equitable rent payable under this section is to be determined in the course of a suit for arrears of rent under section 108 (2) of the Act.

Appeal dismissed.

(4) Select Decision No. 20 of 1892.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 251 OF 1912.

August 19, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VENKATAMMA—PETITIONER—APPELLANT

versus

MANIKKAM NAYANI VARU AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

*Execution—Application more than 12 years from date of decree—Civil Procedure Code (Act V of 1908), s. 48—Decree directing execution of conveyance—Undisposed of execution petition considered as pending—Fresh execution application—Continuation of old application—*Res judicata*—Particular construction of decree—Records of Court lost—Court's power to construct lost records.*

Barring the decrees granting injunctions section 48, Civil Procedure Code, applies to all other decrees.

A decree directing the execution of a conveyance might come under the expression "directs the delivery of any property" in section 48, Civil Procedure Code.

An application for execution is to be taken as pending until it is *validly* disposed of.

Therefore where there was nothing to show that an execution petition praying for the execution of a conveyance was either dismissed, or struck off, or otherwise disposed of:

Held, that the application was still pending and that a subsequent execution petition containing the same prayer was only a petition to continue proceedings under the old petition.

A particular construction of a decree operates as *res judicata* in subsequent proceedings between the same parties.

A Court has inherent power to construct its lost records.

Appeal against the order of the District Court of North Arcot, in Execution Petition No. 11 of 1910, in Original Suit No. 3 of 1895 (Sub-Court of North Arcot.)

Mr. *T. Narasimha Aiyangar*, for the Appellant.

Mr. *S. Srinivasa Aiyangar* (with him Mr. *N. S. Narasimhachari*), for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This is an appeal against an order passed by the District Court of North Arcot in execution proceedings. The decree sought to be executed is a compromise decree, dated the 25th March 1895. The execution petition which was dismissed by the learned District Judge as barred by section 48 of the Civil Procedure Code was filed on the 10th December 1909, more than 12 years from the date of the decree. The decree-holder put forward several arguments in support of his contention that section 48 does not bar his claim. Those arguments might be formulated thus:—

(1) Though the decree is dated in 1895, it became executable only in 1898 and according to the true construction of section 48, clause 1 (*a*), Civil Procedure Code, the twelve years beyond which execution should be refused commenced from 1898 when the decree became executable, and not from 1895 when the decree was passed.

(2) If, however, such is not the true construction of section 48, clause 1 (*a*), then it must be held that section 48 does not cover all kinds of decrees and that its provisions do not apply at all to a decree which is not executable on the date of its passing and that, therefore, the disability to execute after 12 years does not apply to such a decree.

(3) If contentions (1) and (2) above are both unsustainable, the decree in this case might be treated as one "directing the delivery" of a property "at a certain date," thus to come under section 48, clause 1 (*b*), the 12 years having then to be counted from 1898.

(4) If all the above three contentions are unsustainable, it is lastly argued that the present execution petition of December 1909 might be treated as a mere application to continue the proceedings in the former Execution Petition No. 74 of 1899, which was granted but which has not yet been finally disposed of, in which case section 48, Civil Procedure Code, which prohibits only a *fresh application* after 12 years does not call for consideration at all.

These four contentions put forward on behalf of the decree-holder (appellant) have been met by various counter-arguments advanced by Mr. S. Srinivasa Aiyangar who appeared for the judgment-debtor (respondent). Very numerous authorities were quoted and discussed on both sides. I think it necessary to refer only to the more important of them in this judgment, an exhaustive consideration of all the cases being not likely to lead to greater celerity of expression on my part.

As regards the first contention, the case in *Narhar Raghunath Naphad* v. *Krishnaji Govind* (1) is direct authority in support of the appellant's arguments. That decision, however, was critically analysed by Mr. S. Srinivasa Aiyangar who asked us not to follow it. It must be admitted that the construction placed by Chandavarkar and Batchelor, JJ., in that case on the words in section 48, clause 1 (*a*), is *prima facie* a little forced. While that clause provides that no fresh application presented after the expiration of 12 years "from the date of the decree sought to be executed" shall be granted, the learned Judges of the Bombay High Court expand that clause as if it stood thus:—

(*a*1) "the date of the decree sought to be executed" where the decree is at once capable of execution, and (*a*2) where the decree becomes executable only on a subsequent date, the date when it so becomes executable.

Whether the clause 1 (*a*) as it stands is logically capable of this rather wide extension, is not free from doubt,—such an extension may carry out the real intentions of the Legislature, or it may be that the Legislature lost sight of the contingency of the date of the decree not being always the date when it becomes executable and the learned Judges supplied the omission carrying out what would have been the provision made by the Legislature if they had not forgotten that contingency. The Legislature probably committed a similar oversight when enacting the provision contained in the present Article 182 of the Limitation Act (old Article 179). That Article provides generally a period of three years for the limitation of execution proceedings; and the first paragraph of the third column which relates to the commencing period of limitation mentions "the date of the decree" as the starting date. It seems to me clear that the Legislature assumed without warrant that all the decrees without exception are capable of immediate execution.

However, the Courts found in the Limitation Act, Second Schedule, itself a prior Article 181 (old Article 178), which relates to "applications for which no period of limitation is provided elsewhere" and the time from which the period begins to run is mentioned in the third column of that Article as "when the right to apply accrues." The Courts accordingly held that Article 182, third column, clause (1), did not apply to the execution of a decree which is not executable on the date of its passing, but that Article 181 applied to the execution of such a decree though the first column of Article 182 refers generally to "a decree of any Civil Court," that is, in any and every decree or order of all Civil Courts. The learned Judges who decided the case in *Narhar Raghunath Naphad* v. *Krishnaji Govind* (1) fortified their rather forced interpretation of section 48 of the Civil Procedure Code by referring to the interpretation of Article 182 of the Limitation Act (old Article 179) by the Allahabad High Court in *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (2). Mr. S. Srinivasa Aiyangar contends that the harsh provisions of Article 182 (Schedule II, Limitation Act) could be and were more easly got over by the Courts, because in that same Limitation Act

(1) 15 Ind. Cas 822; 36 B. 368; 14 Bom. L. R. 381.

(2) 17 A. 39; A. W. N. (1894) 191.

another Article 181 could be made to cover those hard cases which would be affected if the provisions of Article 182 were applied literally, whereas there is no other section in the Civil Procedure Code which could be resorted to to save decrees which fall under section 48, clause 1 (*a*). This, of course, assumes that just as the Limitation Act was intended to provide exhaustively periods of limitation for the execution of all kinds of decrees, the Civil Procedure Code wished to bar all decrees after a period of 12 years calculated from some date or other. This question, whether section 48 was intended to apply exhaustively to all decrees (except, of course, to decrees for injunctions expressly excluded from its provisions under the new Code of 1908), has also to be considered when discussing the second contention on behalf of the appellant. I need only say that the development of the law by judicial decisions does not always follow an entirely logical course, and as the decision in *Narhar Raghunath Naphad* v. *Krishnaji Govind* (1) seems to be an equitable decision, whether it can be based upon a strict logical construction of section 48, clause 1 (*a*), or not, I would feel inclined to follow it if it was necessary to do so in this case. I do not think, however, having regard to my opinion about the fourth contention of the appellant (which opinion of mine is in his favour), that it is necessary that I should express a decided view in this case as to whether the decision in *Narhar Raghunath Naphad* v. *Krishnaji Govind* (1) should be followed or not.

Before leaving this subject, I might shortly notice the contention of Mr. S. Srinivasa Aiyangar that according to the true construction of the decree in this case, it did not become executable even in 1898, that it is still unexecutable and that the execution petition is, therefore, premature. The particular provisions of the very complicated decree (now sought to be executed) which are material to be stated for the decision of this appeal are to the following effect :—

"That the first defendant do execute a deed in favour of the second plaintiff empowering the second plaintiff to enjoy ¼th share in certain villages within a month from the date of demand by the second plaintiff, that the right to make the demand shall accrue to the second plaintiff as soon as the Original Suit No. 14 of 1894 on the file of the District Court of North Arcot is disposed of and as soon as a sacred tank (named in the decree) is provided with steps on four sides to be constructed by the first defendant and that the construction of the said steps should be completed by the first defendant within three years from the date of the decree."

The first defendant's contention is that the steps of the tank have not yet been completed and that the execution petition is, therefore, premature. It may be that on a strict construction of the decree, it is really unexecutable till the first defendant chooses to complete the construction of the steps of the sacred tank. But in the order on a previous Execution Petition, No. 74 of 1899, between these same parties, it has been decided by the High Court (confirming the lower Court's decision) that the first defendant cannot prevent the decree becoming executable by delaying to complete the construction of the steps of the tank and that on the true construction of the decree, (*a*) that decree became executable when the Suit No. 14 of 1894 was decided, if the decision in that suit took place after three years from the date of the passing of the decree, (*b*) that it became executable within those three years *if both the decisions in Suit No.* 14 *of* 1894 *and the construction of the steps took place within three years*, on the date when the later of the said two events took place, and (*c*) that if the decision of Original Suit No. 14 of 1894 took place within three years but the construction of the steps did not take place within three years, the decree became executable on the expiry of the three years. At least that is how I understand the reasoning on which Execution Petition No. 74 of 1899 was decided by the High Court. If so, that decision has adjudicated the dispute between the parties on this question and that adjudication being *res judicata*, Mr. S. Srinivasa Aiyangar's contention on this point cannot, therefore, be accepted [See *Subba Chariar* v. *Muthuveeram Pillai* (3) on the question of *res judicata* in interpreting decrees].

The second contention is based on the argument that section 48, Civil Procedure Code, which excludes from the effect of its provisions only decrees granting injunctions,

(3) 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545.

should not be treated as intended to affect exhaustively all other kinds of decrees, and just as the words in the first column of Article 182 of the second Schedule of the Limitation Act were held not to include decrees not capable of execution on the dates of their being passed, so section 48, Civil Procedure Code, should also be held not to include such decrees. It seems to me, however, to be very difficult to hold that when decrees granting the relief of injunction are expressly excluded in section 48, Civil Procedure Code, any other kinds of decrees not so expressly excluded were intended to be left out of consideration in enacting the twelve years' rule. It seems easier to hold that all other decrees were intended to be affected by the Legislature, but the period for the commencement of twelve years was to be calculated in the case of a decree not immediately executable from the date when it became executable, as was held in *Narhar Raghunath Naphad* v. *Krishnaji Govind* (1), than to hold that no period of twelve years calculated from any date could bar fresh applications for execution of such a decree.

The third contention is that the direction in the decree ordering the first defendant to execute a transfer document for the $\frac{1}{4}$th share in the villages in the 2nd plaintiff's favour might be treated as a decree directing the "delivery of property" (the property being the transfer-deed) and that in that case clause 1 (*b*) of section 48 might apply; that the "certain date" referred to in that clause is in this case the expiry of three years from the date of the decree and that the date from which the twelve years' period runs is, therefore, 1898.

I was at first inclined to the view that a decree directing execution of a conveyance might come under the expression "directs...the delivery of any property" found in section 48, clause 1 (*b*); and though on a further consideration, I feel some doubts as to whether a decree for specific relief relating to execution of a document was intended by the Legislature to be included in the phrase "directs... the delivery of any property," I am not satisfied that my opinion first formed is erroneous. Assuming then that section 48 clause 1 (*b*) can be applied, was the delivery of property directed to be made "at a certain date" in this case, that is, was the delivery of the conveyance directed to be made "at a certain date" within the meaning of section 48, clause 1 (*b*)? I have already set out the relevant provisions of the decree according to the construction put upon those provisions in Execution Petition No. 74 of 1899. Those provisions show that far from "a certain date" being mentioned in the decree, the execution of the transfer-deed might have taken place within three years of the decree in certain contingencies, that it might take place on some date more than three years after the decree in certain other contingencies (that is, if Original Suit No. 14 of 1894 was decided more than three years after the date of the decree), and that on a third set of contingencies, the transfer-deed was to be executed just one month after the expiry of three years from the date of the decree. I do not think, therefore, that section 48, clause 1 (*b*), can be applied in this case.

The final contention on the appellant's side is that the present application, so far as it seeks to obtain a conveyance of the Dasabhandam income of share in the villages, is only an application to continue the proceedings in an old Application No. 74 of 1899. As I intimated already, my opinion is in favour of the appellant on this contention. In *Chalavadi Kotiah* v. *Paloori Alimelammah* (4) it was decided that where an execution petition was dismissed by the Munsif (even though the District Judge had ordered the Munsif only to stay execution) and where such a dismissal order was passed without notice and in the absence of both parties, such an order of dismissal cannot be regarded as an order passed between the parties at all, that it amounted to no more than a direction to the officers of the Court to remove the proceedings from the pending list and that the order of dismissal had not got the effect of closing the proceedings and they must be considered to have been still pending. On this view, it was held that notwithstanding the dismissal of the prior execution petition in December 1891, an application made in 1905 might be treated as one to continue the proceedings in the prior application of

(4) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 328.

1899 *so far as the application of* 1905 *contained the same prayer* (namely, the sale of attached property) *as was contained in the previous application of* 1899. I think the case which we are now deciding is a stronger case for the decree-holder than that in *Chaloradi Kotiah* v. *Poloori Mimelammah* (4) In that case the former execution petition of 1899 had been wrongly dismissed and yet it was held to be pending because the dismissal was unauthorized by law. Here, so far as the records go, the prayers in the prior Execution Application No. 74 of 1899 *were fully granted both by* the District Court and the High Court. Then there is an entry on the 21st September 1900 that the 1st defendant was arrested at the instance of the decree-holder's representative (2nd plaintiff's widow) for the recovery of moneys (about 6,000 and odd rupees) due to her under the decree; and that he was afterwards released. There is no order dismissing the petition. As regards the prayer for the execution of the transfer-deed, the learned District Judge says in his order under appeal: "Apparently, a draft transfer-deed on a stamped paper was filed by the petitioner in Court. It cannot be ascertained from the records in Execution Petition No. 74 of 1899 whether the petitioner abandoned her application for the execution of a transfer-deed by respondent or why the transfer-deed was not executed by the Court." Apparently also, there is nothing to show that the execution petition was dismissed, struck off or otherwise disposed of. In *Subba Chariar* v. *Muthuveeram Pillai* (3) it was held that an application "intended to revive and carry through a pending execution is not covered by Article 179 of the Limitation Act (XV of 1877) as it is not an application to initiate a new execution" and that "the right to apply to continue execution in such cases accrues from day to day and will not be barred until three years have elapsed *after the proceedings have ceased to be pending.*" See also *Venkatappiah* v. *Jagannadha Row* (5) where it was held that an application for execution is pending until it is *validly* disposed of. I am prepared to follow the *dicta* in these cases and I, therefore, hold that so far as the present execution petition of 1909 relates to the carrying out of the order passed in Execution Petition No. 74 of 1899 directing the 1st defendant to execute a deed of transfer in respect of ¼th share of the Dasabhandam in certain villages in favour of the 2nd plaintiff's widow, it is not a fresh application and the provisions of section 48, Civil Procedure Code, do not, therefore, apply to it. So far, however, as the present execution prays for the recovery of the amount due as mesne profits for 10 *Faslis* (*fasli* 1309 to 1318) to the 2nd plaintiff's widow on the said ¼th share, I would dismiss it as the decree does not give any such relief to the 2nd plaintiff. In this view, it is unnecessary to go into the question whether the application for such relief is a fresh application in execution to which the provisions of section 48 of the Civil Precedure Code become attracted.

It was argued by Mr. S. Srinivasa Aiyangar that as the records in Execution Petition No. 74 of 1899 may not be now forthcoming, it may be difficult to find out what the terms of the draft transfer-deed filed by the appellant in Execution Petition No. 74 of 1899 were and hence the Courts would find it impossible to continue these proceedings. I have held in *Kamakshamma* v. *Emperor* (6) that a Court has inherent power to construct records which had disappeared from its custody. The stamp paper already filed by the second plaintiff's widow might be re-placed by a new stamp paper and the terms of the draft transfer-deed then filed by her might be re-constructed on the evidence and affidavits, adduced and filed by the parties.

In the result while confirming the lower Court's decision so far as it dismisses the prayer for the recovery of mesne profits, I would set it aside so far as it refuses the relief for the execution of a transfer-deed by the first defendant and I would direct the learned District Judge to hear and dispose of that prayer, treating it as a continuation of the corresponding portion of the proceedings in Execution Petition No. 74 of 1899.

The parties will bear their respective costs in this appeal.

NAPIER, J.—I concur with my learned brother in the order proposed for the reason

(5) 12 M. L. J. 24.

(6) 21 Ind. Cas. 467; (1913) M. W. N. 862; 14 M. L. T. 317; 25 M. L. J. 445; 14 Cr. L. J. 595.

given in the latter part of his judgment. Speaking for myself I have still greater doubts than he has of the correctness of the construction of section 48 in *Narhar Raghunath Naphad* v. *Krishnaji Govind* (1) and of the Article 182 (old Article 179) in *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (2).

Appeal allowed in part.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2106 OF 1913.

October 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

AIYASAMI UDAYAN AND OTHERS—DEFENDANTS NOS. 1 TO 4—APPELLANTS

versus

APPASAMI UDAYAN—PLAINTIFF—RESPONDENT.

Hindu Law - Husband and wife—Joint Will—Devise of ancestral properties of husband and separate property of wife—Subsequent adoption by husband—Validity of Will—Construction of deed—Will or settlement—Revocability—Will for consideration.

Where a document styles itself a Will in more places than one and is not written on a stamp paper and where according to the provisions of the document the beneficiaries are to take only after the death of its executants, who do not use any expression therein restricting their rights in the properties dealt with thereunder to mere life-interests:

Held, that the document is a Will and not a settlement.

A Will speaks only from the date of death of the testator.

Bodi v. *Venkatasami Naida*, 21 Ind. Cas. 73; 14 M. L. T. 181; 25 M. L. J. 363; (1913) M. W. N. 779; and *Shib Sabitri Prasad* v. *Collector of Meerut*, 29 A. 82; 3 A. L. J. 747; A. W. N. (1906) 295, referred to.

A Hindu husband and wife executed a joint Will whereby it was provided that the husband of their junior daughter, who was then living with them and managing their affairs, should continue to do so along with his wife, and that after the death of the executants of the Will, their younger daughter or, if she should have a son, that son should inherit their properties, which consisted of the ancestral property of the testator and the absolute property of the testatrix. The son-in-law acted up to the terms of the said Will by residing with the executants thereof and managing their affairs until their death. Subsequent to the execution of the Will, the testator adopted a boy who survived him and died unmarried. In a suit by the reversioner of the adopted boy after the death of the adoptive mother to recover the property from the junior daughter and her husband:

Held, that the above provision in the Will did not amount to a contract to bequeath the property to the junior daughter or her son, that the continued residence of the son-in-law with the father-in-law and the performance by the former of the acts required of him as per terms of the Will did not amount to a consideration for a contract to leave the property by Will and make the Will executed by the testator irrevocable and that so far as the ancestral property of the testator was concerned, it passed to the heirs of the adopted boy but that as regards the separate property of the testatrix, the Will was perfectly valid.

Maddison v. *Alderson*, 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303, 31 W. R. 820; 47 J. P. 821; *Venkata Narasimha Appa Row* v. *Lakshmi Venkayamma Row*, 2 Ind. Cas. 316; 5 M. L. T. 108; 19 M. L. J. 106 and *Venkata Narasinha* v. *Lakshmi Venkayamma*, 5 Ind. Cas. 102; 7 M. L. T. 296, followed.

Synge v. *Synge*, (1894) 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 42 W. R. 309; 9 R. 265; 58 J. P. 396, explained.

Second appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Appeal Suit No. 56 of 1912, preferred against that of the District Munsif of Tiruvannamalai, in Original Suit No. 536 of 1910.

FACTS.—The properties in suit were partly the ancestral properties of one Ramaswami Udayan and partly the absolute properties of his wife Amritham. These two persons had two daughters, the elder married and without issue, and the younger (the 2nd defendant) just married to the 1st defendant. Ever since his marriage the 1st defendant had been living with his parents-in-law and was looking after the cultivation of their lands and managing their affairs. On 14th February 1889 Ramaswami and Amritham executed a document which ran as follows :—

"Will which we two (1) Ramaswami Udayan and (2) Amrithammal, wife of the said person, executed on the 14th February 1889 in full possession of our senses is as follows :—As Ramaswami Udayan among us is 60 years old and as Amrithammal is 50 years old and as we are weak and infirm and have no male issues, considering that man's age is uncertain and as our senior daughter Poongavanam, aged about 20, has been given in marriage and as she also has

no issue and as we have given our junior daughter Bhagiam, aged about 11, in marriage to Aiyaswami Udayan, aged about 22, son of Lakshmana Udayan, elder brother of Amrithammal among us, residing in Kovalavadi, as we have been keeping him with his family in our house and as he is looking after our cultivation business and protecting us, the said Aiyaswami Udayan and our junior daughter Bhagiam should protect both of us until our death and the said Bhagiam or the son that may be born to her should perform the funeral rites of both of us. After the death of both of us the said Bhagiam or, if a son be born to her, that son must inherit and enjoy the immoveable and moveable properties mentioned hereunder and belonging to us with the right of alienating the same by gift, sale or otherwise. None else except the said Bhagiam has any right to the said properties..... Will which we executed to this effect with our consent and in full possession of our senses."

Subsequent to the execution of the said instrument, Ramaswami adopted a boy named Pavadai, who survived Ramaswami. Amritham then died. The 1st and 2nd defendants, however, continued to live with Ramaswami and Amritham and protected them till their death, and finally got into possession of the suit properties. The plaintiff, claiming to be a reversioner of Pavadai, then filed a suit for the recovery of the suit properties from the defendants Nos. 1 and 2 and their sons. The defences, so far as they are material to the second appeal, were that by the instrument of the 14th February 1889 (Exhibit IV in the case), Bhagiam became absolutely entitled to all the properties of Ramaswami and Amritham, that the said document came into operation at once, though the interest created thereby in favour of Bhagiam was *in futuro*, that the disposition under Exhibit IV, even if testamentary, was one made for legal consideration and as such was binding on Pavadai, the adopted son, and that in any event the disposition was good to the extent of the share of Ramaswami, the adoptive father. The District Munsif held that Exhibit IV was a Will and not a deed of settlement creating a present interest in the donee, that it was supported by consideration, and, as a contract, would have been enforceable against Ramaswami and persons claiming under him as volunteers, but that the Will was invalid as against the adopted son, Pavadai, inasmuch as it took effect only on the death of the testator and as such could not prevail against the prior right of the adopted son, *viz.*, the right of survivorship. He, therefore, decreed the suit in respect of the properties of Ramaswami dealt with by the Will, but dismissed the suit as regards the properties of Amritham, which he held validly passed to the legatees under the Will. On appeal the Sub-Judge agreed with the District Munsif in holding that the instrument in question was a Will, but, without recording a finding on the question whether or not the Will was supported by consideration, held that, even if it amounted to a contract for consideration to leave a legacy and could be enforced against persons claiming from the testator as volunteers, it could not be enforced against the adopted son, who claimed the properties by survivorship, which right took precedence over a right created by the devise. He accordingly confirmed the decree of the Court below with certain modifications which are not relevant to the second appeal. From this decree the defendants preferred the above second appeal.

Mr. *S. Varadachariar*, for the Appellants:—Exhibit IV is not a Will, but is a settlement. Under it the legatees got a vested interest, only the time of enjoyment being postponed. The instrument provides for things being done during the life-time of the testator, such as the devisee's living together with him, etc., Vide *Thakur Umrao Singh* v. *Thakur Lachhman Singh* (1), *Rajammal* v. *Authiammal* (2) and *In the goods of Robinson* (3). Even if Exhibit IV is construed as a Will it is irrevocable, because it was executed for consideration and had been acted upon. The recitals in Exhibit IV support the position. Bhagiam's husband did live with the testator for the rest of his life-time,

(1) 10 Ind. Cas. 285; 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 14 O. C 133; 21 M. L. J. 637; (1911) 2 M. W. N. 242; 33 A. 344 (P. C.).

(2) 7 Ind. Cas. 357; 8 M. L. T. 139; 33 M. 304; 20 M. L. J. 519.

(3) (1867) 1 P. and D. 384 at p. 386; 36 L. J. P. 93; 17 L. T. 19.

looked after his affairs and protected him. *Bhala Nahana* v. *Prabhu Hari* (4) and *Shunmngaroya Mudaliar* v. *Manika Mudaliar* (5) show that there can be a valid Will for consideration. In any event Exhibit IV is good to the extent of Ramaswami's share in the properties dealt with by it. Exhibit IV evidences a contract by Ramaswami to leave properties by a Will and that contract can be specifically enforced. *Bhala Nahana* v. *Prabhu Hari* (4) and *Synge* v. *Synge* (6). The fact that Pavadai claimed by right of survivorship would not defeat the demise. See Specific Relief Act, section 27 (*c*).

Messrs. *T. R. Venkatrama Sastri* and *A. S. Visvanatha Aiyar*, for the Respondent:—It is admitted there was no contract apart from Exhibit IV. The recitals relied upon are simply the motives inducing Ramaswami to execute Exhibit IV. They do not amount to proposal and acceptance so as to constitute a binding contract. See *Maddison* v. *Alderson* (7), *Venkata Narasimha Appa Row* v. *Lakshmi Venkayamma Row* (8) and *Venkata Narasinha* v. *Lakshmi Venkayamma* (9). The cases cited for the appellant are not cases of Wills at all. Further there was no competition in them between the right of survivorship and the right by devise. Section 27, clause (*c*), of the Specific Relief Act, even if applicable to alienations for value by a member of a joint Hindu family, does not apply to a Will executed by such a member.

JUDGMENT.

NAPIER, J.—The sole point argued in this appeal is whether the appellants claiming under their mother, a legatee of one Ramasami Udayan, are entitled to claim joint family property left to her under a Will executed prior to the adoption by the testator of the person under whom the plaintiff (respondent) claims. It was admitted that apart from the Will the property would have passed to the adopted son by survivorship on the death of the testator.

It was first argued that the document was not a Will, but on its terms we are clear that it is a Will. The point that was strenuously urged was, however, that as its terms indicate the expectation of the testator that the legatee would support him (the testator) in his old age, and as it was admitted that the legatee had lived with the testator and taken charge of him and his property, the legatee had acquired a right to have the terms of the Will carried out; in other words, that the Will was irrevocable. It was admitted that there was no authority for this proposition, but it was sought to be supported on the analogy of contracts made between two persons, the consideration on one side being a promise to provide for the other party by Will. During the course of the argument it was put to the learned Vakil who appeared for the appellants whether he claimed on a contract outside the Will and he admitted that he could not do so. In my opinion, on that admission, the case became unarguable, for the simple reason that a Will speaks from the date of the death and is of its nature revocable by the testator at any moment. The cases are collected in Theobald's Law of Wills (6th Edition), Chapter X, and no case can be found where the language relied on is to be found in the Will. The case relied upon by the appellants, *Synge* v. *Synge* (6), is a case of contract and it only establishes the proposition that if there is a contract to make a testamentary gift of a particular property, that contract can be specifically enforced against persons claiming under the testator as volunteers. This, of course, does not help the appellants. The case of *Maddison* v. *Alderson* (7) is strongly against the appellants. There a woman who had lived as house-keeper with the testator for many years alleged an oral agreement with him that she would serve him without wages and give up other prospects of establishment in life, he undertaking to make a Will leaving her life-estate in land. He actually had such a Will drawn for him, but died without signing it. Admittedly the alleged contract could not be proved for want of writing under the Statute of Frauds, but it was urged that there was part performance. The House of Lords held that there was no performance and that the fact that the master designed and strove to give her the interest which, it was alleged, he had promised, could not be taken to establish

(4) 2 B. 67.

(5) 3 Ind. Cas. 799; 19 M. L. J. 640; 11 Bom. L. R. 1206 (P. C.); 10 C. L. J. 276; 6 M. L. T. 304; 32 M. 400; 36 I. A. 185.

(6) (1894) 1 Q. B. 466; 63 L J. Q. B. 202; 70 L. T. 221; 42 W. R. 309; 9 R. 265; 58 J. P. 396.

(7) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L.T. 303; 31 W. R. 820; 47 J. P. 821.

(8) 2 Ind. Cas. 316; 5 M. L. T. 108; 19 M. L. J. 106.

(9) 5 Ind. Cas. 102; 7 M. L. T. 296.

the existence of such an agreement several years before. Now it is obvious that if any equity could arise apart from a contract, it would have been urged by the very eminent Counsel who appeared in this case. The fact that the Will *was* made in this case cannot, as already pointed out, make any difference. To hold otherwise would be to open the door to contentions which could be easily raised in a very large number of Wills made by Hindus who are particularly prone to recite existing facts and future arrangements as motives for making the testamentary disposition. In this view it is, in my opinion, unnecessary to consider the further question, whether any such arrangement would have any effect as against the doctrine of survivorship even in respect of the tesator's undivided share during his life-time.

SADASIVA AIYAR, J.— I agree with my learned brother in his conclusions and I shall state my reasons shortly. I feel myself unable to accept the contention of the appellants' learned Vakil that the document, Exhibit IV, was not a Will but a deed of settlement. The document calls itself a Will in more than one place, it is not written on a stamp paper, the beneficiaries were to take only after the death of the executants and the latter do not use any expression in the deed by which they restricted their own rights in the properties till their death to mere life-interests.

As regards the next contention of the appellants' Vakil it seems to me (so far as I was able to understand it) that even if Exhibit IV was not a deed of settlement, there was a proposal made in it by the executant to the 1st defendant and his wife (the 2nd daughter's husband and the second daughter of the executants) to leave the properties by Will if the second daughter of the executants and her husband, the 1st defendant, protected the executants till their death and that that proposal was accepted by the 1st defendant and his wife, that accordingly a sort of binding contract was entered into by the executants to give a vested reversionary interest in the plaint properties by Will to the 1st defendant and his wife and that the Will, therefore, became irrevocable so far as the grant of such an interest was provided for in that Will. Having carefully considered the terms of the Will, I am unable to spell out therefrom any such proposal made by the testator or the testatrix to the beneficiary. It only recites the motive for the making of the bequest, such motive being based on the facts that the son-in-law had been living with his parents-in-law and assisting them in the cultivation of the lands and was expected to protect them till their death, which events were expected to take place soon. That a Will is to be understood as speaking only from the death of the testator and that it has only the same effect as if it was executed at the time of the testator's death cannot be controverted. See *Bodi* v. *Venkatasami Naidu* (10) and *Shib Sabitri Prasad* v. *Collector of Meerut* (11). As the 1st defendant's father-in-law had adopted a boy before his death, and as that boy survived the 1st defendant's father-in-law, that is, the boy's adoptive father, the Will became infructuous as regards the father-in-law's ancestral properties, he having become incapable of bequeathing the properties so as to defeat the adopted son's right of survivorship. That the mere raising of expectations in the mind of a person that a bounty in the shape of a legacy would be left by Will does not amount to a contract, and that even if some acts are performed by that person owing to the raising of such expectations such acts will be referable to the expectations and not to a contract, have been decided by the House of Lords in *Maddison* v. *Alderson* (7), which was followed by Abdur Rahim, J., in the case reported as *Venkata Narasimha Appa Row* v. *Lakshmi Venkayamma Row* (8), the judgement of Abdur Rahim, J., having been confirmed in *Venkata Narasinha* v. *Lakshmi Venkayamma* (9). I would, therefore, dismiss the second appeal with costs.

As regards the memorandum of objections, I see no reason not to accept the finding of fact by the lower Appellate Court that the properties to which the memorandum relates belonged to the 1st defendant's mother-in-law absolutely in her own right. In that view her Will was valid and the plaintiff cannot claim these properties as her adopted son's heir. The memorandum of objections will also be dismissed with costs.

(10) 21 Ind. Cas. 73; 14 M. L. T. 181; 25 M. L. J. 363; (1913) M. W. N. 779.

(11) 29 A. 82; 3 A. L. J. 747; A. W. N. (1906) 295.

NAPIER, J.—I concur that the memorandum of objections should be dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 90 OF 1911.
July 30 1914.
Present:—Justice Sir Henry Hartnoll and Mr. Justice Twomey.
THE BANK OF RANGOON, LTD.,—PLAINTIFF—APPELLANT
versus
SOMASUNDARAM CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Power-of-attorney, construction of—Practice of Chetties—Two Chetties signing joint promissory notes—Liability—Burden of proof—Evidence Act (I of 1872), ss. 102, 103.

Powers-of attorney are to be construed strictly, that is to say, where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

When two Chetty firms sign joint and several promissory notes, they are both jointly interested in the moneys borrowed.

If one of the joint executants desires to escape liability, the burden of proof lies on him to prove that the payee had notice and knowledge that he signed merely as a surety for the other.

Bryant v. *La Banque du Peuple*, (1893) A. C. 170; 1 R. 336; 62 L. J. P. C. 68; 68 L. T. 546; 41 W. R. 600, referred to.

Twomey, J.—A power to sign accommodation notes may well be inferred from a power to sign promissory notes jointly with others.

Mr. *Lentaigne* (*Senior*), for the Appellant.

Mr. *N. M. Cowasjee*, for the Respondents.

JUDGMENT.

TWOMEY, J.—The plaintiff-appellant Bank advanced Rs. 60,000 to two Chetty agents, Kaderasan and Lutchmanan, on a joint promissory note signed by them on behalf of their respective Firms, A. S. P. L. S. and A.A. The principal question in this case is whether the A. S. P. L. S. Firm is liable to the Bank on the promissory note signed by its agent, *K. K.'s* powers were limited by a formal power-of-attorney which the Bank had seen and noted. The Bank, therefore, was fully congnizant of the extent of his authority.

The A. S. P. L. S. Firm repudiate the transaction as being beyond the scope of the agent's authority. They plead that the firm received no benefit from the transaction and that *K.* in signing the pro-note was merely acting as surety for the co-signatory A. A. Lutchmanan. The power-of-attorney contains no express authority to sign pro-notes for the accommodation of strangers to the firm. It is agreed that as the power-of-attorney authorizes the agent to make, draw and sign pro-notes "in his absolute discretion," this includes the power of making, drawing and signing even as surety for another. But it is a well-established principle that general words in a power-of-attorney cannot be construed as conferring general unrestricted powers. They are limited by the purpose for which the power is given and must be restricted by the context. In the present case the main purpose of the power was that the agent should manage and conduct the business of the principal as a "banker, money-lender and general trader." The authority to make, draw and sign pro-notes, etc., must be construed with reference to this general purpose and so as to exclude the exercise of any power which is not warranted either by the terms used or as a necessary means of executing the authority with effect. It cannot be contended that a business such as that for which this power was given, namely the business of a Chetty money-lender, necessarily involves the drawing of pro-notes as surety for strangers. It may be that Chetties do frequently sign joint pro-notes as sureties, but that does not make it a necessary incident of a Chetty's business. It is plain that a money-lending business can be effectually carried on without entering into such accommodation transactions. The only kind of borrowing expressly authorized by this power is that of borrowing money from Banks, etc. with or without pledge of securities for moneys advanced to various persons.

The plaintiff-appellant Bank, however, pleaded that the respondent firm is liable for its agent's act, because the agent did not ostensibly sign merely as a surety and because to all appearances it was a joint transaction in which each signatory was partaking as principal (*i.e.*, *principal* as distinguished from *surety*). The learned Judge on the original side placed on the plaintiff-appellant Bank the burden of showing that the respondent firm was *substantially interested* in the transaction, that is to say, of proving that the agent *K.* did

not sign merely as a surety for the co-signatory. And the learned Judge found, as a matter of evidence, that the respondent firm was not interested at all and that *K.* signed merely as a surety. We are asked to hold that the learned Judge erred in thus laying the onus of proof on the plaintiff Bank and that the respondent firm should have been required to show that the Bank had notice of the alleged fact that *K.* was signing merely as a surety.

My learned colleague has accepted this contention and has found after a careful examination of the evidence that the respondent firm failed to discharge the burden of proving knowledge on the part of the Bank that Kaderasan was signing the promissory note merely as a surety for the Firm A. A.

But it seems to me that any detailed examination of the evidence is unnecessary in view of the admission made before the learned Judge on the original side and the admissions made before us at the hearing of the appeal.

It was admitted on behalf of the respondents on the original side that if the Bank did not know that the agent *K.* signed *merely as a surety*, then *K.'s* Firm A. S. P. L. S. would be liable. Now *K.* did not sign merely as a surety if the A. A. Firm took a moiety or indeed any share of the money. On the joint note *K.* would be still signing as a surety in respect of the share taken by the A. A. firm. *K.'s* firm would be interested in the transaction to the extent of the share taken by *K.* for them and *K.* would be signing as principal in respect of this share. If *K.'s* firm got any share in the loan, *K.* would not be signing merely as a surety. From the pleadings, therefore, it would appear that the respondents admitted by implication that the Bank would be justified in lending on the joint pro-note provided that *K.* was receiving some of the money for his firm. This inference was fully borne out at the hearing of the appeal when the respondent's Counsel expressly admitted that Kaderasan could borrow jointly with another Chetty. Mainly the respondents' contention was that *K* exceeded his authority as agent, not by signing a promissory note jointly with another Chetty, but by signing a joint note when the other Chetty was getting the whole of the money. It was perhaps open to the respondents to go further and contend that under the power *K.* had no authority to sign a promissory note jointly with another Chetty in any circumstances whatever. But they never advanced this contention and whatever our opinion may be as to the construction of the power, I do not think it would be right for us at this stage of the case to say that the respondents have admitted too much and that they should not be held to their admissions.

The effect of these admissions. express and implied, is to my mind conclusive. If the agent was authorized to sign a promissory note jointly with another Chetty, then he was acting within the scope of his authority in signing the note in suit and the Bank need not concern itself at all with the ultimate destination of the money advanced.

In the circumstances I am unable to share my learned colleague's view that the Bank would fail if the respondents could prove that Kaderasan to the knowledge of the Bank signed merely as a surety for the A. A. Firm for a power to sign accommodation notes may well be inferred from a power to sign pro-notes jointly with others. For these reasons, I concur in the orders which my learned colleague proposes to pass varying the decree of the original side.

HARTNOLL, J.—The Bank of Rangoon has sued Ramsawmy Chetty carrying on business under the style of Firm of A.A. Subramanian Chetty and Somasundaram Chetty carrying on business under the style of Firm of A. S. P. L. S. and Ismail Burrabhoy to recover the principal sum of Rs. 60,000 due on a promissory note signed by Lutchmanan Chetty on behalf of the A. A. Firm and by Kaderasan Chetty on behalf of the A. S. P. L. S. Firm and dated the 12th August 1907, together with the interest that has accrued thereon. Ismail Burrabhoy was sued, as it is stated that at the time the promissory note was executed there was deposited with the Bank a mortgage-deed executed by him in favour of the A. A. Firm as collateral security. The principal sum secured by the mortgage-deed was Rs. 65,000. Subaramanian Chetty and Somasundaram Chetty were alleged to be partners. Somasundaram contested the suit by stating that he was not a partner in the A. S. P. L.S. Firm. The learned Judge on the original side found that it was not proved that

Somasundaram Chetty was a partner and so the suit was dismissed against him. The suit was also dismissed against Subramanian as it was found that the power which he gave his agent Kaderasan Chetty did not authorize him to sign as surety for another firm, that he did sign the promissory note in question in such capacity, that no part of the money borrowed on the promissory note was taken either by Kaderasan Chetty or by Subramanian and that the Bank through their Shroff, Pasupathi Iyer, had notice that Kaderasan was signing the name of Subramanian simply as surety for a loan advanced solely for the benefit of the A. A. Firm. As regards the other defendants, the Bank was given the relief asked for. The learned Judge gave Subramanian and Somasundaram separate costs as regards Counsel's fees. This appeal has been laid on the ground that the suit was wrongly dismissed against Subramanian and that the learned Judge erred in awarding Somasundaram his full costs. They still maintain that he is a partner in the A. S. P. L. S. Firm, but do not desire to appeal against the finding that he was not. It must be taken, therefore, for the purpose of this appeal that the Firm of A. S. P. L. S. consisted of Subramanian only. Subramanian Chetty gave a power-of-attorney, dated the 10th June 1903, to Somasundaram to transact his affairs. The power authorized Somasundaram to appoint a substitute in his place, such substitute to have the same powers as he had. In pursuance of such authority Somasundaram appointed one Kaderasan as his substitute on the 2nd November 1905. It is admitted that Kaderasan while acting in Somasundaram's place had the same powers as he had. The plaintiff Bank saw and noted the power-of-attorney given by Subramanian to Somasundaram or the deed of appointment by Somasundaram in favour of Kaderasan on the 6th January 1906. The Bank, therefore, must be held to have knowledge of both deeds.

The first point for consideration is whether Kaderasan had power as the agent of the A. S. P. L. S. Firm to sign a promissory note merely for the accommodation of another firm and in order to determine whether he had such power or not, the power-of-attorney granted by Subramanian to Somasundaram must be scrutinized and construed. As was enunciated in the case of *Bryant, Powis and Bryant, Ld.* v. *La Banque du Peuple* (1) powers-of-attorney are to be construed strictly, that is to say, where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. Learned Counsel for the Bank relies on the following words in the power: "To make, draw, sign, accept, endorse, negotiate and transfer all and every or any bills of exchange, promissory notes, *hundis*, cheques, drafts, bills of lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may *in his absolute discretion* think fit to make, draw, sign, accept, endorse, negotiate and transfer *in my name and on my behalf*." Great stress is laid on the words which I have underlined. But it seems to me that to arrive at a decision on the point at issue the instrument must be looked at as a whole. Subramanian begins by describing himself as a banker, money-lender and general trader and then he goes on to appoint Somasundaram as his attorney to do various acts. The first is to transact, conduct and manage all and every or any of the affairs, concerns, matters and things in which he is now or may hereafter in any wise be interested and concerned and for that purpose to use and sign his name to all and every or any documents or document, writings or writing whatsoever. Then follows a power to borrow money from any Bank, etc., either with or without pledge of securities for moneys advanced to various persons. Then follows the clause which I first set out and which is relied on by the Bank. Then follow clauses to examine and settle accounts, to demand and sue for debts, dues, goods, effects and things belonging to Subramanian, etc., and to give, sign and execute receipts, etc., to represent Subramanian in Court to act for him in actions, to compound or compromise for the payment of debts, etc., to enter on immoveable properties in which Subramanian may be interested, etc., to pay rents and taxes, etc., to let lands in which he may be interested to

(1) (1893) A. C. 170; 1 R. 336; 62 L. J. P. C. 68; 68 L. T. 546; 41 W. R. 600.

recover rents, etc., to transfer and assign sales and mortgages in which he may be interested to sign all deeds of sale, etc., to appear before the Sub-Registrar and to deal with all moneys received by him under and by virtue of these presents. Then follow the words: "To sign my name, to make and execute on my behalf cheques, contracts, agreements, deeds, transfer and assignments and instruments whatsoever requisite or necessary for all or any of the purposes aforesaid and generally in and about the said premises to execute and do every deed and thing requisite and necessary *for all or any of the purposes aforesaid* as fully and effectually to all intents and purposes aforesaid as I myself could do if personally present." The power appears to me to be one constituting an agent to conduct Subramanian's business of banker, money-lender and general trader and although taken by itself the clause relied on by the Bank is in the widest possible terms, I am of opinion that it should not be given the widest possible meaning and that it should only be held to authorize the making and assigning of promissory notes, etc., which would be made and signed in the ordinary course of transacting Subramanian's business, and that it should not be held to authorize any transaction outside the scope of such business. Construing the clause in this manner, is there any evidence on the record to show that it was an ordinary part of Subramanian's business to sign promissory notes merely for the accomodation of another firm? There is nothing from which such an inference can be drawn. On the other hand the evidence goes to show that when two Chetty Firms sign joint and several promissory notes, they are both jointly interested in the moneys borrowed. I would, therefore, hold that it is not proved that the power authorized Kaderasan to sign his principal's name merely for the accommodation of another, so that this ground of appeal fails.

It becomes now necessary to go into the facts. There is no doubt that Lutchmanan on behalf of the A. A. Firm and Kaderasan on behalf of A. S. P. L. S. Firm did execute Exhibit D, a joint and several promissory note, for Rs. 60,000 on the 12th August 1907 and that the consideration for it was the renewal of a debt of Rs. 30,000 incurred by both of them on behalf of their firms on a joint and several promissory note, dated the 8th July 1907, a cheque on the Bank of Bengal for Rs. 2,000 in favour of A. A. Lutchmanan and Rs. 10,000, in cash. The manager of the Bank, Churchward, says that he had no knowledge when the loan was given, that Kaderasan was signing as a surety and after studying his evidence and considering the other facts of the case and the form of the promissory note, I can see no reason to doubt this statement. The respondents allege that the Shroff of the Bank, one Pasupathi Iyer, knew that Kaderasan signed merely as surety and claim that this was notice to the Bank that he was doing so. On the original side this burden of proof showing that the A. S. P. L. S. Firm was interested in the consideration for the note was placed on the Bank, but I am ofopinion that this was wrong. In the case of *Bryant, Powis, and Bryant, Ld.* v. *La Banque du Peuple* (1) the following passage, which occurs in the case of *President, etc., of the Westfield Bank* v. *Cohen* (2), which was delivered by the Court of Appeal of the State of New York, was approved of by their Lordships as well stating the law. It is as follows:—

"Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on constituent, as to all persons dealing in good faith with the agent, such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority."

During the course of the trial before the learned Judge on the original side, it was admitted by the Counsel of A. S. P. L. S. that, if the Bank did not know that Kaderasan signed merely as surety, the A.S.P.L.S. Firm would be liable. This admission seems to me to amount to an admission that the appellant Bank was justified in advancing to the A. S. P. L. S. and A. A. Firms money on a joint and several promissory note signed by their agents and that the A. S. P. L. S. Firm would be liable for the money so borrowed if the Bank did not know that their agent signed merely as surety. This was the position taken by the Counsel of the A. S. P. L. S. Firm at the hearing of the appeal when it was again admitted that the agent of the firm had power to

(2) 37 N. Y. R. (10 Tiff.) 322.

borrow jointly with another firm. It may be said that when two persons jointly and severally borrow money on a promissory note and each takes a share in the money so borrowed, each stands security for the other for the amount taken by him. The A. S. P. L. S. Firm might have contested its liability to the Bank on such a ground, but it did not do so. On the contrary it admitted its liabiliaty in such a case. It, therefore, seems to me that such an aspect of the case should not be considered. Taking the admission with the extract from the judgment I have just quoted, it seems to me that the position is that *prima facie* the Bank was justified in advancing the money as it did, since it is allowed that the agent of the A. S. P. L. S. Firm could borrow jointly with another firm and that is what he purported to do when he signed the promissory note of the 12th August 1907. If the A. S. P.L. S. Firm desires to escape liability, it is for them to show that their agent signed merely as a surety to the knowledge of the Bank. The case seems to fall within both section 102 and section 103 of the Evidence Act. Now has Subramanian proved that the Bank had such notice? He calls Lutchmanan Chetty to prove that the Shroff of the Bank, Pasupathi Iyer, knew that the money was wanted by the A. A. Firm only, that in fact it was Pasupathi Iyer himself who told Lutchmanan to get another man to stand as surety. He also calls Subbia, who was a clerk in the employ of the A. S. P. L. S. Firm from 1905 to 1908, to produce certain books of the firm and prove that the firm did not get any of the Rs. 60,000. He also relies on the fact that the mortgage deposited as collateral security when the note was signed, was one in favour of the A. A. Firm and had nothing to do with the firm of A. S. P. L. S. The sum secured by the mortgage was Rs. 65,000. In the face of the promissory note itself the argument as to the deposit and ownership of the mortgage does not carry us very far, Churchward cannot be expected to know the mutual arrangements between borrowers from the Bank. As a matter of fact Subbia's evidence shows that the two firms were constantly having transactions with each other and if both firms were interested in this promissory note for Rs. 60,000, it is not improbable that the A. A. Firm would have deposited the mortgage as security for the mutual benefit of themselves and the A. S. P. L. S. Firm. The most important witness is Lutchmanan Chetty, as he is the only one who can give direct evidence that Pasupathi Iyer knew that Kaderasan Chetty signed as surety. Is he trustworthy and credible? It may possibly be that Kaderasan did sign as a surety merely and that his firm did not participate in the loan and even if so, it may also possibly be that nothing was said to the Bank officials, to Pasupathi Iyer or any one else when the note was signed that Kaderasan was signing as a surety. If nothing was said then to the effect that he was a surety even if he was, he would bind his principal for the reasons which I have already given since the Bank would not have had notice. The credibility of Lutchmanan Chetty or otherwise, therefore, becomes very important. As I have already stated he, says that Pasupathi Iyer asked him to get another man to stand as surety and that he got Kaderasan. He says that the money was taken by his firm and that interest was paid by his firm, but he produces no books to show this. When cross-examined he allows that Kaderasan told him that his principal had not permitted him to sign and borrow for another and that he had given express directions not to borrow for another and that he (Kaderasan) signed the promissory note to oblige his (Lutchmanan's) master. He allowed that Kaderasan was wrong in signing without his principal's permission. He also said that Kaderasan used his principal's name in signing the promissory note at their request to oblige them. That he should allow Kaderasan to do a wrongful act of this nature is an important fact in considering his credibility as a witness. If he could acquiesce in Kaderasan doing such a wrongful act, is it probable that, if it suit his purpose, he would hesitate to tell a lie in the witness-box? His evidence is not satisfactory in other ways. He said: "I do not remember if Rs. 30,000 out of the sum of Rs. 60,000 was withheld by the Bank and taken towards a debt due by me already." So his recollection of the details of the transaction was not very vivid. If he could not recollect that Rs. 30,000 of the consideration was on account of the renewal of an old

BANK OF RANGOON, LTD. v. SOMASUNDARAM CHETTY.[1]

debt, how does he recollect that Kaderasan signed as a surety? He went on to say: "Kaderasan Chetty and I had jointly borrowed Rs. 30,000 before that. I took that money. It was money got in cash. I have borrowed money in the National Bank of India, Chartered Bank of India and Bank of Burma. I might have borrowed jointly from these Banks with Kaderasan Chetty. In some cases he would have stood surety for me and in some cases we might both have taken the money. *In the Bank of Rangoon also we have borrowed money for both of us together. I do not remember if we both borrowed Rs.* 30,000 *from the Bank for both of us.*" In re-examination he said: "I paid back the sum of Rs. 30,000 borrowed by me with the joint signature of Kaderasan from the Bank." Now Churchward, the manager, says, and there is no reason to disbelieve him, that except for the two loans of the 8th July and 12th August he has never given any other loans to the two Firms of A.A. and A.S.P.L.S. together and that he has never received any other promissory notes from them together. When, therefore, Lutchmanan Chetty allowed that in the Bank of Rangoon he and Kaderasan had borrowed money for both of them together, what loan was he referring to? Or was the statement a loose and random one? If it was a loose and random one, the fact that he should make it goes to impair his credibility. If it was a true statement, it must refer to either the loan on the 8th July or that of the 12th August. His evidence as regards the loan of Rs. 30,000 is unsatisfactory. He first said he took the money, then that he did not remember if they both borrowed Rs. 30,000 from the Bank for both of them and then in re-examination said that he paid back the sum of Rs. 30,000 borrowed by him with the joint signature of Kaderasan from the Bank. The learned Judge on the original side has remarked that as regards Lutchmanan's interest, it is more in favour of the Bank's case in that if his accounts were passed on the footing that the A.A. Firm got only a share of the loan, which would be the case if the story he told in the witness-box was false, and at the time of their being passed he had suppressed the fact that he really had got all the money himself, clearly that would entitle his late employers or their creditors to re-open the account and to recover from him in respect of the balance. He says that he pays income-tax to the extent of Rs. 700 a year and if that is so, he has means. He says that he was agent of the A.A. Firm from 1904 to 1908. So at the time of his giving evidence he was presumably not in their employ. The A.A. Firm did not appear to defend the suit. According to Subbia the A.A. Firm got in two difficulties in 1908, and it may, therefore, have been insolvent when the suit was brought. If so, nothing more could be recovered from them in this suit than could be recovered by the sale of the collateral security deposited at the time. The promissory note was filed, and this would be recoverable from them in any case. Assuming that the full amount due on the promissory note would not be recovered by the sale of such security and that nothing more could be recovered from the A.A. Firm, the question arises whether Lutchmanan would have anything to fear from the A.A. Firm from going into the box and telling a story that, if believed, would free the A.S.P.L.S. Firm from liability. The books of the A.A. Firm may show that they only got half of the Rs. 60,000 and they may know that they only got half. If they are in difficulties or insolvent, they may have nothing to gain by bringing a suit to enforce from the A.S.P.L.S. Firm a half-contribution of what has been recovered from them or by bringing a claim against Lutchmanan, which they may know to be false, simply to take advantage of his giving false evidence. It may even be possible that knowing the only tangible property of theirs that can be proceeded against is the mortgage deposited, they have connived with the A.S.P.L.S. Firm to reduce their joint liability to the Bank. I do not think that due weight can be given to any such considerations as to what was Lutchmanan's interest. His evidence must be taken, analysed and pronounced on as it stands. The evidence of Subbia remains. He states that he was a clerk in the employ of the A. S. P. L. S. Firm from 1905 to 1908. He produced the following books of the Firm:—(1) a ledger account for the period from November 1905 to November 1907, the ledger containing the account of the Bank of Rangoon, (2) a day book beginning from the 14th March 1907 upto the time he gave his evidence, (3) two current account books. He says that between

1905 and 1907 there is no entry of a debt on the joint signatures of A. A. and A. S. P. L. S. and it is clear that there is no note of such a transaction in the book produced. The point is whether the books can be relied on as correct and trustworthy for the entries made in them in Kaderasan's time. It must be remembered that the A. S P. L. S. Firm allows that Kaderasan was a bad servant to them and did not conduct their business properly. Subbia says that he was prosecuted for a defalcation in Rangoon. A study of Subbia's evidence leads me to note as follows: The two current accounts give ledger accounts with the different persons with whom A. S. P. L. S. had dealings. Exhibit P contains accounts with two people other than Chetty Firms. No such ledgeraccount was produced in regard to transactions with the A. A. Firm, though looking at the evidence of joint transactions between the two firms it would be expected that one would be in existence. If separate ledger accounts were kept for dealings with others, why was not one kept for dealings with the A. A. Firm? Towards the commencement of his cross-examination Subbia said that the accounts of his firm with the A. A. Firm were not in the ledger he produced, but in another ledger which he had at his house and that they had with the A. A. Firm the current account ever since his firm started up to the time their firm got into difficulties in January 1908. The next day he brought two current account books, and at first said that he would have to find out where A. A's account was and that he had not looked into it at home. He then said that the account was not in the two books. His explanation as to the variance between his evidence does not seem to me to be satisfactory. He distinctly said at first there was a separate current account with the Firm of A. A. As there were such for transactions with others, why was there not one with A. A.? The impression left on my mind is that there may be such an one with A. A. and that it may have been suppressed.

Then looking at the ledger account produced (P. 173) there is a note under date the 7th October 1907 of a joint transaction with A. A. in respect of borrowing Rs. 30,000 from the Chartered Bank. The entry runs: "7th October 1907. Credit as on this date in respect of our share out of a demand loan of Rs. 30,000 taken jointly with A. A. on the 27th August deducting half (of it) to the above, Rs. 15,000."

The entry goes on to show that the loan was taken on the 27th August and yet it was not entered till the 7th October. If this was so, it would tend to show that the books may not have been kept correctly and carefully. It must be that the books would in 1907 be under the charge of Kaderasan, a man who did not conduct the business properly and was subsequently prosecuted for defalcation. Subbia on being asked to explain the entry said: "The loan was raised on the 27th August, but it was entered on the 7th October. The reason why it appears on the 7th October though money was borrowed on the 27th August is that the loan was renewed on that day. Entry in the ledger shows that our firm got the money on the 27th August. There is nothing in the day book *re* the loan of Rs. 30,000 (he means under date 27th August as I have verified from the day book). It is also possible that on paper was 27th August but the money was actually taken on the 7th October." Such evidence does not explain satisfactorily how a loan apparently recorded as taken on the 27th August was not entered till the 7th October. If omission on due date to enter could occur once, is it possible the transactions in question were omitted to be entered on due date and subsequently not entered at all? There is another item of account that does not seem to me to be very satisfactory, and that is the item marked as Ik. under date the 29th May 1906. It says: "Credit in respect of a two months' term (*thavenai*) loan 'signed' by C. V. C. T. bearing 9 per cent. interest--Rs. 30,000." Subbia says that it does not appear that the C. V. C. T. got everything out of this amount. The loan was from the Bank of Rangoon. The voucher of the Bank showing particulars with regard to it is Exhibt G3. That voucher shows that the Rs. 30,000 were paid by cash Rs. 19,000 and by a cheque in favour of the C. V. C. T. Rs. 11,000. There is no reason to doubt the genuineness of Exhibit G3. Looking at the C. V. C. T.'s ledger account it does not help us

to explain how a cheque for Rs. 11,000 was given to them, if they did not participate in the loan. Subbia does not satisfactorily explain the Rs. 431-8 in Exhibit 4, the Rs. 438-4 in Exhibit H2 and the Rs. 451-3-6 in Exhibit K2. When Subbia comes to give evidence as to transactions between his A. A. Firm he says: "I cannot say what the state of account was between A. A. Firm and our firm on 8th July 1907. I shall have to work it out. I cannot say whether a balance of Rs. 50,000 might have been owing from one firm to another. 1907 August 12th. I cannot say what was the state of accounts between A. A. Firm and our firm. I cannot say whether a balance of Rs. 60,000 might have been owing from the one to another. . . . . Though I conduct the case now on behalf of the defendant I have not looked in to the state of affairs in August 1907 for the purposes of the suit. As we have no current account between the two firms, I shall have to examine all books of Bank loan transactions to find that out. Bank loan transactions if carried into another, then that must be looked into. I will have to work out from Exhibit I. I think the account has not been carried into any other book. I think their account must appear only in the book." He is then taken through entries in the ledger beginning from the 8th July 1907, the date of the first promissory note. It would have been more satisfactory if Subbia had been able to give more definite evidence about the state of the account between the two firms on 8th July 1907. As regards the transactions of the 8th July and 12th August 1907 it is impossible to say from the entries as they stand that the A. S. P. L. S. Firm benefited from the loans taken from the Bank of Rangoon on that day. Rupees 30,000 were taken from the A. A. Firm on the 12th August, Rs. 28,000 being re-paid on the 13th August; but this does not show that both firms benefited equally from the extra Rs. 30,000 taken on that day.

If the books can be believed and trusted, they may be said to show that the A. S. P. L. S. Firm did not jointly borrow the Rs. 60,000 from the Bank of Rangoon; but in the face of my analysis of Subbia's evidence can they be trusted? There is the fact of Kaderasan's character, the non-explanation of an entry of a loan apparently taken on the 27th August 1907 till the 7th October, the giving of a cheque for Rs. 11,000 to the C. V. C. T. as part of consideration for a loan which, according to the books, the Firm C. V. C. T. did not participate in and the non-explanation of some minor sums. There is further the fact that no separate current account with the A. A. Firm has been produced though such an account seems to have been kept in respect to transactions with others and the fact that Subbia does not give definite evidence as to the state of the account between the two firms on the 8th July 1907, the date of the first loan. I think that special stress should be laid on the non-production of a separate current account with the A. A. Firm and the suspicion which arises that there may be such an account, the fact that it is possible that a loan taken on the 27th August was not entered into the ledger till the 7th October and the fact that a cheque for Rs. 11,000 was given to the C. V. C. T. Firm when a loan was being disbursed by the Bank on the joint liability of the A. S. P. L. S. books, showing apparently that the C. V. C. T. Firm did not participate in it. I do not think that under the circumstances the books can be implicitly relied on.

Respondent's Counsel comments strongly on the fact that Pasupathi Iyer has not been called by the Bank, and from Churchward's evidence it would appear that effective steps could have been taken to examine him. It is explained in paragraph 11 of the appeal why it was not thought necessary to examine him, and the Bank's Counsel said at the hearing that it was too late to examine Pasupathi Iyer on commission after Lutchmanan's evidence had come back as the case had been in the warning list. The witnesses were not examined till long after Lutchmanan had been examined and I am of opinion that it was a grave omission on the part of the Bank to have taken no steps to secure Pasupathi Iyer's evidence. It must be, however, remembered that ac-

cording to Churchward's evidence, at the time of the hearing Pasupathi Iyer does not seem to have been in the service of the Bank, and if this is so, one of the main reasons for thinking that he might depose untruly in favour of the Bank had ceased to exist. In the circumstances why did not the A. S. P. L. S. firm take steps to secure his evidence?

But in any case the burden of proof lay on the A. S. P. L. S. firm to prove that the Bank had notice that their firm was not interested in the loan evidenced by the promissory note for Rs. 60,000 and on the evidence produced, I am unable to find that they have proved that the Bank had such notice. In the first place, it does not seem to me that they have proved that they were not interested in either of the sums of Rs. 30,000 and in the second, even assuming that they were not interested in either of such sums and that it is a fact that Kaderasan signed both notes merely as a surety, I am unable to hold that on the unsatisfactory evidence of Lutchmanan Chetty it is proved that Pasupathi Iyer knew or had notice that Kaderasan signed merely as a surety. If he did sign merely as a surety, it may possibly have been that he did do so without anything being said about it to Pasupathi Iyer. All parties may have then been of opinion that the power gave Kaderasan authority to sign his principal's name as surety, and if so there would be no special reason for any talk as to the capacity in which Kaderasan signed, and in considering whether this is what actually took place the credibility of that part of Lutchmanan's evidence, in which he says that Kaderasan told him that his principal had not permitted him to sign and borrow for another and that he had given express instructions not to borrow for another and that he had signed to oblige him, comes into question. Is such a story likely to be true?

In this view it is unnecessary to discuss whether if Pasupathi Iyer knew that Kaderasan signed merely as a surety, such knowledge would be notice to, and would bind, the Bank.

One further point remains, and that is whether Subramanian and Somasundaram should have been each allowed Counsel's fees. I would not interfere with the order of the learned Judge on the point, as Somasundaram had to meet quite a different case to the case Subramanian had to meet.

In the result, I would vary the decree passed by the learned Judge on the original side by ordering that the names of the legal representatives of Subramanian now deceased, namely Somasundaram Chetty and Shenmugam Chetty, be added to that of Ramaswamy Chetty as being liable to the Bank in the sum of Rs. 78,744-10-6 for principal and interest and that the same decree be passed against them all three as was passed against Ramaswamy Chetty. I would also give the Bank costs against the firm of A. S. P. L. S., *i. e.*, now Somasundaram Chetty and Shenmugam Chetty in their capacity as legal representatives of Subramanian Chetty on the original side and in this appeal.

I would not allow Somasundaram costs as an individual respondent in this appeal.

Decree varied.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 891 OF 1914.

November 13, 1914.

Present:—Mr. Justice Kumaraswamy Sastri.

SIVAGAMI AMMAL—PLAINTIFF—PETITIONER

versus

LOUIS GNANA PRAKASA MUDALIAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, r. 1—Case once begun—Court bound to go on from day to day—Case part-heard before Subordinate Judge—Subordinate Judge proper officer to adjourn it and not District Judge.

When the hearing of a suit has once begun, the Court is bound to go on, under Order XVII, rule 1, of the Civil Procedure Code, from day to day, unless for special reasons it is necessary to adjourn it to some future day.

Where a Subordinate Judge, before whom a suit was part-heard, adjourned it from 7th October 1914 to 18th January 1915 in obedience to the order of the District Judge to whom he applied for directions:

Held, that the order of the District Judge must be set aside and that the Subordinate Judge was the proper officer to decide when a part-heard case before him was to be adjourned and the District Judge had no voice in the matter.

LAXMIRAM LALLUBHAI JOSHI *v.* BHALASHANKAR VENIRAM MEHTA.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Cuddalore, in Original Suit No. 48 of 1913.

Mr. *T. V. Venkatarama Iyer*, for the Petitioner.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondent.

JUDGMENT.—The suit was part-heard by the Subordinate Judge and he was under Order XVII, rule 1, Civil Procedure Code, bound to go on from day to day unless for special reasons it was necessary to adjourn the case to some future day. The Subordinate Judge has adjourned the case from the 7th October 1914 to 18th January 1915 in obedience to the orders of the District Judge to whom he seems to have applied for directions.

I have perused the proceedings of the District Judge and find it difficult to see on what grounds it can be supported. The Subordinate Judge was the proper officer to decide when a part-heard case before him was to be adjourned and the District Judge had no voice in the matter. Even assuming that he has, it is difficult to follow his reasoning. He seems to assume that the Vakils were unnecessarily prolonging the case before the Subordinate Judge and that as the Subordinate Court was sanctioned for a short time, the Subordinate Judge should show larger disposals by adjourning the present case and taking up other suits. I cannot but express my emphatic dissent to the procedure and the reasoning adopted by the District Judge.

I set aside the order of the Subordinate Judge and direct him to take up the case and proceed with it according to law. He will exercise his own discretion in adjourning the case. I make no order as to costs.

Order set aside.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 929 OF 1913.

July 7, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

LAXMIRAM LALLUBHAI JOSHI—PLAINTIFF—APPELLANT

versus

BHALASHANKAR VENIRAM MEHTA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution—Judgment-debtor declared insolvent—Appeal by decree-holder – Step-in-aid of execution.

An appeal by the decree-holder against an order declaring the judgment-debtor an insolvent is "an application to take a step-in-aid of execution" within the meaning of Article 182 of the first Schedule of the Limitation Act, and, therefore, an application for execution filed within three years of such an appeal is not barred.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 68 of 1912, reversing the order passed by the Subordinate Judge of Umreth, in Darkhast No. 462 of 1911.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *Manubhai Nanabhai*, for the Respondent.

JUDGMENT.—The facts in this case are somewhat unusual. There was an ordinary mortgage-decree of the year 1903. The mortgagee applied for execution in due course on the 8th of August 1905. In January 1906 the mortgagor applied under the old Code of Civil Procedure to be declared an insolvent. In his application of August 1905 the mortgagee asked that the property might be sold, but did not seek any further relief against the mortgagor. Accordingly in June 1906 the property was sold under this Darkhast. In September of the same year the Court declared the mortgagor an insolvent, although under section 351 it did not discharge him. In December of the same year the Court struck off the Darkhast of August the 8th, 1905, for two reasons: (1) that it had been satisfied, (2) that the judgment-debtor was now an adjudicated insolvent. The mortgagee appeared from the first in the insolvency proceedings as the sole opposing creditor.

We might find some difficulty, more, speaking for myself I think, a verbal than a real difficulty, in bringing such appearance within the meaning of the words "application to take some step-in-aid of execution" under Article 179 (old), now Article 182. But as the result of those proceedings was against

him, the creditor, appellant here, appealed to the District Court and succeeded. We think that it is not putting too great a strain upon ordinary language to say that an appeal in such circumstances fairly falls within the meaning of the words "an application to take a step-in-aid of execution." It is clear that as long as the insolvency proceedings went in favour of the debtor, the creditor could not have presented any application in ordinary course for the further execution of his decree with the least hope of success. Two at least of the High Courts in India had already put so liberal a construction upon the insolvency provisions of the old Civil Procedure Code that an executing creditor must have foreseen that no application for the execution of the decree, either by sale of property or arrest of the person of the judgment-debtor, could have the least chance of success so long as the judgment-debtor had been declared an insolvent under section 351, even although he had not been actually discharged within the meaning of section 357. So that we think that in view of the Court's finding that this judgment-debtor was an insolvent early in 1906, the present appellant had no other course open to him than in the first instance to get this bar to the further execution of his decree removed, and the only way in which he could hope to obtain that result would be by first opposing the insolvency petition in the first Court, and, if he failed there, by appealing to higher authority. This he did, and although it is unnecessary to trace the subsequent tedious proceedings, it is sufficient to say that his last appeal could not have been made earlier than January 1909, that is to say, well within three years of his present Darkhast.

Adopting that view, it is unnecessary to enter into any of the other nice and difficult questions which have been raised and adequately argued in the course of this appeal. We do not seek to lay down any general principle upon any of those questions, but we desire to confine our judgment to the rather unusual facts before us, and we think that we do no violence to the meaning of Article 179 (old), now Article 182, by holding that the present Darkhast is within three years of the last application made by the judgment-creditor to a Court to take some step-in-aid of the execution of his decree. For these reasons we think that the appeal ought to be allowed and the judgment of the Court below reversed. We direct, therefore, that the Darkhast be restored and that execution do proceed upon it according to law. We think that this appeal must be allowed with all costs.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REVISION PETITION No. 9 OF 1913-14, OF GONDA DISTRICT.

April 9, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Maharajah Sir BHAGWATI PRASAD SINGH—DEFENDANT—APPELLANT

versus

SURAJ BALI—PLAINTIFF—RESPONDENT.

Ejectment, power of, not absolutely reserved under lease—Thekadar *not authorised to eject tenants without landlord's consent—Notice of ejectment signed by landlord alone, whether sufficient—Signature of* thekadar, *whether necessary.*

Where the power of ejecting tenants is not absolutely reserved under the lease but it is simply provided that it should not be exercised without the consent of the landlord, a notice of ejectment signed by the landlord alone is insufficient and must bear the signature of the *thekadar*.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 1st October 1913, reversing that of the Assistant Collector, Gonda, dated 7th March 1913.

FACTS.—The defendant Maharajah gave one of his villages on lease to a *thekadar*. The lease provided that the *thekadar* would not be entitled to issue notices of ejectment on tenants without having had previously obtained written consent of the Maharajah.

Subsequently a notice of ejectment signed by the Maharajah alone was served upon the plaintiff tenant, who contested it on the ground that it was invalid as it did not bear the *thekadar's* signature. The defendant pleaded that the notice was valid, inasmuch as the *thekadar* had not been given the power of ejectment and thus it was not necessary that the notice should have been signed by him.

The Court of first instance, relying upon the decision of the Board of Revenue in *In re*

MG. HYIN BA v. MG. PE U KIN.

Maharajah of Balrampur v. *Bhajan* (Petition No. 16 of 1904-05, of Gonda District), which held in that case that the *thekadar's* signature on the notice was not required, upheld the notice and dismissed the suit. The Commissioner, on appeal, finding that the Maharajah had transferred by lease his right of collection of rent to the *thekadar* in whose favour mutation was effected, and had merely restricted the *thekadar* from issuing notices without his consent, and that there was thus no complete reservation by the Maharajah of the power of ejectment, held that the notice ought not to have been issued by the Maharajah alone but by the *thekadar* with the Maharajah's consent. The notice having thus been cancelled by the first Appellate Court, the matter was further contested in appeal before the Board.

The Hon'ble Shaikh *Shahid Husain*, for the Appellant.

Mr. *S. P. Kain*, for the Respondent.

JUDGMENT.—The objection to the notice upheld by the Commissioner was essentially of a technical character and if the Commissioner had overruled it, I should have had no fault to find with his doing so. It is impossible, however, to say that according to the strict letter of the law, the decision of the Commissioner is not correct. The power of ejectment was not under the *thekadar's* lease absolutely reserved. It was simply provided that it should not be exercised without the consent of the Maharajah. In these circumstances, to fully comply with the law the notice should bear the signature of the *thekadar*.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 117 OF 1913.

August 24, 1914.

Present:—Mr. Justice Parlett.

MG. HYIN BA AND ANOTHER—APPELLANTS

versus

MG. PE U KIN AND A OTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 64, 73—Execution proceedings Attachment of property by two decree-holders—Sale ordered under first attachment—Private alienation of property after attachment—Deposit of decretal amount of first decree-holder—Assets, rateable distribution of—Second decree-holder, right of.

Where a judgment-debtor's property was attached in execution of a certain decree and another decree-holder applied for attachment of the same property in execution of his decree against the same judgment-debtor, and the judgment-debtor paid into the Court the decretal amount with costs of the first decree-holder a day before the sale and meanwhile sold it privately to another person:

Held, that, whether the second decree-holder's attachment was actually effected or not, he was entitled under section 73, Civil Procedure Code, to a rateable distribution of the assets received by the Court and the private transfer of the property was, under section 64, Civil Procedure Code, void as against his claim to the extent of his share.

Mr. *Villa*, for the Appellant.

Mr. *Ba Dun*, for the Respondent.

JUDGMENT.—On 8th February 1912 Mg. Kya Ban attached a house and site in execution of a money-decree against Ma Sein and two others and the sale was eventually fixed for the 4th May. On that day the judgment-debtors deposited the decretal amount and costs in Court and the attachment was on 6th May withdrawn and the next day the money was paid to Mg. Kya Ban. It appears that on 18th of April the judgment-debtors had privately transferred the attached property to the present respondents for Rs. 200 a part of which money the judgment-debtors paid into Court on 4th May.

Meanwhile on 15th March Mg. Kyin Bu applied in execution of a money-decree against the same judgment-debtors to attach the same property, and on 16th March the Judge ordered a warrant of attachment to issue. On 19th March some one, apparently a clerk, noted that it had been issued and on 27th April the Judge recorded a statement that it had been; no warrant is, however, forthcoming nor is it proved that attachment was in fact effected until the 8th May. On 15th July the present respondents got the attachment removed. Mg. Kyin Bu then filed this suit for a declaration that the property was liable to attachment as being his judgment-debtors' and got a decree. It was, however, reversed on appeal on the ground that section 64 of the Civil Procedure Code did not apply, as at the time of the sale Mg. Kyin Bu had not obtained an effectual attachment of the property. The District Judge appears to have overlooked the explanation to that section, which was enacted to set at rest conflicting views held as to the scope of the law as it previously

stood. Whether Kyin Bu's attachment was actually effected before the sale or not, he had clearly made application to the Court for the execution of a decree for the payment of money passed against the same judgment-debtors, and, therefore, immediately assets were received by the Court, as they were on 4th May, Mg. Kyin Bu was entitled under section 73 to a rateable share thereof and the private transfer of the property was void as against his claim to such share, and to that extent it must be declared void.

I find that the decretal amount with costs due to Mg. Kya Ban was Rs. 153-13-7 and that due to Mg. Kyin Bu is Rs. 166-4, their rateable shares, therefore, were 154/320 and 166/320, *i.e.*, 77/160 and 83/160 respectively, *i.e.*, they were almost exactly equal, and it will be sufficiently near to take Kyin Bu's share as one-half.

I, therefore, reverse the decree of the District Court and declare that the sale of the property to the respondents was void to the extent of one-half and that one-half of that property is liable to attachment and sale by Kyin Bu in execution of his decree in Civil Revision No. 52 of 1912. Respondents will pay appellants' costs in all Courts, Advocate's fee in this Court two gold *mohurs*.

Decree reversed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 640 OF 1913.

July 20, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

HARCHAND PANAJI—PLAINTIFF—APPELLANT

versus

GULABCHAND KANJI—DEFENDANT—RESPONDENT.

Execution—Decree in foreign Court—Voluntary submission to jurisdiction—Transfer of execution proceedings to British Court, where judgment-debtor resides—Decree, whether can be executed.

A decree passed against a person who voluntarily submits to the jurisdiction of a foreign Court can, on transfer, be executed in the Court within whose jurisdiction he resides.

Second appeal from the decision of the First Class Subordinate Judge, Surat, in Appeal No. 27 of 1912, confirming the order passed by the Second Class Subordinate Judge at Surat, in Darkhast No. 242 of 1911.

Mr. *T. R. Desai*, for the Appellant.

Mr. *G. N. Thakore*, for the Respondent.

JUDGMENT.—The lower Courts have declined to execute a decree of a Baroda Court against the respondent's father, Kanji Kapura, which had been transferred for execution against his estate to the Court of the Second Class Subordinate Judge of Surat.

The learned Judge of the lower Appellate Court states that it was conceded that, on the principles of International Law as laid down in *Sirdar Gurdyal Singh* v. *Raja of Faridkot* (1), the decree would have been a nullity had the defendant not appeared and defended the suit in the Baroda Court, and that it was argued before him that the defendant had voluntarily submitted to the jurisdiction by employing a Pleader to defend the suits. As to this the learned Judge of the lower Appellate Court says that the defendant protested against the right of the Baroda Court to entertain the suit at the earliest opportunity and did not make any other defence.

We have referred to the statement of the pleadings and issues in the Baroda Court and find that the statement of the lower Appellate Court is incorrect.

The defendant pleaded, *first*, that the plaintiff had no right to sue as the sum claimed was vested in him by inheritance as the brother of the plaintiff's father's deceased brother's widow. *Secondly*, that, if not, the suit was defective for want of parties as the other brothers of the plaintiff's father were not joined. *Thirdly*, that the plaintiff's suit could not be entertained as the money dealings relied on took place outside the jurisdiction of the Court. *Fourthly*, that the plaintiff's suit would not lie in that Court as the defendant had no property and did not reside or carry on business in Baroda territory. *Fifthly*, that the suit was time-barred.

Upon this defence four issues were raised :

1. Is the suit defective for want of parties ?

2. Is the suit barred by time ?

(1) 22 C. 222; 21 I. A. 171 (P. C.); 4 M. L. J. 267 (1894) A. C. 670; 11 R. 340.

ARJUN RAGHU NAROLE v. KRISHNAJI VENIMADHAV VALIMBE.

3. Does the suit lie in this Court ?

4. What relief should be granted to the plaintiff ?

All the issues were decided in the plaintiff's favour after evidence had been adduced by both sides.

The case appears to us to be clearly one of voluntary submission to the jurisdiction, the defendant taking his chance of getting a decree in his favour : see *Boissiere & Co.* v. *Brockner & Co.* (2) and *Voinet* v. *Barrett* (3). The case is a stronger one in favour of the appellant than that of *Parry & Co.* v. *Appasami Pillai* (4), relied on in the lower Courts, for there was no preliminary decision of the question of jurisdiction on the protest of the defendant and no circumstance of pressure such as the Madras Court thought existed in *Parry & Co.* v. *Appasami Pillai* (3).

We set aside the decree of the lower Appellate Court and return the Darkhast for execution of the Baroda Court's decree in the Court of the Second Class Subordinate Judge of Surat.

The respondent must pay the costs of his opposition to the Darkhast up to date.

Decree set aside.

(2) (1889) 6 T. L. R. 85.
(3) (1885) 55 L. J. Q. B. 39; 34 W. R. 161.
(4) 2 M. 407; 5 Ind. Jur. 188.

BOMBAY HIGH COURT.
CIVIL APPLICATION No. 147 OF 1913.
June 16, 1914.
Present:—Mr. Justice Beaman and Mr. Justice Hayward.

ARJUN RAGHU NAROLE—APPLICANT
versus
KRISHNAJI VENIMADHAV VALIMBE—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 101—Execution—Decree transferred to Collector—Court which passed decree, powres of—Jurisdiction.

When a decree is transferred to a Collector the Court which passed the decree is for the time being *functus officio* for all purposes of execution; but as soon as the Collector has exhausted all the powers of execution conferred upon him, any matters requiring to be done, and usually regarded as in execution, must be done by the Court which made the decree.

Civil application, under extraordinary jurisdiction, from an order passed by the First Class Subordinate Judge at Satara, in Miscellaneous Application No. 2 of 1913.

Mr. *Jayakar* (with him Mr. *K. N. Koyajee*), for the Applicant.

Mr. *Gadgil* (with him Mr. *D. R. Patwardhan*), for the Opponent.

JUDGMENT.

BEAMAN, J.—A decree was sent to the Collector for execution under section 68 of the Civil Procedure Code. The Collector appears to have put up the property of the judgment-debtor for sale, to have sold it, and given the purchaser a sale-certificate. Thereafter the present opponent, claiming to be in possession in his own right, appears to have obstructed the auction-purchaser, and the Collector removed him, as he has power to do, under rule 14 (1) made under section 70 of the Civil Procedure Code. Thereupon the opponent went to the Court which passed the decree and obtained from it an order under rule 101 of Order XXI. Against this the present applicant, the auction-purchaser, has moved this Court in the exercise of its extraordinary jurisdiction to declare that the Subordinate Judge's order under Order XXI, rule 101, was made, in the circumstances stated, without jurisdiction. I think that the true answer to the question which arises here, a question which must frequently arise in similar cases, is that the execution entrusted to the Collector was completed and must have been completed before the Court which made the decree, could properly be invited to make, or certainly before it could properly have made, any order under rule 101. I agree that in principle there could not be two Courts executing the same decree at the same time, and this appears to me to have been the reason underlying Burkitt, J.'s decision in *Muhammad Said Khan* v. *Payag Sahu* (1). But when we examine the rules framed under section 70, and it is under those rules alone that the Collector exercises his powers, it will be seen that in the execution of the decree he is authorized to do a certain number of necessary acts, while, on the other hand, his powers are much less extensive than those conferred upon

(1) 16 A. 228; A. W. N. (1894) 55.

an ordinary Court executing its own decree under Order XXI. So that while I do not demur to the principle I have stated, namely that after a decree has been transferred to a Collector the Court which passed that decree is for the time being *functus officio* for all purposes of execution, I also say that as soon as the Collector has exhausted all the power of execution conferred upon him by rule 14 framed under section 70, then any matters requiring to be done, and usually regarded as in execution, such as those provided for in rules 97 to 103, for example, of Order XXI, must be done by the Court which made the decree. Otherwise there might certainly arise situations in which parties have suffered wrong at the hands of a Collector tied down by the rules conferring upon him very restricted powers, and yet be entirely without redress. This can never have been the intention of the Legislature, and were authority needed, I might refer to a decision by Sir Lawrance Jenkins to which I myself was a party in *Pita Moti* v. *Chunilal* (2). There again, I think, the reason is precisely and accurately stated by the learned Chief Justice and that reason will certainly cover the present case. We are, therefore, of opinion that the order complained of was not *ultra vires* but made in the exercise of jurisdiction vested in the learned Judge who made it, and was very properly made. The Rule must, therefore, be discharged with all costs.

HAYWARD, J.—This application raises the question whether a Collector's order dispossessing a third party in execution under rule 14 of the rules in force under section 70 of the Civil Procedure Code can be called in question by that third party by application to the Court under rules 100 and 101 of Order XXI of the Civil Procedure Code.

The powers of the Collector in execution must be looked for either in Schedule III or in the rules in force or framed under section 70 of the Code. Where powers are conferred on the Collector, the effect is to oust the jurisdiction to that extent of the Court as provided by sub-section 2 of section 70 of the Code. Now the Collector has been granted power to dispossess third parties in execution under rule 95 of Order XXI of the Code by the inclusion of that provision in rule 14 in force under section 70 of the Code. But the Collector has not been granted power to hear the grievances of third parties after being so dispossessed in execution under rules 100 and 101 of Order XXI of the Code. This power must, therefore, be deemed to have been left with the Court and not to have been taken away under sub-section 2 of section 70 of the Code. "If the power has by rules been vested in the Collector, then it is exercisable by him and not by the Court. If that power has not been conferred on him, then ..... the power must continue still to be exercisable by the Court," as was stated by Jenkins, C. J., in the case of *Pita Moti* v. *Chunilal* (2).

The Rule on this application must, therefore, in my opinion also, be discharged with costs, inasmuch as it proceeds on the alleged want of jurisdiction of the lower Court.

Rule discharged.

(2) 9 Bom. L. R. 15; 31 B. 207.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 529 TO 536, 538, 539, 854 AND 988 OF 1913.

August 11, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasawmy Sastri.

DORAISAMI REDDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

VENKATACHALLAM PILLAI—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), *Sch. Part A, Art.* 8—"*Ascertainment of rent,*" *meaning of—Interpleader suit as to who is entitled to water-cess, whether suit for ascertainment of rent—Limitation Act (IX of* 1908), *s.* 15—*Stay by injunction—Injunction order set aside—Time, whether excluded.*

In order to entitle a landlord in a suit for arrears of rent to deduct the time taken in prosecution of a previous suit between himself and the tenant, the suit must be one relating to the ascertainment of rent within the meaning of Article 8, Part I, of the Madras Estates Land Act (I of 1908).

An interpleader suit by tenant against landlord and Government merely to determine which party is entitled to collect water-cess from the tenants, is not a suit for ascertainment of rent within the meaning of Article 8, Part I, of the Estates Land Act,

DORAISAMI REDDI *v.* VENKATACHALLAM PILLAI.

A party cannot claim to exclude, under section 15 of the Limitation Act, 1908, the time during which no injunction staying a suit was in force against him.

Raja Rangayya Appa Rao v. *Bobba Sriramulu*, 27 M. 143 (P. C.); 6 Bom. L. R. 241; 14 M. L. J. 1; 8 C. W. N. 162; 31 I. A. 17; *Ramayyar* v. *Vadachalla*, 14 M. 441 (F. B.); 1 M. L. J. 661; *Velachala Gramani* v. *Boomiappa Mudliar*, 27 M. 65; *Kidambi Venkatachariar* v. *Lakshmi Doss*, 31 M. 62; 14 M. L. J. 601; 3 M. L. T. 106; *Syed Ghulam Ghouse Shah Sahib* v. *Shunmugam Pillai*, 8 Ind. Cas. 491; 8 M. L. T. 345; 34 M. 438; *Singaram Pillai* v. *Syed Ghulam Ghouse Shah Sahib Kadir*, 8 Ind. Cas. 1091; 9 M. L. T. 82; 20 M. L. J. 927; 36 M. 438; *Arunachellam Chettiar* v. *Kadir Rowthan*, 29 M. 556; 16 M. L. J. 486; 1 M. L. T. 315; *Upendra Nath Nag Chowdhury* v. *Surya Kanta Roy*, 20 Ind. Cas. 205; *Ghulam Nasiruddin* v. *Herdo Prasad*, 14 Ind. Cas. 343; 9 A. L. J. 540; 34 A. 436, referred to.

Second appeals respectively against the decree of the District Court of South Arcot, in Appeal Suits Nos. 101 and 127, 102 and 128, 100 and 120, 105 and 132, 66 and 134, 85 and 118, 67 and 149, 129, 138, 124, 113, 202 and 114 of 1912 respectively preferred against those of the Deputy Collector, Cuddalore Division, in Revenue Suits Nos. 107, 115, 64, 130, 148, 59, 25, 117, 153, 94, 33 and 35 of 1911, respectively.

IN S. A. NOS. 529 TO 536, 538 AND 539 OF 1913.

Mr. *C. Padmanabha Aiyangar*, for the Appellants.

Messrs. *L. A. Govindaraghava Aiyar* and *A. Ramachandra Aiyar*, for the Respondent.

IN S. A. NO. 854 OF 1913.

Mr. *C. Padmanabha Aiyangar*, for the Appellants.

Mr. *C. Venkatachallam Pillai*, for the Respondent.

IN S. A. NO. 988 OF 1913.

Mr. *C. Padmanabha Aiyangar*, for the Appellants.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondent.

JUDGMENT.—These second appeals are from suits for arrears of rent by the *shrotriemdar*, the plaintiff, against his tenants for eight *faslis* (*Fasli* 1312 to *Fasli* 1319). The main defence is that the claim up to *Fasli* 1316 is barred by limitation. As regards *Fasli* 1317, the plea is that as the arrears were due in February it was not open to the plaintiff to stipulate in the *patta* that they shall be paid at the end of April and as the suit was brought on the 1st of May 1911, the claim for that *fasli* also is barred by limitation. There is a further defence applicable to all the *faslis*, that the plaintiff agreed to forego his claim for water cess, in case the Government collected it from the defendant; and as the defendant paid it to Government, he is not liable to pay it over again to the plaintiff.

The plaintiff in answer to the plea of limitation sets up two answers: (1) There were proceedings to ascertain the arrears of rent which terminated only in April 1910, and that those proceedings saved the bar; (2) that the plaintiff was prevented by injunction from collecting the rent, and if the time during which the injunction was in force were excluded, the plaintiff's suit will be in time. In order to understand these arguments, the history of the previous litigation has to be shortly stated.

The defendant, the tenant, instituted an interpleader suit (Original Suit No. 38 of 1904 in the District Munsif's Court of Panruti), to which he made the plaintiff and the Government parties, for determining which of them was entitled to collect the water-cess from him. He also prayed for an injunction restraining the plaintiff from collecting it from him till the rights of the rival claimants were settled. The District Munsif held that the Government alone was entitled to collect the cess and restrained the plaintiff by injunction from collecting it. This was on the 5th May 1906. On appeal Mr. Hamnett, the District Judge, held that the suit was bad for misjoinder of parties and of causes of action and dismissed the suit on the 3rd of November 1906. On the 22nd of October 1909, the High Court in second appeal reversed this decision and remanded the suit for disposal on the merits. After remand, Mr. Moberly, the then District Judge, held that both the Government and the plaintiff were entitled to collect the cess. This was on the 4th April 1910. Finally the High Court held on the 18th October 1912 that the plaintiff alone was entitled to collect it. It may be mentioned in passing that the plaintiff instituted the suit on the 1st May 1911 on the strength of the judgment of the District Judge on remand.

The first question for our consideration is whether the litigation ending with the judgment of the District Judge in April 1910 is a "*suit or proceeding for the purpose of ascertaining the rent*" under Article 18,

Part A, of the Schedule to the Madras Estates Land Act. Prior to the Act, claims of this nature were governed by Article 110 of the General Limitation Act. It was in consequence of the decisionof the Judicial Committee of the Privy Council in *Raja Rangayya Appa Rao* v. *Bobba Sriramulu* (1) that the Article in the Madras Estates Land Act was inserted. A large part of the claim in the suit arose before the Madras Estates Land Act became law. On a careful consideration of the grounds of the decision in *Raja Rangayya Appa Rao* v. *Bobba Sriramulu* (1), we are unable to hold that the previous litigation related to the ascertainment of rent. Before their Lordships of the Privy Council it was argued that as under section 14 of the Act rent remaining unpaid at the end of the year became an arrear of rent, it must be deemed to have been ascertained at the end of the *fasli* year. The answer of their Lordships is: "In their Lordships' opinion this whole series of sections (referring to section 14 and onwards) applies to ascertained rents, not to rents at rates which have yet to be determined". It is clear from this language that in the opinion of their Lordships it is only when the rate has to be determined under sections 7 to 10 and there are proceedings in that behalf, that rent remains unascertained. Mr. L. A. Govindaraghava Aiyar argued that when the right to the cess is in dispute between rival claimants, the amount of rent is not an ascertained sum. If this argument is accepted, whenever the rent is claimed by two members of the same family in opposition to each other, and although the question may arise incidentally or by two rival landholders each claiming the right in himself, the period of limitation will not commence until their dispute is finally adjudicated upon. We think this would be straining the language too far. Their Lordships observe: "The object of a Limitation Act is presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all." Therefore, pleas of extenuation of the bar of limitation have to be strictly construed. Consequently the only permissible plea must be found within the Article itself. In another passage, it is said: "Under this procedure it seems clear that as long as proceedings are pending before the Collector and, on appeal from him, before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that, therefore, no arrear of rent can be said to have become due within the meaning of the Limitation Act." Thus, in the opinion of their Lordships, the rate of rent must be in suspense, and there must be proceedings to settle it. In this case, there has never been any dispute regarding the rate of rent; and there were no proceedings to ascertain that rate. In the Article under reference the cause of action is made to commence from "the date of the decree or order by which the rent is finally ascertained." In this case there has been no such decree or order, and we are, therefore, constrained to hold that this plea will not avail the plaintiff. The decisions to which our attention has been drawn do not directly relate to the point we have to determine. It was pressed on us by the Vakil for the appellant that as the interpleader suit was in a Civil Court, even if it related to the ascertainment of rent, it will not save limitation. We cannot agree with this contention. It is settled law that the ordinary jurisdiction of the Civil Courts is not taken away in regard to claims for rent, except in so far as there is a special exclusion contained in any enactment. This was laid down in *Ramayyar* v. *Vedachalla* (2), *vide* also *Vedachala Gramani* v. *Boomiappa Mudaliar* (3) and *Kidambi Venkatachariar* v. *Lakshmi Doss* (4). Therefore, if there is a claim to settle the rate of rent pending in a Civil Court, the time taken up by its prosecution will count in favour of the landlord. The observations of the learned Chief Justice in *Syed Ghulam Ghouse Sha Sahib* v. *Shunmugam Pillai* (5) were relied on for the proposition that proceedings in Civil Courts are outside the scope of the Article in the Limitation Act. There is no foundation for such a conclusion from that judgment. The only question before his Lordship in that case was whether certain revenue proceedings saved limitation and the

(1) 27 M 143 (P. C.); 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom. L. R. 241; 31 I. A. 17.

(2) 14 M. 441 (F. B.); 1 M. L. J. 661.

(3) 27 M. 65.

(4) 31 M. 62; 7 M. L. J. 601; 3 M. L. T. 106.

(5) 8 Ind. Cas 491; 34 M. 438; 8 M. L. T. 345.

judgment deals with that question alone. The conclusion arrived at by the learned Judges in *Singaram Pillai* v. *Hazarath Kibulari Syed Ghulam Ghouse Sha Sahib Kadir* (6) [on appeal from *Syed Ghulam Ghouse Sha Sahib* v. *Shammugam Pillai* (5)] shows that the question of starting the cause of action from the termination of proceedings in Civil Courts was not in issue in that case. In *Arunachellam Chettiar* v. *Kadir Rowthan* (7), there was no question regarding proceedings in Courts. The decision in *Upendra Nath Nag Chowdhury* v. *Surya Kanta Roy* (8) distinguishes the Privy Council case on the ground that an alternative claim for rent could have been added. Whether this view is consistent with the answer given by their Lordships of the Judicial Committee at page 152 to the second objection raised by the Counsel for the respondent, is doubtful. The decision may be correct with reference to the special rent law obtaining in Bengal. On the whole, our conclusion is that the litigation relied upon was not a suit or proceeding to ascertain the rent.

Mr. L. A. Govindaraghava Aiyar, the learned Vakil for the respondent, argued that section 15 of the Limitation Act saved the bar of limitation. The injunction was issued, as stated by us already, on the 5th May 1906. It was withdrawn by the decree of the Appellate Court on the 3rd of November 1906. The High Court reversed this decision on the 22nd of October 1909. The learned Vakil contended that on this latter date, the order of the District Munsif was revived, and that the injunction must be deemed to have been in force between the date of the District Munsif's decree and that of the order of the High Court. In the first place, the order of remand by the High Court is not tantamount to the issue of an injunction. In the second place, there was nothing to prevent the plaintiff from suing between May 1906 and October 1909. He cannot claim to exclude in his favour the time during which no injunction was in force against him. The case of *Ghulam Nasiruddin* v. *Herdo Prasad* (9) is only authority for the position that where a portion of the decree is stayed by injunction, the exclusion operates in favour of the entire decree. We, therefore, hold that section 15 of the Limitation Act is not available to the respondent.

As regards *Fasli* 1317, we find that when the *patta* was tendered giving the tenant the privilege of paying the *kist* two months after it became due, he raised no objection to that term in the *patta*. It is also in evidence that similar terms were contained in the earlier *pattas*. It is clear that there was a contract between the parties that the rent should be claimed only at the end of April. The claim for *Fasli* 1317 is not barred by limitation.

Only the *patta* for *Fasli* 1314 stipulates not to claim from the defendant the water-cess in case he is obliged to pay it to Government. There is no such undertaking in the other *pattas*, nor is any claim made for the water-cess of *Fasli* 1314 in the suit. We cannot uphold the contention of the defendants that the plaintiff is precluded from recovering water-cess because he paid it to Government.

In the result we dismiss with costs Second Appeals Nos. 529, 531, 533, 534, 538, 539 and 988 of 1913. As regards Second Appeals Nos. 530, 532, 535, 536 and 854 of 1913, the decrees will be modified by dismissing the suit as regards the claim up to *Fasli* 1316 (inclusive) and the decree will stand as regards the rest of the claim and proportionate costs will be allowed to both parties in this and in the Lower Appellate Court.

Appeals partly allowed and partly dismissed.

(6) 8 Ind. Cas. 1091; 36 M. 438; 9 M. L. T. 82; 20 M. L. J. 927.
(7) 29 M. 556; 16 M. L. J. 486; 1 M. L. T 315.
(8) 20 Ind. Cas. 205.
(9) 14 Ind. Cas. 343; 34 A. 436; 9 A. L. J. 540.

LOWER BURMA CHIEF COURT.

CIVIL REVISION APPLICATION No. 110 OF 1913.

November 25, 1914.

Present:—Mr. Justice Young.

P. H. RIPLEY—DEFENDANT—APPLICANT

versus

R. VAITHENATHA IYER—PLAINTIFF—RESPONDENT.

Master and servant—Monthly servant leaving without notice, whether entitled to wages—Notice Damage—Set-off.

Default of a servant after the day on which a periodical payment of wages accrued due would not deprive him of his right to recover such periodical payment. A master is entitled to reasonable notice

and reasonable damages if such notice were not given, but such a plea must be raised by way of set-off and should be stamped.

Mahomed Nassoruddin v. *Oppenheimer & Co.* 9 Bur. L. R. 285, referred to.

Mr. *Villa*, for the Applicant.

Mr. *Israil Khan*, for the Respondent.

JUDGMENT.—This is an application to revise a decree of the Additional Judge of the Small Cause Court, Rangoon, the facts being as follows: The plaintiff, a compositor in the Hanthawaddy Press employed on a monthly wage having left his employ without notice, sued his employer both for the wages for the broken period of the month during which he had left the service and also for his wages for the prior month which had already accrued due. The defendant by his written statement pleaded that the plaintiff was not entitled to any wages for the broken period of the month during which he had left his master's service without notice and that as he had not given a month's notice he was not entitled to the prior month's wages, and relied apparently both on an alleged express agreement between the parties and also on an alleged custom that a month's notice should be given on either side. But the agreement alleged in the evidence was for a month's notice on either side. The learned Judge held there was no such express agreement proved and gave a decree for the completed month's wages, but refused the claim for the broken period. Defendant applied in revision on the ground that the learned Judge should have held that there was an implied contract by custom that a month's notice should be given on either side and should have held that the defendant was justified in refusing to pay him his wages for the previous month. It seems quite clear on the authority of *Taylor* v. *Laird* (1) and *Button* v. *Thompson* (2) that, to adopt the language of Smith at page 171 of the sixth edition of his work on Master and Servant, default of a servant after the day on which a periodical payment of wages accrued due would not deprive him of his right to recover such periodical payment and would not divest a vested right. It was also clear that a master was entitled to reasonable notice and to reasonable damages if such notice were not given, but it was also clear that such a plea must be raised by way of set-off if it was raised by way of defence, and not made the subject of a separate suit by the master. It is not quite clear to me whether the defendant wished to allege a custom that he was entitled in the case of a monthly hiring to require a month's notice or to deduct a month's salary, or whether he wished to allege a custom that he was entitled to a month's notice and that a month's pay on breach of such custom was reasonable damages. I incline to think that the latter was his contention. It, however, makes no difference in the result. In the latter case he could not plead a set-off at all, vide *Mahomed Nassrouddin* v. *Oppenheimer & Co.* (3), since it would be a plea that sounded in damages and in neither case, since the amendment of the Court-Fees Act, could the plea, being unstamped, be regarded. The application must accordingly be dismissed with costs, two gold *mohurs*.

Appeal dismissed.

(1) (1856) 1 H. & N. 266; 25 L. J. Ex. 329; 108 R.R. 562.

(2) 4 C. P. 330; 38 L. J. C. P. 225; 20 L. T. 568; 17 W. R. 1069.

(3) 9 Bur. L. R. 285.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2709 OF 1913.

November 6, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

LATIFA BIBI, MINOR, BY NEXT FRIEND ANDAR SAYAD ABBAS SAHIB—PLAINTIFF—APPELLANT

versus

NARAYANACHARI—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenant, right to cut trees—Lease providing for payment of full value of trees by landlord on resuming—Damages, measure of.

A tenant, even though he holds on a perpetual lease, is *prima facie* not entitled to cut and carry away timber trees from the holding.

Where, under the terms of a lease, the landlord is entitled to the land only on the payment of the full values of the trees to the tenant, the damages caused to the landlord by the cutting off the trees are only nominal.

Gangamma v. *Bommakka*, 5 Ind. Cas. 437; 33 M. 253; 7 M. L. T. 231, followed.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 395 of 1912, preferred against that

of the Court of the District Munsif of Udipi, in Original Suit No. 416 of 1911.

FACTS.—Plaintiff is the landlord, first defendant is the *chalgani* tenant, defendants Nos. 2 and 3 are the *mulgani* tenants, holding under a *mulgani* lease which prohibits them from cutting the trees on the land and from alienating the same and which gives the tenants a right to claim the value of improvements on the land, who assigned their rights to the first defendant. The first defendant cut certain teak trees growing on the land and he contended that, as they were planted by his ancestors, he was entitled to cut them. The present suit is for the value of the trees so cut and for a permanent injunction from cutting those trees in future. The District Munsif held that the first defendant was not entitled to cut the trees even if they were planted by his ancestors and accordingly gave the plaintiff a decree for Rs. 75 and an order of injunction restraining him from felling the trees in future on the land. On appeal the District Judge held that the trees having been planted by his ancestors, he is entitled to cut them, and accordingly dismissed the suit. The present appeal is against that decree.

Messrs. *K. P. Madhava Row* and *K. P. Lakshmana Row*, for the Appellant.

JUDGMENT.—Following *Gangamma* v. *Bommakka* (1) we hold that a tenant, even though he holds on a perpetual lease, is *prima facie* not entitled to cut and carry away timber trees from the holding.

The tenant is, therefore, bound to pay damages on account of his wrongful act complained of in this suit.

Under the lease-deed, Exhibit A, the only substantial right of the landlord (besides the right to rent) is to get possession of the land with the trees thereon whenever the lease is put an end to, which latter event can take place only if the holding is alienated or if the holding is voluntarily given up. Even when the lease is so put an end to and the landlord takes possession of the land and the trees thereon, he has to pay full value to the tenant for the trees. Hence, the damages caused to the landlord by the cutting off the trees can only be nominal.

We allow Rs. 15 for such damages and setting aside the lower Appellate Court's decree, restore that of the District Munsif with this modification, that Rs. 15 shall be substituted for Rs. 75 in that decree. The appellant will get 3/4ths of his costs in all the Courts from the first defendant and the defendants will bear their own costs in the lower Courts.

Appeal allowed ; Decree modified.

(1) 5 Ind. Cas. 437; 33 M. 253; 7 M. L. T. 231.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 87 OF 1913.

August 24, 1914.

Present:—Mr. Justice Parlett.

VASA NARAYANASWAMY, SON AND LEGAL REPRESENTATIVE OF VASA MATHIA—PLAINTIFF—APPELLANT

versus

ANANTHAYE AND OTHERS—DEFENDANTS—RESPONDENTS.

*Specific Relief Act (I of 1877), s. 39—Cancellation of bond, who can sue for—Hindu law—*Sudras—*Inheritance by illegitimate children.*

A suit under section 39 of the Specific Relief Act is maintainable only by a person against whom the instrument is void or voidable or to whom it may cause injury.

Under the Hindu Law the illegitimate children of the *Sudra* caste are heirs.

Inderun Valungypoody Tayer v. *Ramaswamy Pandia Talaver*, 13 M. I. A. 141; 3 B. L. R. 1; 12 W. R 41 (P. C.); 2 Suth. P. C. J. 267; 2 Sar. P. C. J. 498; 20 Eng. Rep. 504, followed.

Mr. *Chari*, for the Appellant.

Mr. *Harvey*, for the Respondent.

JUDGMENT.—The District Judge erred in holding that if the bond is void, it does not matter whether plaintiff had any cause of action or not. A suit under section 39, Specific Relief Act, is maintainable only by a person against whom the instrument is void or voidable or to whom it may cause injury. For the appellant it is further urged that the plaintiff, being illegitimate, was barred from inheriting from her father and so her interests were in no way injured by the existence of the bond. Authority for this proposition is not quoted, but in *Inderun Valungypoody Tayer* v. *Ramaswamy Pandia Talaver* (1) the Privy Council held that in the *Sudra* caste, to which plaintiff's family

(1) 13 M. I. A. 141; 3 B. L. R. 1; 12 W. R. 41 (P.C.); 2 Suth. P. C. J. 267; 2 Sar. P. C. J. 498; 20 Eng. Rep. 504.

belong, illegitimate children may inherit. This suffices to dispose of the appeal. But it fails on other grounds. It is true that in her plaint plaintiff said she was illegitimate, her mother, 2nd defendant, not being married to her father. The 2nd defendant stated that she was married and the plaintiff did not contest the point. The appellant, who is first defendant, did set up that plaintiff was illegitimate and as the pleadings stood, that plea was raised by him and by no other party to the suit. It was, therefore, for him to prove it; he offered no evidence whatever on the point and, therefore, the issue was decided against him. The appeal is dismissed with costs, Advocates fee two gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 161 OF 1913.

August 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

RAJA OF KALAHASTI—JUDGMENT-DEBTOR—APPELLANT

versus

Sri Raja VENKATARAMIAH ROW BAHADUR GARU AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 69, cls. (1), (3)—Power of Court to adjourn sale after partially holding it—'Debt and costs', meaning of—Judgment-debtor's right to get sale adjourned by tendering balance.

Where properties of the judgment-debtor were sold in three lots and after the sale of two lots, he tendered to the bidding officer that portion of the decree amount which would have remained if the purchasers of the first two lots had paid up the amounts, but the officer proceeded with the sale:

Held, that the sale of the third lot was not vitiated by irregularity or illegality and could not be set aside to the prejudice of a *bona fide* purchaser at the Court auction.

The words 'the debt and costs' in clause (3) of Order XXI, rule 69, could not be interpreted to mean "the balance of the decree debt and costs which would remain if by a legal fiction the sales of previous lots (not yet completed by the payment of the whole purchase-money) were taken as completed by treating the whole of the purchase-money as actually paid up."

Obiter dictum.—A Court may even without an application from the judgment-debtor adjourn a sale after the sale of some lots under Order XXI, rule 69, clause (1).

Appeal against the order of the District Court of North Arcot, in Civil Miscellaneous Petition No. 759 of 1912 (Execution Petition No. 59 of 1906, in Original Suit No. 15 of 1897).

Mr. *L. S. Veeraraghava Iyer*, for Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *K. Pandaly*, for the Respondents.

JUDGMENT.—The petitioner (judgment-debtor) never applied to the Court either for adjournment of the sale of the third lot or for stopping that sale. He tendered to the officer conducting the sale that portion of the decree amount which would have remained if the purchasers of the first two lots paid up the whole of the purchase-money due by them within 15 days allowed to them and did not make default. We do not think that the words 'the debt and costs' mentioned in clause (3) of Order XXI, rule 69, could be interpreted to mean "the balance of the decree debt and costs which would remain if by a legal fiction the sales of previous lots (not yet completed by payment of the whole of the purchase-money) were taken as completed by treating the whole of the purchase-money as actually paid up."

We do not say that the Court even without an application from the judgment-debtor had no power to adjourn the sale of the third lot (see clause (1), Order XXI, rule 69), but we do not see our way to holding that because the Court of its own accord did not mercifully take that course, the sale of the third lot is vitiated by irregularity or illegality and could be set aside to the prejudice of the *bona fide* purchaser in such Court auction.

The appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 135 OF 1913.

August 24, 1914.

Present:—Mr. Justice Parlett.

MAUNG TA TE—PLAINTIFF—APPELLANT

versus

MAUNG NYIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73 (b)—Execution proceedings—Sale-proceeds, distribution of—Mortgagee, whether entitled to share without obtaining decree.

A mortgagee who does not obtain a decree on his mortgage or charge has no right to obtain, by an order in execution or by miscellaneos application, payment of any part of the sale-proceeds of the property over which he claims his mortgage or charge, and a suit lies against him to refund the amount if paid to him.

Narana Chetty v. *Sit Kauk*, 2 U. B. R. 276, followed.

Mr. *Maung Pu*, for the Appellant.

Mr. *Halkar*, for the Respondents.

JUDGMENT.—This case appears to be exactly similar to that of *Narana Chetty* v. *Sit Kauk* (1). The appellant, not having obtained a decree on his mortgage or charge, had no right to obtain, by an order in execution or by miscellaneous application, payment of any part of the sale-proceeds of the property over which he claimed his mortgage or charge. The respondents were entitled to maintain a suit against him to compel him to refund the amount paid to him. The judgment in *Hla Baw* v. *S. K. R. Muthia Chetty* (2) clearly sets out the duty of a Court in respect of inquiry into mortgages or charges claimed over attached property. Had such inquiry been made, the decree-holders, who were entitled to notice, would have disputed the alleged mortgage and action under section 73(*b*), Civil Procedure Code, could not properly have been taken.

The appeal is dismissed with costs, Advocate's fees two gold *mohurs*.

Appeal dismissed.

(1) 2 U. B. R. 276.
(2) 3 L. B. R. 275.

MADRAS HIGH COURT.

CIVIL APPEAL No. 204 OF 1912.

November 10, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

PONNURANGA MUDALIAR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

THANDAVARAYA MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58—Mortgage, elements of—Adamanakadanpathiram, *whether mortgage—Limitation Act (IX of 1908), s. 31.*

It is not essential for a mortgage that there should be a formal transfer of interest or that a power of bringing the property to sale should be expressed.

Balasubramania Nadar v. *Sivagaru Asari*, 11 Ind. Cas. 629; 21 M. L. J. 562; *Rama Brahmam* v. *Venkatnarasu Puntulu*, 16 Ind. Cas. 209; 23 M. L. J. 131; (1912) M. W. N. 1124; *Venkatarama Aiyar* v. *Suppa Nadan*, 24 Ind. Cas. 24; 27 M. L. J. 58; (1914) M. W. N. 501, followed.

A document which calls itself as an *adamanakadanpathiram* and gives a sufficiently accurate description of the mortgaged property and recites also the amount due thereunder, is a mortgage within the meaning of section 31 of the Limitation Act, 1908, and not merely a simple money bond.

Appeal against the decree of the District Court of Chingleput, in Original Suit No. 32 of 1910.

Mr. *T. Narasimha Aiyangar*, for the Appellants.

Mr. *M. O. Parthasarathy Aiyangar*, for the Respondents.

JUDGMENT.

SPENCER, J.—The question we have to decide is whether the instrument upon which this suit was brought is a simple mortgage or a simple debt bond. It is dated September 22nd, 1869, and registered. If it is a mortgage, a suit brought by the mortgagee on August 5th, 1910, for recovery of the debt by sale of the mortgaged property is not barred by limitation (section 31, Act IX of 1908). The District Judge dismissed the suit, holding that this was not a mortgage and that the plaintiffs were not in time.

He relied on the absence of words in the document creating a right to cause any property to be sold and the proceeds to be applied in payment of the debt, also on the failure to make any property security for payment.

The document, however, begins and ends with a description of itself.

It is styled an *adamanakadanpathiram* which means an instrument of mortgage. It is created by act of parties, is for a debt and contains a covenant to pay. At the beginning there is a full description with boundaries of the executant's house, a description which would be pointless if the parties merely intended to create a personal bond to pay a debt. The amount due on a prior mortgage of this house in 1865, the amount due on a mortgage of the lands in the executant's possession (which are not described), the amounts due on two simple bonds, interest and cash paid on the date of execution, are then consolidated and a covenant to pay the whole sum follows. Next there is a stipulation that the executant will not redeem a certain usufructuary mortgage on his one-fourth share before he pays the debt due under the mortgage of his house with interest.

Now it is clear to us that the intention of the parties was to effect a simple mortgage of the house for the sum of Rs. 805 and odd found to be due on the date of execution, and if the document is lacking

in respect of apt words expressing a transfer of interest and giving a power of sale, this defect is only owing to the imperfect expression of their minds. This Court has held in several recent cases that it is not essential for a mortgage that there should be a formal transfer of interest or that a power of bringing the property to sale should be expressed. Vide *Balasubramania Nadar* v. *Sivagaru Asari* (1); *Rama Brahmam* v. *Venkatanarasu Puntulu* (2) and *Venkatarama Aiyar* v. *Suppa Nadan* (3). In the two last-named decisions it has been pointed out that the restricted meaning put on the term 'mortgage' in the Full Bench decision in *Rangasami* v. *Muthukumarapa* (4) based on the definition of mortgage in section 58 of the Transfer of Property Act of 1882, which was after the Limitation Act of 1877 and after the execution of the document in suit, received considerable modification in consequence of the Privy Council decision in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (5). It seems improbable that the creditors in this case would have accepted a mere personal bond in substitution for two prior mortgages, even though it contained in addition a clause calculated to cause a clog on the redemption of their usufructuary mortgage.

We think that the document before us in this suit is a mortgage within the meaning of section 31 of the Indian Limitation Act of 1908. We, therefore, reverse the District Judge's decision on the issue relating to limitation and we remand the suit to his file for disposal of the other questions raised. Costs will be costs in the cause.

The District Judge's attention will be directed to the memorandum of appeal. The appellant claims only Rs. 2,000 in appeal giving up his claim to Rs. 2,756.

SANKARAN NAIR, J.—I agree that the instrument is a mortgage.

Appeal allowed; Suit remanded.

(1) 11 Ind. Cas. 629; 21 M. L. J. 562.

(2) 16 Ind. Cas. 209; 23 M. L. J. 131; (1912) M. W. N. 1124.

(3) 24 Ind. Cas. 24; 27 M. L. J. 58; (1914) M. W. N. 501.

(4) 10 M. 509.

(5) 30 M. 426 (P. C.); 9 Bom. L. R 1104; 2 M. L. T. 333; 6 C. L. J. 379; 4 A. L. J. 625; 11 C. W. N. 1005; 17 M. L. J. 444; 34 I. A. 187.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 49 OF 1914.

March 13, 1914.

Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

RASHMONI DASI—PETITIONER—APPELLANT

versus

GANADA SUNDARI DASI—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Jurisdiction—Order obtained by suppression or misrepresentation of facts—Appointment of guardian after minor had attained majority—Power of Court to recall order—Appeal—Guardians and Wards Act (VIII of 1890), ss. 39, 47, 48—Revision—Power to investigate facts in revision—Distinction between appellate and revisional jurisdiction—Inherent power of Court.

A District Judge, acting under the provisions of the Guardians and Wards Act, appointed a guardian of the person and property of a girl said to be a minor. Subsequently, it was brought to his notice that the girl had attained majority long before he had made the order for the appointment of her guardian. Upon this he revoked his order and removed the guardian. The order of revocation was assailed in the High Court:

Held, (1) that as the order was not made under any of the clauses of section 39 of the Guardians and Wards Act, it could not be questioned by way of appeal under any of the clauses of section 47;

(2) that section 48 of the Act did not preclude the District Judge from re-considering his order and that he had jurisdiction to entertain the application for revocation of his order in the exercise of his inherent powers.

The principle of section 151, Civil Procedure Code, is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary Civil Courts. Therefore a Court which exercises powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it, of which cognizance may be required in the interest of justice.

A Court is competent to recall an order obtained from it by suppression or misrepresentation of facts.

A Court has jurisdiction to determine that it has no jurisdiction to deal with the matter brought before it.

If even after an order has been made the Court is apprised that it has been made to assume jurisdiction in a matter over which it has in reality no jurisdiction, the Court has inherent power to investigate the matter and to recall the previous order if it transpires that it has been made without jurisdiction.

It is competent to the High Court to investigate facts in revision, if the Court is satisfied that such a step is needed in the ends of justice.

Kailash Chandra Haldar v. *Bissonath Paramanic*, 1 C. W. N. 67, referred to.

A Court, in the exercise of its appellate jurisdiction investigates the facts and, if necessary, substitutes its own appreciation of the evidence for that of the primary Court. But when the Court, as a Court of revision, looks into the evidence, it does so with a view to determine whether the Subordinate Court has assumed a jurisdiction which it did not possess,

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or declined a jurisdiction which it did possess, or has in the exercise of its jurisdiction acted illegally or with material irregularity.

In other words, a Court of revision cannot, in the name of revisional jurisdiction, exercise appellate powers. That is to say, it may look at the evidence to determine whether the Subordinate Court has acted illegally or irregularly in the exercise of its jurisdiction but it cannot examine the evidence with a view to determine whether the Subordinate Court has correctly appreciated its effect.

Appeal against the order of the District Judge of 24-Perganas, dated the 14th January 1914.

Mr. *B. C. Mitter*, Babu *Provas Chunder Mitter*, Dr. *Sarat Chunder Basack* and Babu *Surendra Madhub Mullick*, for the Appellant.

Babus *Umakali Mukherjee*, *Biraj Mohan Mojumdar*, *Girija Prosanna Roy Chowdhry* and *Dhirendra Krishna Roy*, for the Respondent.

JUDGMENT.—We are invited to consider the propriety of an order by which the Court below has recalled an order previously made for the appointment of the appellant as guardian of the person and property of her daughter-in-law, the respondent.

On the 20th January 1912 the appellant made an application under the provisions of the Guardians and Wards Act. The application was not opposed and on the 15th May a conditional order was made, as a matter of course, in her favour. She was called upon to furnish security and as soon as the order of the Court had been carried out in this respect, a formal order of appointment was drawn up on the 26th November 1912. On the 21st July 1913 the daughter-in-law applied to the District Judge for revocation of the previous order on the ground that she had attained majority before her mother-in-law was appointed guardian of her person and property. The District Judge thereupon took evidence and ultimately came to the conclusion that the daughter-in-law had been born on the 23rd January 1893 and had consequently attained majority on the 23rd January 1911, long before the order for the appointment of her mother-in-law as guardian of her person and property had been made. In this view the District Judge has recalled the orders of the 15th May and the 26th November 1912. The order of revocation has been assailed in this Court on behalf of the mother-in-law, and we have been invited to examine its propriety in the exercise either of our appellate or of our revisional jurisdiction.

A preliminary objection has been taken to the competency of the appeal and it has been argued that as the order was not made under any of the clauses of section 39 of the Guardians and Wards Act, it cannot be questioned by way of appeal under any of the clauses of section 47. This preliminary objection raises a question of considerable importance as to the true nature of the jurisdiction which has been exercised by the District Judge in this matter. On behalf of the appellant, it has been broadly contended that the District Judge had either jurisdiction to take action under section 39 or had no jurisdiction at all to deal with the matter in controversy before him. In support of the former view, it has been argued that section 39 is not exhaustive and the circumstances specified therein, under which the Court is competent to remove a guardian, are merely illustrative. We have in substance been invited to read section 39 as if the Legislature had provided that "the Court may remove a guardian appointed by the Court for the following amongst other reasons." We are not prepared to accept this view as well-founded. If the Legislature had intended to give illustrations merely of the contingencies in which the Court may remove a guardian in the exercise of the power conferred upon it by section 39, the section might have been differently framed. In our opinion, section 39 specifies the circumstances under which the Court may remove a guardian appointed under the Statute. It is worthy of note that each of the circumstances specified in the section is of such a character that if its existence is established, the Court would have no option but to remove the guardian in the interests of the minor. Consequently we must hold that the order in this case was not made under section 39. We may add that the only clause of section 39, which, it was suggested, might possibly cover the case if reliance had to be placed upon a special clause, was clause (*j*) which provides that the Court may remove the guardian by reason of the guardianship ceasing or being liable to cease under the law to which the minor is subject. But if it be a fact that when the order for appointment of the guardian was made in the present case, there was no infant in respect of whom

the Court could exercise jurisdiction, no question clearly arises about the cessation of guardianship. There is no escape consequently from the position that section 39 does not apply, and this necessarily leads to the inference that the order is not appealable under clause (9) of section 47, which provides for an appeal to this Court from an order, made by a Subordinate Court under section 39, for removal of a guardian. The first branch of the contention of the appellant must consequently fail.

As regards the second branch of the contention of the appellant it has been broadly argued that if the District Judge had no jurisdiction to entertain an application under section 39, he had no jurisidiction to deal with the matter at all. The contention in substance is that the Judge invested with authority to deal with matters under the Guardians and Wards Act constitutes a special Court created by the Legislature for specified purposes and that the limits of his jurisdiction must be sought for within the four corners of the Statute. The position taken up by the appellant is that as there is no section of the Guardians and Wards Act applicable in terms to the present matter, the Judge was incompetent to inquire into the allegations of the respondent. In our opinion, this contention is entirely baseless. A Court which exercises powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it, of which cognizance may be required in the interest of justice. Section 151 of the Code of Civil Procedure of 1908, which provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, does not formulate a new doctrine. It merely furnishes Legislative recognition of a well-established principle, which is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary Civil Courts. The futility of the contention of the appellant may be illustrated by an obvious example. Section 10 of the Guardians and Wards Act specifies the contents of the application to the Court; the applicant is required, amongst other matters, to state, so far as can be ascertained by him, the date of birth of the minor. Suppose after the application has been made and before the order of the Court has been passed thereon, it is brought to the notice of the Court, by the person in respect of whom a guardian is proposed to be appointed or by some person on his behalf, that he is not an infant, that he has as a matter of fact attained majority and that consequently the provisions of the Guardians and Wards Act cannot be applied to his case. In such an event, it would plainly be competent to the Court to determine whether the alleged infant was in reality an infant. The Court has jurisdiction to determine the question, indeed it is incumbent upon the Court to investigate the matter on the fundamental principle that when the jurisdiction of a Court is invoked in respect of a particular matter and such jurisdiction is challenged, it is the duty of the Court to determine the essential facts on the actual existence of which alone the Court is competent to assume jurisdiction. It is indisputable that the Court is competent to make an inquiry of this description, even though it may ultimately transpire that the Court has no jurisdiction over the matter in controversy, in other words, the Court has jurisdiction to determine that it has no jurisdiction to deal with the matter brought before it [*Huree Persad* v. *Koonjo Behary* (1); *Hukum Chand* v. *Kamalanand Singh* (2); *Budh Singh* v. *Niradbaran Roy* (3); *Rowland Hudson* v. *John Pierpont Morgan* (4)]. This view cannot be seriously challenged, and once it is accepted, as it must be, it follows inevitably if that even after the order has been made on the application, the Court is apprised that it has been made to assume jurisdiction in a matter over which it has in reality no jurisdiction, the Court has inherent power to investigate the matter and to recall the previous order if it transpires that it has been made without jurisdiction. It is needless to refer to authorities in support of this proposition, but if authority is required, reference may be made to the classical work on Chancery Practice by Daniell, Volume II,

(1) (1862) Marshall 99; 1 Hay 238; W. R. Sp. 29; 1 Ind. Jur. (o. s.) 20.
(2) 33 C. 927 at p. 941; 3 C. L. J. 67.
(3) 2 C. L. J. 431 at p. 437.
(4) 1 Ind. Cas. 356; 36 C. 713 at p. 721; 9 C. L. J. 563; 13 C. W. N. 654.

page 1303, where the following statement will be found: "If an order has been made as a matter of course and if there is any irregularity in the order or if it has been obtained upon any false suggestion or by the suppression of any material fact, it will be discharged on special application by motion, although on the merits it would have been proper to make the order." There are numerous cases to be found in the reports where this doctrine has been applied in England, and amongst these reference may be made to the cases of *Brooks* v. *Purton* (5); *St. Victor* v. *Devereux* (6); *Marquis of Hertford* v. *Suisse* (7); *Holcombe* v. *Antrobus* (8); *Wilkin* v. *Naimby* (9); *De-Feuchères* v. *Dawes* (10); *Wyllie* v. *Ellice* (11); *Brignall* v. *Whitehead*(12); *Harris* v. *Start*(13); *Lewis* v. *Cooper* (14); *Bidder* v. *Bridges* (15). But the principle is essentially of much wider scope than is indicated by the passage to which we have just referred. It is not confined in its application to *ex parte* orders or to orders made as a matter of course. If an order has been obtained from the Court by a suppression of facts, if the Court has been overreached and has been induced to assume jurisdiction over a matter in which, upon a true state of facts, it does not possess jurisdiction, the Court is competent to recall the order obtained from it by suppression or misrepresentation of facts. This view is supported by a long series of decisions, amongst which may be mentioned *Hira Lal* v. *Premamoyee Debi* (16); *Gurdeo Singh* v. *Chandrikah Singh* (17); *Udit Chobey* v. *Radhika Prasad* (18); *Nagardas* v. *Anandrao* (19). Much stress, however, was laid upon the provisions of section 48 of the Guardians and Wards Act, where it is stated that save as provided by section 47 (which specifies appealable orders) and by section 622 of the Code of 1882 (which defines the grounds for revision), an order made under the Act shall be final and shall not be liable to be contested by suit or otherwise. The reference to section 47 of the Guardians and Wards Act and to section 622 of the Code of 1882 indicates that the Legislature had in view the question of the liability of an order to be challenged by way of appeal or revision before a superior tribunal. The Legislature did not contemplate, it is said, a re-consideration of the order by the Court itself on the ground that the Court had been induced to assume jurisdiction in a matter in which it had no jurisdiction. But we are clearly of opinion that section 48 is not a bar to the present proceedings and that the District Judge had jurisdiction to entertain the application in the exercise of his inherent powers. Consequently his order is not appealable. The preliminary objection must accordingly be allowed and the appeal dismissed with costs; we assess the hearing fee at three gold *mohurs*.

As regards the application for revision, it is plain that it can be sustained, on the ground either that the Court had no jurisdiction to deal with the application or that the Court in the exercise of its jurisdiction has acted illegally or with material irregularity. We have already held that the District Judge had jurisdiction to deal with the matter and, therefore, the only point for consideration is whether he acted illegally or with material irregularity. It has been suggested in support of the application that important evidence was improperly excluded and that if such evidence had been admitted, it could have been shown that the application for revocation of guardianship was not *bona fide*. Reference has also been made in the course of argument to portions of the evidence. We may in this connection observe that it is competent to the Court to investigate the facts in revision, if the Court is satisfied that such a step is needed in the ends of justice, as was done in the case of *Kailash Chandra Haldar* v. *Bissonath Paramanic* (20). But we must

(5) (1841) 4 Beav. 494; 11 L. J. Ch 73; 49 E.R. 430.
(6) (1843) 6 Beav. 584; 13 L. J. Ch. 102; 8 Jur. 26; 49 E. R. 952.
(7) (1844) 7 Beav. 160; 49 E. R. 1024; 64 R. R. 47; 8 Jur. 50.
(8) (1845) 8 Beav. 405; 14 L. J. Ch. 378; 50 E.R. 159.
(9) (1845) 8 Beav. 465; 50 E. R. 183.
(10) (1848) 11 Beav. 46; 50 E. R. 733.
(11) (1848) 11 Beav. 99; 17 L. J. Ch. 378; 12 Jur. 711; 50 E. R. 754.
(12) (1861) 30 Beav. 229; 8 Jur. (N. S.) 183; 5 L. T. 301; 10 W. R. 69; 132 R. R. 250; 54 Eng. Rep. 876.
(13) (1838) 4 M. & C. 261; 41 E. R. 102.
(14) (1847) 2 Phil. 178; 16 L.J. Ch. 265; 41 E.R. 909.
(15) (1884) 26 Ch. D. 1 at p. 3; 50 L. T. 287; 32 W. R. 445.
(16) 2 C. L. J. 306.
(17) 1 Ind. Cas. 913; 5 C.L.J. 611 at p. 620; 36 C. 193.
(18) 6 C. L. J. 602; 3 M. L. T. 41.
(19) 31 B. 590; 9 Bom. L. R. 495.
(20) 1 C. W. N. 67.

guard against the possible assumption that the Court may, in a matter like this in the exercise of its revisional jurisdiction, assume appellate powers. One aspect of the fundamental distinction between the exercise of appellate and revisional powers was explained in the case of *Shiva Nathaji* v. *Joma Kashinath* (21). A Court in the exercise of its appellate jurisdiction investigates the facts and, if necessary, substitutes its own appreciation of the evidence for that of the primary Court. But when the Court as a Court of revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess, or declined a jurisdiction which it did possess or has in the exercise of its jurisdiction acted illegally or with material irregularity. If this distinction were overlooked, the superior Court might, in the name of revisional jurisdiction, exercise appellate powers. Consequently in the case before us, we cannot be rightly invited by the petitioner to examine the evidence with a view to determine whether the District Judge has correctly appreciated its effect. But we may look at the evidence to determine whether he has acted illegally or irregularly in the exercise of his jurisdiction. Upon that point we are satisfied that the ground taken by the petitioner has not been established. There is no indication whatever from the proceedings in the Court below that the District Judge excluded any evidence the true bearing of which was explained to him. The only ground on which the petitioner invites the Court to interfere in the exercise of revisional jurisdiction thus completely fails.

The result is that this Rule is discharged. We make no separate order as to costs.

Appeal dismissed: Rule discharged.

(21) 7 B. 341.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1374 OF 1912.

November 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SUBRAMANIA PETHANNAR BHOOPATHI (DECEASED) AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MUTHIAN CHETTIAR—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 3 (5)—Landholder—Co-sharers, mortgage by—One co-sharer alone redeeming and taking possession—Recognition as landholder—Rent, suit for—Maintainability.

Though under the first paragraph of section 3, clause 5, of the Madras Estates Land Act (I of 1908) both a mortgagor and a usufructuary mortgagee are 'landholders', yet under the 2nd paragraph of the said clause the usufructuary mortgagee alone is the 'landholder' for the purposes of the said Act.

When there are a number of joint landholders, the test to be applied for ascertaining which among them is entitled to proceed and be dealt with as a 'landholder' for all or any of the purposes of the Madras Estates Land Act seems to be 'who amongst them is or are entitled to collect the rent of the whole' estate?

The power given to the Collector under paragraph 2 of section 3 (5) does not exclude the power of a Civil Court to recognise that person as landholder who is entitled to collect the whole rents.

Where an estate owned by several joint owners and subject to a usufructuary mortgage was redeemed by the plaintiff, one of such several owners, owning the largest number of shares, and he got possession of the estate with the knowledge and consent of the owners of the remaining shares therein:

Held, that the plaintiff, who redeemed the mortgage and got rightful possession of the whole estate from the usufructuary mortgagee, being the person entitled to collect the whole rents, was also entitled to be recognised as the 'landholder' for all the purposes of the Act, including the right to sue for rent solely.

Ahmed Wali Khan v. *Shamsh-ul-Jahan Begam*, 28 A. 482; 10 C. W. N. 626; 3 A. L. J. 360; 3 C. L. J. 481; 1 M.L.T. 143; 8 Bom. L.R. 397; 16 M. L. J. 269 (P. C.), referred to.

Second appeal against the decree of the District Court of Ramnad, in Appeal Suit No. 333 of 1911, preferred against that of the Special Deputy Collector of Ramnad, in Summary Suit No. 1904 of 1910.

FACTS.—The estate concerned in the present suit was owned by several joint proprietors, of whom the plaintiff owned the largest number of shares. He alone having redeemed the estate from a usufructuary mortgage to which it was subject and having got into possession, without any objection on the part of the other co-owners sued the defendant, a *kudivaram* tenant of the

village, for rent. The defendant contended that the suit was not maintainable in the absence from record of the owners of the remaining shares in the *melvaram*. Both the Courts below held that the endorsement of payment on the usufructuary mortgage-deed constituted the plaintiff an assignee of the said mortgage rights, that as such he became invested with all the rights of a "landholder" under the Madras Estates Land Act and that in consequence he was entitled to maintain the suit. The defendant, thereupon, preferred this second appeal to the High Court.

Mr. *T. Rangachariar*, for the Appellant:—The suit is not maintainable, as all the co-sharers are not parties thereto. The plaintiff alone has no right to sue, as the endorsement of payment on the mortgage-deed does not amount to an assignment. The Courts below have erred in holding that the endorsement of payment amounted to an assignment. The plaintiff can at best be only a charge-holder and cannot sue for rent.

Mr. *R. Kuppuswamy Iyer*, for the Respondent:—In this case the payment of the mortgage amount by the plaintiff, one of the mortgagors, followed by delivery by the mortgagee to the plaintiff of the mortgage document with the payment endorsed thereon not as discharge, which endorsement is also registered, does amount in law to an assignment of the mortgage rights. The plaintiff is, therefore, a 'landholder' within the meaning of section 3, clause 5, of the Madras Estates Land Act. Further the plaintiff owns a part of the estate and is a landholder. None of the other co-sharers object to the plaintiff's collecting the rent. The Collector is empowered by the Act to choose one of several landholders to conduct proceedings under the Act and the Civil Courts have got a similar power. In this case the Collector did recognise the plaintiff as the person entitled to sue and even if the Court were to hold that he has not done so, the Civil Courts are not debarred from doing so even now.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant. We must accept the following findings of the lower Appellate Court, namely, (*a*) the defendant is the *kudivaram* tenant of the plaint lands and (*b*) that the plaintiff owns the greater portion of the *melvaram* right in the village lands (Exhibit H shows that he owns roughly 22 out of 26 shares) and (*c*) that he paid up a person, who owned the usufructuary mortgage right on the entire lands, and got possession of the *melvaram* right from the said usufructuary mortgagee.

The lower Courts no doubt fell into an error in holding that the mere endorsement of the payment of the mortgage amount to the owner of the usufructuary mortgage rights, (which is all that is proved by the registered endorsement on Exhibit A) made the plaintiff the assignee of the said usufructuary mortgage rights, which rights had admittedly invested the usufructuary mortgagee with all the rights of a landholder under the Estates Land Act. The contention of the defendant (the tenant) in second appeal is that the plaintiff, who owns only 22/26th share of the *melvaram* right, cannot maintain this suit for rent without having made the owners of the remaining four or five shares co-plaintiffs with himself or at least without having made them party defendants.

I think that though the reason given by the lower Courts (namely, that the plaintiff became the assignee of the usufructuary mortgagee) for treating the plaintiff as a landholder may be erroneous, the plaintiff's status as a landholder may be supported on another ground. Under section 3, clause 5, of the Estates Land Act the definition of "landholder" includes every person entitled to collect the rents of the whole estate by virtue of any provision of law. In *Ahmed Wali Khan* v. *Shamsh-ul-Jahan Begam*(1) their Lordships of the Privy Council say that possession of property repasses in redemption from a usufructuary mortgagee to the person who redeems the mortgage. Now, in this case, though the plaintiff did not own the whole of the equity of redemption, he was entitled under section 91 of the Transfer of Property Act to redeem the usufructuary mortgage of the entire village and he did so redeem and get possession. In fact his possession was admitted by the other sharers in Exhibit G and was found in the judgment, Exhibit H (para. 39), to which the other sharers were parties.

(1) 28 A. 482 10 C. W. N. 626; 3 A. L. J. 360; 3 C. L. J. 48; 1 M. L. T. 143; 8 Bom. L. R 397; 16 M. L. J. 269 (P. C.).

Now a possession of the *melvaram* right can mean nothing else than the possession of the right to the receipt of rents. Hence the plaintiff, as the person entitled to collect the entire rents, came under the definition of landholder under section 3, clause 5. Where the *melvaram* right has been mortgaged under a usufructuary mortgage, the definition of 'landholder', no doubt, will include both the mortgagor and mortgagee, the mortgagor as the person "owning the estate" and the usufructuary mortgagee as the person "entitled to collect the rents." But it is clear that the mortgagor cannot be treated, after he has created the usufructuary mortgage, as the landholder *for the purposes of the Estates Land Act*, that is so far as exercising the powers of the landholder to grant *pattahs* and to recover rents, etc., are concerned. Thus though under the first paragraph of section 3, clause 5, both come within the definition of "landholder," for the purpose of the second paragraph only one of them is the "landholder," namely, the usufructuary mortgagee. So also though the plaintiff and the owners of the other shares may be joint landholders, still, when we have to decide which of them is entitled "to proceed and be dealt with" as such landholder or landholders for all or any of the purposes of the Act, the test clearly seems to be, "who amongst them is or are entitled to collect the whole of the rents." The Collector, of course, under the said paragraph 2 can recognise or nominate any of these persons as "landholder" for the purposes of the Act, but that does not mean that one of them, if he is entitled to collect the whole rent, is not also entitled to be recognised by the Civil Courts as the "landholder" for the purposes of the Act. In the present case, the plaintiff who redeemed the usufructuary mortgage and got rightful possession of the whole estate from the said usufructuary mortgagee, being the person entitled to collect the whole rents, is also entitled to be recognised as the "landholder" for all the purposes of the Act, including the right to sue for the rent solely. In the result the contention of the appellant fails and I would dismiss the second appeal with costs.

NAPPIER, J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1474 OF 1913.

June 27, 1914.

Present:—Mr. Justice Coxe.

RAJANI KANTA DAS AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KALI PRASANNA MUKHERJEE—AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Discovery of new and important matter—Review of order dismissing appeal under O. XLI, r. 11, whether entertainable.

No review lies of an order dismissing an appeal under Order XLI, rule 11, Civil Procedure Code, merely on the ground of an alleged discovery of new and important matter.

Bhyrub Nath Tye v. *Kally Chunder Chowdhry*, 16 W. R. 112, followed.

Civil Rule against the order of the Subordinate Judge of Khulna, dated December 23rd, 1912.

Babu *Jadunath Mandal*, for the Petitioners.

Babu *Jadunath Kanjilal*, for the Opposite Party.

JUDGMENT.—This was a Rule on the opposite party to show cause why an appeal should not be re-heard on the ground of the discovery of new and important evidence. A preliminary objection is taken that an application of this kind cannot be made after the disposal of a second appeal. The preliminary objection is supported by the decisions of *Bhyrub Nath Tye* v. *Kally Chunder Chowdhry* (1); *Raru Kutti* v. *Mamad* (2) and *Nandkishore* v. *Anwar Hussain* (3). The first of these rulings is binding upon me and I must, therefore, hold that this application cannot be granted. Reference is made by the other side to the case of *Heera Lall Ghose* v. *Ram Taruck Dey* (4). But the observations by the learned Judges in that case do not amount to a decision which can be weighed against the decision of *Bhyrub Nath Tye* v. *Kally Chunder Chowdhry* (1), inasmuch as the learned Judges refused the application for review, and their observations, therefore, can only be regarded as *obiter dicta*.

The Rule is discharged with costs.

Let the documents filed by the petitioners be returned.

Rule discharged.

(1) 16 W. R. 112.
(2) 18 M. 480.
(3) 4 Ind. Cas. 809; 32 A. 71; 6 A. L. J. 979.
(4) 23 W. R. 323

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 307 OF 1914.

October 9, 1914.

Present:—Mr. Justice Rattigan.

JAHANGIR SINGH—PLAINTIFF—PETITIONER

versus

HIRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 10, inapplicability of.

Section 10 of the Code of Civil Procedure, 1908, does not apply where the previously instituted suit is pending in a Court not competent to try it.

Petition, under section 70 of Act XVIII of 1884, as amended by Act IV of 1912, for revision of the order of the District Judge, Jullundur, dated the 16th February 1914, ordering that the proceedings in the case be stayed till the decision of the other case.

FACTS.—*J* got possession of a house in execution of a decree obtained by him against *H* under section 9 of Act I of 1877. A few days after, *H* again illegally dispossessed *J* and instituted a regular civil suit to establish his title in the Court of a first Class Munsif. Meanwhile *J* also brought another suit under section 9 of the said Act in the Court of the District Judge, who stayed the proceedings under section 10 of the Code of Civil Procedure, Act V of 1908, on the ground that a previous suit relating to the same property was pending. The day after the passing of the District Judge's order, the Munsif in turn passed an order to the effect that the suit in his Court comprised property of value beyond his jurisdiction, and directed the plaint to be returned to the plaintiff in order that it might be presented to a competent Court.

s or der was not challenged by *H*.

Lala *Hukam Chand*, for Mr. *N. C. Mehra*, for the Petitioner.

Mr. *Gullu Ram*, for the Respondents.

JUDGMENT.—The facts as alleged by the parties are set forth in the order of the District Judge. At the time when that order was passed, the regular suit by present respondents had been filed in the Court of Lala Tirath Ram, Munsif, and was pending before that Court. The day after the passing of the District Judge's order the Munsif in turn passed an order to the effect that the suit instituted in his Court comprised property of value beyond his jurisdiction, he accordingly directed the plaint to be returned to the plaintiff in order that it might be presented to a competent Court. This order has not been challenged, and it is admitted that the suit in question is now pending in the Court of a Subordinate Judge. The result then is that at the time when the present petitioner brought his suit under section 9 of the Specific Relief Act, there was no "previously instituted suit" pending in a Court of competent jurisdiction between the same parties and relating to a matter substantially in issue in the petitioner's suit.

I accordingly accept this petition and, setting aside the order of the District Judge, I direct him to proceed with the suit of *Jahangir Singh* v. *Hira and Narain* in accordance with law. I make no order as to costs in respect of to-day's hearing.

Petition allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 55 OF 1913.

October 20, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

V. R. M. K. M. T. MUTHUKARUPPAN CHETTIAR BY HIS AGENT, MUTHUVIRA PILLAI—CREDITOR—PETITIONER—APPELLANT

versus

MUTHURAMAN CHETTIAR AND ANOTHER—DEBTORS—PETITONERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 12 (1), (3), 46 (3)—Creditor's petition—Notice to other creditors, if necessary—Order refusing to add creditor as party—Adjudication—Appealability.

There is nothing in section 12 (3) of the Provincial Insolvency Act, III of 1907, to warrant the contention that in the case of a petition filed by a creditor to adjudge his debtor an insolvent, notice to other creditors is not necessary under section 12 (1) of the said Act.

Bava Jeer Chetty v. *Bava Rangasami Chetty*, 12 Ind. Cas. 618; 36 M. 402; 22 M. L. J. 52; 10 M. L. T. 433; (1911) 2 M. W. N. 480, referred to.

Under section 46 (3) of the Provincial Insolvency Act, an appeal lies to the High Court at the instance of a creditor against an order of adjudication passed on the petition of another creditor, if the Court declined to add the former as a party.

Appeal against the order of the District Court of Coimbatore, in Original Petition No. 4 of 1912, dated 19th December 1912.

MUTHUKARUPPAN CHETTIAR *v.* MUTHURAMAN CHETTIAR.

FACTS.—The facts of the case are briefly as follows:—One *M C*, a creditor of *C B V*, debtor, moved the District Judge of Coimbatore under section 6, clause 4 (*a*), and section 11, clause (2), of Act III of 1907 in Original Petition No. 4 of 1912 and prayed that the debtor may be adjudged an insolvent. The debtor *C B V* also filed Original Petition No. 5 of 1912 before the same Judge to be adjudged an insolvent. In Original Petition No. 4 of 1912 the District Judge issued notice under section 12, clause (3), of the Act only to the debtor. The appellant then moved the District Court to be made a party to the proceedings in Original Petition No. 4 of 1912. This was objected to by *M C* and the Judge finally dismissed the application. The appellant sought by Civil Miscellaneous Petition No. 2306 of 1912 for leave to appeal to the High Court, but the said petition was disposed of by the following order of Sadasiva Aiyar, J.—

"I refuse leave to appeal because there is admittedly another petition (Original Petition No. 5 of 1912) put in by the debtor himself in the District Court to be declared an insolvent and the present petition is being posted along with that petition for trial. And if an order is passed on that petition, no separate order will be required on this petition.

If, however, a separate order is passed for any reason, the petitioner can come up on appeal against such an order."

Original Petition No. 4 of 1912 was finally disposed of by the Judge and the debtor was adjudicated an insolvent and it is against the said order that the present appeal is preferred.

Mr. *V. C. Seshacharriar*, for the Respondent, took the preliminary objection that no appeal could lie, inasmuch as the appellant rightly or wrongly had not been made a party to the proceedings in the lower Court and had, therefore, no *locus standi* to prefer the appeal. He could not be said to be an *aggrieved party* because the stage for passing an order of adjudication by the lower Court was intended by the scheme of the Act to be a preliminary stage in which the Court was not bound to consider all possible objections which might be raised by the parties to the proceedings. *Ex parte Sidebotham; In re Sidebotham* (1) and *Bava Jeer Chetty* v. *Bava Rangasami Chetty* (2). The Act required only a notice to the debtor, but not to the other creditors.

Mr. *L. A. Govindaraghava Aiyar*, with Mr. *T. M. Krishnaswami Iyer*, for the Appellant:—The appellant, being admittedly a creditor, was entitled to notice, as he would otherwise be aggrieved by an order which might be passed against him and behind his back. He could not take the objection in Original Petition No. 5 as his mortgage would not have been within the period of three months of the petition, *vide* section 37 of the Act. He as a creditor was entitled to notice and should have had an opportunity to advance his objections. He had the right of appeal as the order in Original Petition No. 4 was passed under section 15 of the Act.

JUDGMENT.—The questions are, *first*, whether the appellant is entitled to appeal, *next*, whether he should succeed on the merits.

The District Judge treated it as immaterial whether the appellant, the petitioner before him, should be allowed to take part in the proceedings in the present case, Original Petition No. 4 of 1912, or should be left to his remedy in Original Petition No. 5 which was filed by the debtor later. It was not immaterial, because if appellant had had an opportunity of taking part in Original Petition No. 4, he might have been able to show that there should be no adjudication therein. The adjudication would then have had to be in Original Petition No. 5 and then appellant's mortgage would not have been within the period of three months of the petition referred to in section 37 of the Provincial Insolvency Act.

Original Petition No. 4 was presented by a creditor. But we cannot find reason for holding, and section 12 (3), on which respondent relies, does not justify the conclusion, that on such a petition only the debtor should have notice and that the general notice to creditors under section 12 (1) is not to issue. If the general notice is to issue, it will be purposeless unless creditors are allowed to take part in the proceedings. That is implied also by the decision in *Bava Jeer* v. *Rangasami Chetti* (2). In fact in the present case the

(1) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715.

(2) 12 Ind. Cas. 618; 36 M. 402; 22 M. L. J. 52; 10 M. L. T. 433; (1911) 2 M. W. N. 480.

District Judge entirely neglected this important part of the necessary procedure, observing that the advertisement in Original Petition No. 5 would be sufficient. We hold that appellant should have been allowed to take part in the proceedings.

The lower Court's order of adjudication in Original Petition No. 4 was passed under section 15. The appellant, therefore, is entitled to appeal against it under section 46 (3).

We must, therefore, allow the appeal, set aside the District Judge's order in Original Petition No. 4 and direct him to restore the petition to file and dispose of it according to law in the light of the foregoing and after issuing the necessary general notice under section 12 (2).

Respondents will pay appellant's costs in this Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2449 OF 1913.

November 5, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

THAMBIKILAN MUTHIRIAN AND ANOTHER—DEFENDANTS Nos. 1 AND 2—APPELLANTS

versus

MUTHU REDDI AND OTHERS—PLAINTIFFS Nos. 1 TO 4 AND DEFENDANTS Nos. 4 AND 5—RESPONDENTS.

Landlord and tenant—Lease—Tenant holding over—Relations, whether regulated by expired lease—Forfeiture of tenancy for non-payment of rent, condition whether incongruous.

The terms of a lease which has terminated, may regulate the relations between the parties to the lease when the tenancy becomes one on sufferance, if they are not incongruous with a tenancy of that description.

Therefore, a condition of forfeiture inserted in such a lease for non-payment of rent holds goods after expiry of the lease under the circumstances.

Thomas v. *Packer*, 1 H. & N. 669; 26 L. J. Ex. 207; 3 Jur. (N. S.) 143; 28 L. T. (O. S.) 274; 5 W. R. 316; 108 R. R. 776, *Kishore Lal Dey* v. *The Administrator-General of Bengal*, 2 C. W. N. 303, followed

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suit No. 646 of 1912 (transferred from the District Court), preferred against that of the District Munsif of Kulitalai, in Original Suit No. 336 of 1911.

Mr. *S. Krishnamachariar*, for the Appellants.

Mr. *T. V. Muthukrishna Aiyer*, for the Respondents.

JUDGMENT.—The only question is whether defendants had forfeited their right as plaintiffs' tenants. It is urged that the forfeiture is based on a clause of the lease, Exhibit E, which entitles plaintiffs to immediate possession if there are arrears in any year, and that this clause did not govern the relations between the parties when the lease had terminated and defendants were holding over. We hold that the terms of the lease may regulate the relations between the parties when the tenancy became one on sufferance, if in the particular case they are not incongruous with a tenancy of that description. Vide *Thomas* v. *Packer* (1) and *Kishore Lal Dey* v. *The Administrator-General of Bengal* (2). The first of these cases, it may be pointed out, particularly resembles the present in respect of the fact that the forfeiture became enforceable (as it would here) after the ensuing year's holding had begun. We have not been shown how the clause in Exhibit E, on which plaintiffs rely, is in any way incongruous with the incidents of a tenancy on sufferance.

It has not been shown that the plaintiffs waived their right to insist on the forfeiture, or that defendants are entitled to relief against it.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 1 H. & N. 669; 26 L. J. Ex. 207; 3 Jur. (N. S.) 143; 28 L. T. (O. S.) 274; 5 W. R. 316; 108 R. R. 776.

(2) 2 C. W. N. 303.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPEAL No. 23 OF 1913.

January 30, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

OSMOND BEEBY—DEFENDANT—APPELLANT

versus

KHITISH CHANDRA ACHARYA CHAUDHURI AND ANOTHERS—PLAINTIFFS—RESPONDENTS.

Administrator pendente lite—Commission—Government security pledged to Bank for loan, how far assets

OSMOND BEEBY *v.* KHITISH CHANDRA.

of deceased—Evidence Act (I of 1872), s. 115—Estoppel — Suit to recover excess commission, whether to open settled account—Laches—Acquiescence — Commission once charged on whole, whether allowed on part property sold.

Government securities, whether endorsed in blank or endorsed to a Bank for a debt, pass a legal and not a mere equitable interest and the Bank is a holder for value to the extent of the sum for which it has a lien.

Therefore, the sale-proceeds of such securities as are applied to the discharge of the debt are not the assets of a deceased that come into the hands of the administrator *pendente lite*, notwithstanding the fact that the sales are effected through the agent nominated by the administrator, and the administrator *pendente lite* is not entitled to commission on such amount.

Scott v. *Franklin*, 15 East 428; 104 E. R. 906, referred to.

The mere fact that the accounts of the administrator *pendente lite* were passed and the plaintiff with full knowledge of their contents raised no objection and the Solicitor also expressed a favourable opinion, does not operate as an estoppel.

A suit to recover from the administrator the commission retained in excess, of what he was entitled to is not a case of opening a settled account so much as enforcing a claim against a fiduciary agent.

A defence of laches cannot prevail where a statutory period of limitation is prescribed.

Acquiescence cannot be imputed where there is no evidence to show that the plaintiff actually knew the facts as represented in the accounts to be incorrect or that he did not rely on that representation.

Redgrave v. *Hurd*, (1881) 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251, referred to.

If commission be once taken on the whole property, the administrator *pendente lite* cannot again charge commission on the sale-proceeds of a part of the property.

Appeal against the decree of Mr. Justice Chaudhuri in Suit No. 882 of 1907 on the Original Side of the High Court.

Mr. *E. Norton* (with him Mr. *Mullick*), for the Appellant.

Mr. *B. Chakravarti* (with him Mr. *B. K. Lahiri*), for the Respondents.

JUDGMENT.

JENKINS, C. J.,—This is an appeal from a judgment of Chaudhuri, J., in a suit brought against Mr. Osmond Beeby, a former administrator *pendente lite* of the estate of Dakshina Mohan Roy, for a refund of remunerations alleged to have been retained by him in excess of what was his due.

The order appointing the defendant to be administrator *pendente lite* provided for his remuneration by the allowance of "a commission of 2 per cent. on the assets that will come into his hands."

Dakshina Mohan Roy at the time of his death was indebted to the Bank of Bengal, the National Bank of India and the Comptoir National D'Escompte De Paris. Against this indebtedness each Bank held Government securities, the total value of which was Rs. 6,40,942-8-10. The indebtedness to the several Banks was discharged out of the sale-proceeds of the Government securites, with the result that a balance of Rs. 29,215-4-5 only came to the hands of the administrator *pendente lite*. He has, however, retained a commission of 2 per cent. on the Rs. 6,40,942-8-10. To this exception is taken by the plaintiffs in this suit.

What we, therefore, have to decide is, whether this sum, representing the full value of the Government securities, can be regarded as assets of the deceased that came into the the hands of the administrator *pendente lite*. Chaudhuri, J., held that there was a pledge to each of the Banks and that the Banks were entitled to possession of these securities and had possession of them as pledgees. There is no ground of appeal directed against this finding, and I think we ought to accept it as correct.

There is no evidence as to how these securities were endorsed, but this at least is certain that there is no suggestion that they were endorsed by Mr. Beeby.

At the same time we know they were sold and transferred by the Banks, so that it is conceded they must either have been endorsed in blank or endorsed to the several Banks. In either case each Bank, as to the securites held by it, would be a holder for value, at any rate to the extent of the sum for which it had a lien. To borrow the phraseology of English Law, by the delivery of the securities as endorsed there passed a legal and not a mere equitable interest. [See per Lord Ellenborough in *Scott* v. *Franklin* (1)]. How then can it be said that these securities to the extent of the amount for which each Bank had a lien, were assets of the deceased which came to the hands of the administrator *pendente lite*?

For Mr. Beeby it is argued that though his claim could not have been sustained

(1) (1881) 15 East 428; 104 E. R. 906.

had the securities been mortgaged, still as the Banks were only pledgees the same difficulty does not arise; for that under those sections of the Contract Act which relate to pledges, the property in the securitie did not pass to the Banks. In the circumstances, it is contended, the sales of the securities must be deemed to have been made by the several Banks as agents for Mr. Beeby. But can it be fairly said that the Banks sold as the agents of Mr. Beeby? True it is that the brokers by whom the sales were effected were the firm nominated by Mr. Beeby, and under provisions of the Contract Act the Banks were not entitled to sell at the time when the sales were effected. But I cannot think that the Banks in selling as they did were acting as the agents of the administrator *pendente lite*.

Moreover, the Banks were not only pledgees, they were also holders for value of these negotiable instruments with the consequent rights that belong to that position; and in the circumstances I am unable to hold that so much of the sale-proceeds, as the several Banks applied to the discharge of the debts due to them, were within the description of assets that came into the hands of the administrator *pendente lite*.

But then it is said that the present plaintiffs are estopped. These plaintiffs are a *pardanashin* lady and a minor. The lady succeeded to a widow's limited interest at the deceased's death, and the minor, by surrender of all previous limited interest to him as the next male reversioner on the 16th August 1905, then became and now is the full owner of the deceased's estate. What is charged against the plaintiffs is that the accounts of the administrator *pendente lite* were passed, and that the plaintiff, Sreemutty Sindhubala Debi, with full knowledge of their contents, including the charge of this commission, through her agent and attorney, raised no objection, though she had full notice. And in this connection reliance is placed on a conversation alleged to have passed between Mr. Beeby and the attorney in the Bar Library when the attorney expressed an opinion that Mr. Beeby was justified in making this charge. But I fail to see how any estoppel arose. When the procedure followed on the passing of accounts is borne in mind, it would be dangerous to hold that this alone would suffice for the purpose of forming the basis of an estoppel, nor can the plaintiffs be bound by this casual conversation. But apart from that, how can it be said that the conditions prescribed by section 115 of the Evidence Act have been established? Even if it be assumed that the plaintiffs represented that the charge was rightly made, still it had to be observed that the accounts represented the 6 lakhs as having been received by Mr. Beeby. And had that been the fact, then he would have been entitled to the commission shown in the accounts as retained by him.

Nor can I see what act was induced by the plaintiffs: his appropriation of the amount of the commission was before the passing of the accounts, as also was his departure for England.

But if the plaintiffs are not estopped, are they debarred by laches or acquiescence from enforcing their claim? I think, not. This is not a case of opening a settled account so much as enforcing a claim against a fiduciary agent, on the ground that it has been discovered that he has retained more of the estate than he was entitled to under the order authorising his remuneration.

The defence of laches cannot prevail when, as here, a statutory period of limitation is prescribed. Nor can acquiescence be imputed to the plaintiffs, for though Mr. Beeby's accounts as passed showed the retention of the amounts now sought to be recovered, still these accounts represented the 6 lakhs odd, on which the commission was calculated, as received by him.

There is no evidence to show that the plaintiffs actually knew the facts as represented in the accounts to be incorrect or that they did not rely on that representation, and the inference, therefore, is that they did so rely. [*Redgrave* v. *Hurd* (2)].

In saying this, I do not forget the alleged conversation with Mr. Bhupendra Nath Bose in the Bar Library.

The broad facts are these, if my view of the extent of Mr. Beeby's right to commission is correct an administrator *pendente lite* has retained as his remuneration more than he was entitled to claim: his accounts,

(2) (1881) 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251.

contrary to the fact, represented receipts by him entitling him to the commission retained by him; and a suit is now brought against him to recover that amount within the time allowed by law.

I hold no answer has been shown, and I, therefore, would not disturb Mr. Justice Chaudhuri's decision on this part of the case.

Then three points have been raised by way of cross-objection. *First*, it is said that the administrator has charged commission on the basis of the deceased being entitled to a $\frac{1}{4}$th share in the family property, whereas his share was only 1/5th I am not prepared to dissent from the view taken by Chaudhuri, J. The share was originally $\frac{1}{4}$th, and I think it may fairly be said that this share came into Mr. Beeby's hands, though it was liable to be reduced to 1/5th and was in fact so reduced.

The next objection is that Mr. Beeby received commission on the sale-proceeds of a part of the Ghoshal property, though he had previously received commission on the entirety of that property. Chaudhuri, J., has not dealt with this point under the impression that it was not seriously urged. But Mr. Chakravarti assures us that this was not so. If commission was taken on the whole of the property, I do not think commission could be again taken on the sale-proceeds of a part of the property. As this is what happened, the objection must succeed.

The third objection raises the question whether commission is to be charged on the gross or only on the net collections.

The gross collections were made on behalf of those entitled, of whom Mr. Beeby as administrator *pendente lite* was one. I, therefore, think we ought not to disturb Mr. Justice Chaudhuri's decision on this point.

The result then is that, in my opinion, the decree of the learned Judge should be varied by increasing the sum of Rs. 12,234-8-9 thereby decreed to Rs. 12,763-6-9 by the addition thereto of the sum of Rs. 528-14-1, the commission on the proceeds of sale of a part of the Ghoshal property.

WOODROFFE, J.—I agree.

Decree varied.

MADRAS HIGH COURT
FULL BENCH.

LETTERS PATENT APPEAL No. 71 OF 1913.
October 6, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

S. VEERARAGHAVA IYER—DEFENDANT—APPELLANT

versus

J. D. MUGA SAIT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 13, 44—Foreign judgment—Decree of Court of Cochin State—Execution in British India—Executing Court, power of, to impeach validity of decree—Jurisdiction—Suit in Cochin State—Temporary injunction pendente lite—*Appearance of defendant—Jurisdiction objected to—Written statement also filed—Submission, whether voluntary or under duress—Foreign Courts and Courts of Native States, judgments of—Suit in British India on such judgments, maintainability of.*

A British Indian Court, executing a decree passed by a Court in a Native State, in respect of which a notification pursuant to section 44 of the Civil Procedure Code has been issued, is competent to go behind the decree and inquire into the question whether the Court which passed the decree had jurisdiction to do so, as a British Court ought not to execute the decree if passed without jurisdiction.

The question whether submission to jurisdiction is voluntary or under duress is one of fact in each case. If the submission is for saving property, it is not voluntary, even though a written statement is filed objecting to the jurisdiction and raising a defence on the merits.

Boissiere and Co. v. *Brockner and Co.*, 6 T. L. R. 85; *Guiard* v. *De Colermont and Donner*, 30 T. L. R. 511; *Voinet* v. *Barrett*, 55 L. J. Q. B. 39; 34 W. R. 161; *Parry and Co.* v. *Appasami Pillai*, 2 M. 407; 5 Ind. Jur. 188; *Sivaraman Chetti* v. *Iburam Saheb*, 18 M. 327; and *Harchand* v. *Gulabchand*, 26 Ind. Cas. 265; 16 Bom. L. R. 620, referred to.

The scope and effect of sections 13 and 44 of the Civil Procedure Code (Act V of 1908) and their bearing upon each other considered.

Per *Seshagiri Aiyar, J.—Quære*:—Whether suits upon judgments of Native States, in respect of which a notification pursuant to section 44 of the Civil Procedure Code has been issued, can be instituted in British India?

Letters Patent Appeal against the judgment of the Hon'ble Mr. Justice Sadasiva Aiyar, in Appeal against Appellate Order No. 53 of 1911, reported in 20 Ind. Cas. 704, preferred against that of the Subordinate Judge of Palaghat, in Appeal Suit No. 874 of 1910, preferred against that of the Court of the District Munsif of Palaghat, in Execution Petition No. 967 of 1910 (Original Suit No. 82 of 1083 on the file of the Trichur District Court).

FACTS.—The suit out of which the pre-

sent Letters Patent Appeal arose was instituted by the plaintiff in the District Court of Cochin against the defendant, a resident of British India, for damages for breach of contract entered into in Cochin and to be performed in Cochin. Immediately after the institution of the suit the plaintiff applied for and obtained a temporary injunction to restrain the defendant from disposing of certain logs of timber which were within the jurisdiction of the Court. This order was duly served on the defendant. The latter then applied to the Cochin Court to dissolve the injunction. He also filed a written statement objecting to the jurisdiction of the Cochin Court and pleading non-liability for the claim. The District Judge of Cochin overruled the objections of the defendant and decreed the suit. The plaintiff then had this decree sent to the District Munsif's Court of Palaghat (a British Court) for execution under section 44 of the Civil Procedure Code. The defendant contended before the latter Court that the Cochin decree was a nullity as it was passed without jurisdiction. This plea was upheld and the execution was dismissed. On appeal the Subordinate Judge reversed that decision, holding that the District Munsif had no power to go into the question whether the Cochin Court had or had not jurisdiction to pass the decree. The defendant thereupon preferred Civil Miscellaneous Second Appeal No. 53 of 1911* to the High Court. It was heard by their Lordships Sundara Aiyar and Sadasiva Aiyar, JJ. Sundara Aiyer, J., held that the executing British Court could inquire into want of jurisdiction of the foreign Court which passed the decree. Sadasiva Aiyar, J., held *contra*. The judgment of Sadasiva Aiyar, J., prevailed and the civil miscellaneous second appeal was dismissed. The defendant then preferred this appeal under section 15 of the Letters Patent.

Mr. *K. K. Pandalai*, for Dr. *S. Swaminathan*, for the Appellant:—A British Indian Court executing the decree of a Court of a favoured Native State is competent to question the jurisdiction of the latter to pass the decree. The section of the new Code governing the question is 44. Section 229 B of the Code of 1882 and section 434 of that of 1877 are the corresponding sections. See also Order XXI, rule 7. Foreign Court is defined in section 2 of the present Code.

[SIR JOHN WALLIS, OFFG. C. J.—Section 44 puts the Courts of the selected Native States in the same position as Courts of British India for purposes of jurisdiction.]

The question depends upon the construction of the words "as if they had been passed by the Courts of British India" in section 44 of the Code. It is only in so far as the modes and machinery of execution are concerned that the decrees of the Courts of favoured Native States are placed in the same position as decrees of British Indian Courts. The intention of the section is not to place the decrees of the Courts of Native States in every respect on a par with the decrees of British Indian Courts. If a decree of a Court of a Native State had been passed without jurisdiction, a British Indian Court could not execute it. Maxwell's Interpretation of Statutes, 4th Edition, pages 122, 130, 131, 136, 139, 166, 218, 222, 223; *Cox* v. *Hakes* (1); *Darlington Wagon Co. Ltd.* v. *Harding* (2); *Ex parte Blain*; *In re Sawers* (3); *Cooke* v. *Charles A. Vogeler Co.* (4). The section should be read as being subject to the provisions of section 13 of the Code.

[SESHAGIRI AIYER, J.—In construing the provision as to the recovery of income-tax, it has been held that income-tax is not arrears of revenue so as to entitle Government to a first charge for income-tax due. That case turned upon the meaning of the words "as if."]

[SIR JOHN WALLIS, OFFG. C.J.—The section of the Income-tax Act says "recover as if", showing that the provision relates to the procedure only.]

In section 44 also the words are "execute as if." The case about the Income-tax Act is *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar* (5). Again, with reference to section 476, Criminal Procedure Code, where also the words "as if" occur, it has been held that they mean that there is no complaint in such a case.

*See 20 Ind. Cas. 704; (1913) M. W. N. 605; 14 M. L. T. 96.—*Ed.*

(1) 15 A. C. 506 at pp. 517, 523, 528; 60 L. J. Q. B. 89; 63 L. T. 392; 39 W. R. 145; 17 Cox. C. C. 158; 54 J. P. 820.

(2) (1891) 1 Q. B. 245 at p. 247; 60 L. J. Q. B. 110; 64 L. T. 409; 39 W. R. 167.

(3) 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334.

(4) (1901) A. C. 102; 70 L. J. Q. B. 181; 84 L. T. 10; 17 T. L. R. 153; 8 Manson 113.

(5) 26 M. 230 at p. 232; 12 M. L. J. 368.

[AYLING, J.—The words are "proceed as if," thus showing that the provision relates to procedure only.]

Musa Haji Ahmad v. *Purmanund Nursey* (6) lays down that the expression in section 44 of the Code refers to procedure only. A judgment of a foreign Court against a non-resident foreigner cannot be enforced in British Indian Courts, *Sirdar Gurdyal Singh* v. *Raja of Faridkot* (7).

[SESHAGIRI AIYAR, J.—You can bring a suit on a decree of a recognised foreign Court.]

Dicey, page 357, rule 81; *Cooke* v. *Charles A. Vogeler Co.* (4). The operation of a Statute is *prima facie* territorial and it cannot be extended to non-resident foreigners.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent:—In this case the defendant submitted to the jurisdiction of the Cochin Court. Hence the decree is not bad as being against a non-resident foreigner.

[SIR JOHN WALLIS, OFFG. C. J.—There was a protest against jurisdiction.]

But the defendant pleaded over. He pleaded to the merits also and thereby submitted to jurisdiction. The suit contract was entered into in Cochin and was to be performed in Cochin.

[SIR JOHN WALLIS, OFFG. C. J.—The defendant pleaded to jurisdiction and to the merits. Does that amount to submission?]

Yes. Dicey, page 370, rule 83. In an action *in personam* a foreign Court has jurisdiction when the defendant has submitted to its jurisdiction by voluntarily appearing without protest. Westlake on International Law, pages 376, 377. *Carrick* v. *Hancock* (8). In the latter case the defendant pleaded to jurisdiction and prayed in the alternative for a judgment on the merits.

[SESHAGIRI AIYAR, J., referred to *Venkatalutchmi Ammal* v. *Srirungapatram Srinivasamurthy* (9)].

Voinet v. *Barrett* (10); *Voinet* v. *Barrett* (11); Halsbury's Laws of England, Volume 6, page 285. An appearance under protest is nonetheless a voluntary appearance. An application for leave to file a defence has been held to be submission; *Shaikh Atham Sahib* v. *Daoud Sahib* (12); *Schibsby* v. *Westenholz* (13); *Harchand* v. *Gulabchand* (14); *Parry & Co.* v. *Appasami Pillai* (15); *Kandoth Mammi* v. *Neelancherayil* (16); Piggott on International Law, Part I, Volume I, page 352; Foote's Private International Law, page 552; American Cyclopædia, Volume XXI, page 1585; Story, page 764. The defendant has not only appeared but has adduced evidence and taken the chance of a decision in his favour. A suit upon a judgment is a suit upon a contract of which the judgment is evidence.

[SESHAGIRI AIYAR, J.—Can the question of jurisdiction be gone into in a suit upon a judgment?]

Yes, a suit would not lie in case of Native States not notified under section 44 of the Code. *Sama Rayar* v. *Annamalai Chetty* (17).

[SESHAGIRI AIYAR, J., referred to *Mayaram* v. *Ravji* (18).]

That case was a case of the Nizam. There was no notification in the case of the Nizam. *Musa Haji Ahmad* v. *Purmanund Nursey* (6) proceeds on the view that a British Indian Court executing a decree even of a British Indian Court can go into the question of the jurisdiction of the Court which passed the decree. That view has been dissented from and is no longer law. See *Hari Gobind Kulkarni* v. *Norsingrao Nauherao* (19). The effect of accepting the interpretation placed upon section 44 of the Code by the other side will be to render the section completely useless.

[SESHAGIRI AIYAR, J.—The plaintiff is saved the trouble of producing evidence, the expense of paying additional Court-fee, etc.]

[SIR JOHN WALLIS, OFFG. C. J.—The merits cannot be contested. The procedure enacted by section 44 is an expeditious method of getting the benefit of the decree.]

Chitty's Statutes, Volume 6, 31 and 32 Vict., Ch. 54.

[SIR JOHN WALLIS, OFFG. C. J., pointed out the strong language of the corresponding

(6) 15 B. 216.
(7) 22 C. 222; 21 I. A. 171; 4 M. L. J. 267; (1894) A. C. 670; 11 R. 540.
(8) 12 T. L. R. 59.
(9) 11 M. L. J. 91.
(10) (1886) 55 L. J. Q. B. 39; 34 W. R. 161.
(11) (1885) 54 L. J. Q. B. 521.
(12) 3 Ind. Cas. 190; 32 M. 469; 19 M. L. J. 457.
(13) (1870) 6 Q. B. 155 at p. 161; 40 L. J. Q. B. 73; 24 L. T. 93; 19 W. R. 587.
(14) 26 Ind. Cas. 265; 16 Bom. L. R. 620.
(15) 2 M. 407; 5 Ind. Jur. 188.
(16) 8 M. H. C. R. 14.
(17) 7 M. 164 at p. 165.
(18) 24 B. 86; 1 Bom. L. R. 539.
(19) 23 Ind. Cas. 123; 38 B. 194; 16 Bom. L. R. 30.

provision of that Act and contrasted it with the language of section 44.]

As for the difference between the right to execute and the right to sue, see Dicey, page 422, rule 104. Wherever the Legislature intends to speak of the manner of execution only, it employs different language from that found in section 44. See section 145. The Code makes no difference between the decree of a British Indian Court and the decree of a Court of a favoured Native State. Order XXI, rule 7, throws a flood of light on the subject.

[SIR JOHN WALLIS, OFFG. C. J.—Rule 7 is a purely evidentiary provision.]

JUDGMENT.

WALLIS, OFFG. C. J.—The learned Judges have differed on the question whether the District Munsif was right in refusing to execute the decree of the Cochin Court, as to which a notification has been issued pursuant to section 44, Civil Procedure Code, on the ground that it was passed without jurisdiction. It was not disputed that in the circumstances, which were similar to those in the Faridkote case, the Cochin Court must be considered to have had no jurisdiction, but it was contended that a British Court was bound under the terms of the section to execute it as if it had been passed by a Court of British India, and that it would not now be open to a Court in British India to refuse to execute the decree of another Court in British India for want of jurisdiction. I do not think it necessary to consider the 2nd proposition, because I agree generally with the judgment of Sundara Aiyar, J., that section 44 has not the effect contended for and that a British Court ought not to execute a decree of the Cochin Court passed without jurisdiction. That judgment is a judgment of a foreign Court within the meaning of section 13, Civil Procedure Code, and it would, in my opinion, require much plainer words than are to be found in section 44 to show that it was the intention of the Legislature that decrees of foreign Courts to which section 44 applies should be enforced in British Courts without regard to the provisions of that section. Full effect may be given to section 44 by holding that it was merely intended to alter the procedure by which such a foreign judgment can have effect given to it in British India. This was decided by Farran, J., more than 20 years ago in *Musa Haji Ahmad* v. *Purmanund Nursey* (6), which apparently has not been questioned in our Courts until the present case and was known to the Legislature when the provision of the last Code were revsied and the present Code was enacted. The suggestion that the Legislature intended all decrees of Courts in the position of the Cochin Court to be executed in British India without any question seems to me altogether inadmissible, having regard to the way in which the question has been dealt with as regards the superior Courts in the United Kingdom. The judgment of a superior Court can only be executed in the superior Court of another part of the United Kingdom under the Judgment Extension Act, 1868, when they are judgments "for any debt, damage or costs." Such judgments are, it is expressly provided, to have the same force and effect after registration in the executing Court as if they were judgments of that Court—words which are not to be found in section 44, Civil Procedure Code. Further section 8 makes a significant exception in the case of decrees of the Court of Session "pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland." In countries such as Scotland whose jurisprudence is based on the Roman Law, jurisdiction against a foreigner may be founded on seizure of his property within the territorial limits; but the English Law does not recognise such a procedure except in the case of the custom of foreign attachment in the City of London, as to which see *Wadsworth* v. *The Queen of Spain* (20), and the Legislature has, therefore, thought proper to except Scotch decrees founded on such an arrestment and obtained *in absentia* from the operation of the Act. The Inferior Courts Jurisdiction Act, 1882, is also confined to judgments for any debt, damages and costs and only allows execution of judgments obtained in one part of the United Kingdom against defendants domiciled in another part, subject to the restrictions as to cause of action and service contained in section 10 of the Act.

(20) (1851) 17 Q. B. 171; 20 L. J. Q. B. 488; 16 Jur. 164; 85 R. R. 398; 117 E. R. 1246.

It cannot, I think, have been the intention of the Indian Legislature in section 44 to ignore all these restrictions.

The next question is whether the defendant submitted to the jurisdiction of the Cochin Court. The lower Appellate Court returned a finding that he did not, and the respondent filed a memorandum of objections to the finding. Sundara Aiyar, J., observes that no attempt was made to impeach the finding at the hearing, but the learned Vakil who appeared on both occasions assured us that this was a mistake and has addressed us an elaborate argument on the point. The law on this question cannot perhaps be considered to be fully settled. The decision in *Parry & Co.* v. *Appasami Pillai* (15), that it is enough merely to object to the jurisdiction, is probably no longer law. See *Boissiere and Co.* v. *Brockner and Co.* (21) and *Guiard* v. *De Colermont and Donner* (22). There is, however, the high authority of Lord Esher. M. R., and Bowen, L. J., in *Voinet* v. *Barrett* (10) that submission is not voluntary, in the language of Bowen, L. J., in a case where goods belonging to the defendant have been seized by a foreign tribunal so that he only appears to get them released. In the recent case of *Guiard* v. *De Colermont and Donner* (22) where judgment has been given against the defendants in default of appearance and a small sum about £4 in a Paris Bank has been attached in execution, the defendant sought to set aside the default decree without any reference to the seizure of this comparatively trifling sum and Lawrence, J., held that it was not a submission for the purpose of saving property and held the judgment of the French Court was binding. Whether the submission was for the purpose of saving property or voluntary, is apparently a question of fact in each case. In the present case it is found that the plaintiff, in May 1908, obtained an *interim* injunction restraining the defendant from disposing of the timber belonging to him in the Cochin State, and that in the following July the defendant filed a counter-petition for the removal of the injunction and a written statement denying the jurisdiction and raising a defence on the merits on the same day. On the above facts I think there was evidence to support the finding and am not prepared to interfere with it in second appeal. This appeal is allowed. The order of the lower Appellate Court is set aside and the order of the District Munsif restored with costs throughout.

AYLING, J.—I agree.

SESHAGIRI AIYAR, J.—I agree. In order to decide the question of law arising in this appeal, it is necessary to set out the facts which have been either found or proved. A suit was instituted in the District Court of the Cochin State against the appellant for damages for breach of contract. On the institution of the suit and before defendant appeared, an application was made for an injunction restraining the defendant from alienating certain logs of timber owned by the appellant and which were within the jurisdiction of the District Court. The order was issued and notice of it was served on the appellant. It is not clear from the records whether this notice and the summons in the suit were served at the same time or on different dates. I find from the printed records that the appellant applied to have this injunction order vacated. There is nothing to show whether this application was prior to the filing of the written statement or after. Unfortunately, the written statement has not been filed in the case. We have to gather its terms from the judgment of the Cochin Court. The summary of it in paragraph 2 of that judgment shows that the appellant took exception to the jurisdiction of the Court on the ground that he was permanently residing in British India and also pleaded that he was not liable to the suit claim. The District Judge of Cochin overruled both the contentions and passed a decree against the appellant. This decree was sent to the District Munsif's Court of Palaghat (in British India) for execution under section 44 of the Code of Civil Procedure. Appellant contended before that Court that the decree of the District Court of Cochin was a nullity, as it was passed without jurisdiction. The District Munsif upheld that plea. On appeal the Subordinate Judge reversed this decision, holding that it was not competent to the District Munsif to consider the question of jurisdiction. A

(21) 6 T. L. R. 85.
(22) 30 T. L. R. 511.

civil miscellaneous appeal was perferred against this order and the two learned Judges who heard it have differed.

The main contention of the appellant is that the decree of the District Court of Cochin does not by transfer to a British Court become a decree of the latter Court for all purposes. Mr. Pandalai contends that the words, "as if they have been passed by the Courts in British India," relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court. I agree with this contention. In my opinion section 44 of the Civil Procedure Code is subjected to the same limitations as are contained in section 13 regarding foreign judgments. Under this latter section the recognition of foreign judgments is not absolute but is subject to certain reservations. Section 44 introduces an exception in favour of certain Native States. The Governor-General in Council is empowered by that section to give the privilege of execution to the judgments obtained in these States, without going through the process of instituting suits on them as is required in the case of other foreign judgments. The privilege is not an illusory one, as Mr. Ananthakrishna Iyer suggests. The favoured decree-holder need not pay fresh Court-fees for a suit. He need not go through the process of establishing his claim, provided the conditions mentioned in section 13 are complied with; and he can, on production of the decree, take out execution. These are substantial advantages which the Legislature has secured to the decrees of States which are included in the notification issued under section 44 of the Code. I do not think that the Legislature intended to obliterate the distinction between judgments of Native States and those of British India by the operation of section 44. I think there is force in the contention of the learned Counsel for the appellant that the language of section 44 does not *primâ facie* import equality between the two classes of judgments. As Lord Halsbury points out in *Cox* v. *Hakes* (1): "It is impossible to contend that the mere fact of a general word being used in a Statue precludes all the inquiry into the object of the Statute or the mischief which it was intended to remedy." Lord Herschell also says: "that for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation." This principle has been accepted and acted upon in *Darlington Wagon Co.* v. *Harding* (2) and *Ex parte Blain*; *In re Sawers* (3). In the present case, we cannot impute to the Legislature an intention to do away with the distinction between judgments of Native States and those obtained in British India, thereby taking them out of the category of foreign judgments altogether. I have already indicated that substantial advantages would be secured even on the footing that section 44 is controlled by section 13.

It is not necessary for emphasising this position to hold that suits on the judgments of favoured Native States are not permissible under the Code. There have been conflicting views on this question. I am inclined to think that both the remedies are open to persons who have obtained judgments in these States. However, as this question has not been fully argued, I prefer not to express any decided opinion on it. Assuming that only execution is contemplated and not suits, still a judgment from the Native States included in the notification already referred to must be obnoxious to the qualifications contained in section 13.

Another question, which might be more decisive on the matter we have to decide, was not also fully argued, and although I hardly feel any doubt upon it, I shall not base my decision on it. Mr. Ananthakrishna Iyer contended that in regard to decrees obtained within British India, the executing Court will have no power to go into the question whether the Court which passed the decree had jurisdiction to decide it. He relied on the change in the language between section 225 of the old Code and Order XXI, rule 7, of the new Code and quoted the recent decision of the Bombay High Court in *Hari Gobind Kulkarni* v. *Narsingrao Nouherao*(19) in support of his contention. I am not satisfied that the change is in favour of depriving the executing Court of the power to inquire into

the jurisdiction of the Court which passed the decree. The words omitted suggest that the Court is not *suo motu* to require proof of jurisdiction. In my opinion the omission does not lead to the conclusion that it is not open to the contesting party to challenge the jurisdiction of the decree Court. I agree with Mr. Justice Sundara Aiyar that this conclusion is not warranted by the change in the language. The learned Judges of Bombay in the recent case do not refer to *Bhagwantappa* v. *Visvanath* (23). If jurisdiction can be questioned regarding judgments of British Courts, it would *a fortiori* follow that judgments of Native States are not exempt from it. However, as I said before, I shall not base my judgment upon this aspect of the case.

I feel no hesitation in holding that the words, "as if they had been passed by the Courts of British India," have not the effect of giving foreign judgments the character of the judgments of our Courts. In *Ramachandra* v. *Pitchaikanni* (24) it was held that similar words in the Abkari Act had not the effect of giving arrears due under it the characteristics of arrears of Revenue under Act II of 1864. This was followed in *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar* (5) regarding income-tax, where the language used is strikingly similar to the words in section 44. The learned Judges held that the words, "as if it were an arrear of revenue," only related to the process of enforcing the income-tax dues. In *Musa Ahmad* v. *Purmanund Nursey* (6) the words in question were understood as relating only to the mode of execution. These decisions are directly in point. Mr. Ananthakrishna Iyer drew our attention to the language employed in sections 1 and 2 of 31 and 32 Victoria, Chapter 54 (the Judgments Extension Act of 1868) and contended that the words in section 44 are similar to those words and should be given the same meaning as in that Act. To my mind the language employed appears to be totally different. Section 1 speaks of the registry of Scotch judgments in the English Courts and proceeds to say "that they shall from the date of such registration be of the *same force and effect*, (the italics are mine) and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered." These words are very different from the language employed in section 44 of our Code.

On the other hand, the language of section 5 of 45 and 46 Victoria, Chapter 31, bears a close resemblance to the words used in section 44. The Act is known as the Inferior Courts Judgments Extension Act. Under this Act "process of execution may issue thereon out of the Court in which the same shall have been so registered against any goods or chattels of the person against whom such judgment shall have been obtained, which are within the jurisdiction of such last mentioned Court, in *the same or the like manner* as if the judgment to be executed had been obtained in the Court in which such certificate shall be so registered as aforesaid." Then follows section 10 which exempts from the operation of section 5 all judgments obtained against persons not domiciled within the jurisdiction of the Court which passed it and against whom the whole cause of action has not arisen within its limits. This Act gives the clue to the meaning to be attributed to section 44 of the Code of Civil Procedure and the limitation of section 10 of that Act must govern our Code also.

Mr. Ananthakrishna Iyer argued a further question, which has not been considered by the learned Judges who heard the civil miscellaneous appeal. The learned Vakil contends that as the appellant voluntarily submitted to the jurisdiction of the Cochin Court, he is estopped from questioning it in execution. The facts necessary for deciding this point have not been clearly elicited. The Subordinate Judge on remand found that there was no voluntary submission and Mr. Justice Sundara Aiyar says: "the learned Vakil for the respondent properly abstained from attempting to impeach it." Mr. Justice Sadasiva Aiyar does not refer to the question at all.

I have stated in the opening of my judgment the facts, in so far as they are gatherable from the records. The question for onsideration on these materials is, did the ppellant voluntarily submit himself to the urisdiction of the Cochin Court? It has been held in Madras that where a defendant

(23) 28 B. 378; 6 Bom. L. R. 342.
(24) 7 M. 434.

VEERARAGHAVA IYER v. MUGA SAIT.

demurs to the jurisdiction of a Court and at the same time submits an alternative plea for a judgment on the merits in his favour, he should not be deemed to have voluntarily submittted to jurisdiction. *Parry & Co.* v. *Appasami Pillai* (15). This is also implied by the decision in *Siraraman Chetti* v. *Iburam Saheb* (25). In a very recent case it was held in Bombay, *Harchand* v. *Gulabchand*(14), that if in addition to challenging jurisdiction the defendant takes the chance of judgment being given in his favour, the submission is voluntary. The basis for this pronouncement is the decision of Cave, J., in *Boissiere and Co.* v. *Brockner and Co.* (21). The learned Judge says: "Where, however, he appears voluntarily and submits to the jurisdiction of the foreign Court there arises a legal obligation to obey the judgment. The question I have to decide in this case is what is meant by the word 'voluntarily?' For the plaintiffs it is contended that every appearance is voluntary which is not made under duress. For the defendants it is submitted that as the foundation for the legal obligation is consent an appearance under protest affords no indication of consent to the jurisdiction, or, in other words, is not voluntary. Now, no one supposes that when a man appears voluntarily as a defendant in an action before a foreign Court he does so because he likes it; he appears because on the whole he deems it his interest to submit to have the dispute decided by the foreign tribunal and to take his chance of winning the suit; and if he enters into the litigation from those motives, intending to take advantage of the judgment if he wins, there is obviously a moral obligation on him to pay if he loses, and this moral obligation is recognised by our law as sufficient under the circumstances to constitute a legal obligation. If this is the true source of the obligation why should it not extend to the case of a man who appears without duress, and, therefore, voluntarily in one sense, but who accompanies his appearance with a protest and appears, not because he is compelled to do so, but because he judges it to be for his interest to do so? That is, he intends to take all the advantages he hopes to gain by appearing and by a protest to relieve himself from the disadvantage. He wishes to have the benefit without the burden;" and after discussing some of the authorities bearing on the question, comes to the conclusion that the appearance of the defendant was voluntary, notwithstanding the protest. Dicey (Conflict of Laws) accepts this as good law. See case (2) on page 370. See also Foote on Private International Jurisprudence, pages 552 and 553. I am not sure from the remarks of Westlake in his book on "Private International Law" that he is satisfied with the decision of Cave, J. (See remarks at page 378). If the decision of this appeal, however, depended entirely upon this question, I would hesitate to follow the decision in *Parry & Co.* v. *Appasami Pillai* (15), although it may not be irrelevant to point out here that the conditions of existence in this country may not justify the application of the principle enunciated by Cave, J. There are circumstances in this case which render it unnecessary to decide which of the two decisions [*Parry & Co.* v. *Appasami Pillai* (15) or *Boissiere and Co.* v. *Brockner and Co.* (21)] should be followed. There was an order against the appellant prohibiting him from alienating his properties which were within the jurisdiction of the Cochin Court. It was to protect himself from this order that he made his appearance, although he filed a statement on the merits as well. This amounts, according to accepted authorities, to appearing under duress. Lord Esher, referring to the *dictum* of Blackburn, J., in an earlier judgment, says in *Voinet* v. *Barrett* (10): "This sentence clearly means that an appearance which would otherwise be voluntary is not treated as voluntary if it is only made in order to save property which is in the hands of a foreign tribunal; that is to say, if the appearance is made in a case in which property of the party so appearing is already in the foreign country and has been seized by the foreign tribunal before appearance has been entered, so that the party appears in order to save the property so seized, and in order to get it out of the hands of the foreign tribunal. Such an appearance is not treated as voluntary, because it is made in order to save property which is already in jeopardy in the hands of a foreign tribunal; but if a defendant enters an appearance before any property has been seized, such an appearance may be a voluntary appearance." Bowen, L. J., is equally clear on the

(25) 18 M. 327.

question: "It is true that a defendant does not do so in a case in which goods belonging to him have already been seized by a foreign tribunal, so that he only appears in order to get them released; but if his appearnce is not a compulsory appearance, but is voluntary, then the matter stands in a different position." Cave, J., in the case already referrred to, makes a reservation in favour of the defendant appearing under duress. Westlake says that this position is unassailable. He pleads for an extension of the doctrine to all cases where the defendant appears to protect his property in a foreign Court, although there is no order for attachment or seizure of the same (see page 377). To the same effect are the opinions of other writers (Foote on Private International Jurisprudence, page 552; Piggott on Foreign Judgments, Volume I, page 349; Dicey on the Conflict of Laws, case 3, on page 372). The facts elicited in this case show that it was in order to protect his property that the appellant appeared before the Court, and the fact that he subsequently invoked the opinion of the Court on the merits should not preclude him from pleading that the Cochin Court had no jurisdiction over him.

I do not consider it necessary to deal with the question, which has been considered by both the learned Judges at some length, whether the use of the word *may* in section 44 is not equivalent to conferring powers to inquire into the competency of the judgment passed by a Foreign Court. If the British Court have a discretion, what is to be the limit of its exercise? Are these Courts to inquire into the merits to ascertain whether the judgment was a just one? If section 44 is not controlled by section 13, I do not think the use of the word *may* will give the British Courts power to deal with the jurisdiction of the Courts of Native States. Nor am I prepared to hold that the use of the word *may*, instead of *shall*, was intended to subject section 44 to the limitations contained in section 13.

My conclusion is that the Courts in British India are competent to decide before issuing execution, whether the Courts of Native States had jurisdiction to pass the judgment which is sought to be enforced by them. I agree with the order proposed by the learned Chief Justice.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 158 OF 1913.

October 13, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VENKATA KRISHNA MOORTHI, MINOR, BY HIS NEXT FRIEND AND ADOPTIVE FATHER, RAMAPPA—PLAINTIFF—APPELLANT

versus

BHEEMAKKA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee entitled to possession on mortgagor's failure to pay instalment—Legal title, whether in mortgagee—Trespasser, possession of, whether adverse to mortgagee.

Where, under the terms of a mortgage instrument, the mortgagee is entitled to possession only on the mortgagor committing default in payment of any of the instalments, the legal possession is not with the mortgagee, and the possession of a trespasser is not adverse as against him.

Parthasarathi Naicken v *Lakshmana Naicken*, 9 Ind. Cas. 791; 35 M. 231; (1911) 2 M. W. N. 201; 21 M. L. J. 467; *Peria Aiya Ambalam* v *Shanmugasundaram*, 22 Ind. Cas. 615; 26 M. L. J. 140; 15 M. L. T. 112; 1 L. W. 119, followed.

Second appeal against the decree of the District Court of Bellary, in Appeal Suit No. 133 of 1911, preferred against that of the District Munsif of Bellary, in Original Suit No. 272 of 1910.

Mr. *K. Bhashyam Aiyangar*, for the Appellant.

Mr. *K. Rajah Aiyar*, for the Respondents.

JUDGMENT.—There is no right of re-entry expressly provided for in Exhibit A in favour of the mortgagee (plaintiff's predecessor-in-title) and it is arguable that on the failure to pay the first instalment due under Exhibit A, the mortgage became a transaction of simple mortgage for all purposes, even assuming that it had the character of a usufructuary mortgage originally.

Under these circumstances it seems difficult to hold that the possession of trespassers (assuming defendants Nos. 2, 3 and 4 to be trespassers) was necessarily adverse to the mortgagee whose right to obtain possession of the mortgaged property is so problematical [See *Parthasarathi Naicken* v. *Lakshmana Naicken* (1) and

(1) 9 Ind. Cas. 791; 35 M. 231; (1911) 2 M. W. N. 201; 21 M. L. J. 467.

Peria Aiya Ambalam v. *Shanmugasundaram* (2)].

We, therefore, reverse the lower Court's decree based on the view that the possession of defendants Nos. 2 to 4 was necessarily adverse to the mortgagee also, and we remand the suit to the Court of first instance for fresh decision. The District Munsif has not framed some of the necessary issues, namely, issues about the genuineness and validity of the mortgage-bond, Exhibit A, issues as to the title of the plaintiff's mortgagor and as to his possession of the plaint items on the date of the mortgage-deed, Exhibit A, and issues as to the title and possession of the persons (Komati Yellappa and Irappa) through whom the defendants Nos. 2 to 4 claim. These issues must be framed and decided at the re-trial.

Costs hitherto will abide.

Appeal allowed.

(2) 22 Ind. Cas. 615; 26 M. L. J. 140; 15 M. L. T. 112; 1 L. W. 119.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 242 OF 1912.

June 25, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

MOHINI MOHAN MISSER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SURENDRA NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 95—Malicious prosecution, suit for damages for, when mantainable—Interlocutory injunction, whether dissolved when perpetual injunction granted—Limitation Act (IX of 1908), Sch. I, Art. 42—"Want of reasonable and probable cause", allegation of—Malice—Erroneous decision, procuring of—Damages, liability for.

The bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosection, except where the proceedings involve "either scandal to reputation or the possible loss of liberty to the person" or are specially provided by Statute.

Therefore, a suit for damages cannot be maintained against a defendant for obtaining maliciously and without reasonable or probable cause a perpetual injunction, which was dissolved on appeal.

Nanda Kumar Shaha v. *Gaur Sankar*, 13 W.R. 305; 5 B. L. R. App. 4, questioned.

An interlocutory injunction granted in such a suit is *ipso facto* dissolved by a decree of the Court granting a perpetual injunction.

Therefore, if a suit for damages for "wrongfully" obtaining such an injunction is maintainable, limitation under Article 42 of tho Limitation Act would begin to run from the date when the interlocutory injunction ceases.

Per *Fletcher, J.*—An allegation that the defendants were actuated by malice and that the suit for an injunction ultimately proved unsuccessful, when the decree of the High Court was set aside by His Majesty in Council, is not sufficient to show want of reasonable or probable cause.

The want of probable cause is not to be inferred because of mere evidence of malice.

Turner v. *Ambler*, (1847) 10 Q.B. 252; 16 L. J. Q. B. 158; 6 Jur. 346; 11 E. R. 98; 74 R. R. 278, followed.

Per *Richardson, J.*—It is doubtful whether a suit as contemplated in section 95 of the Civil Procedure Code to recover compensation in respect of a temporary injunction applied for on insufficient grounds or without reasonable and probable cause, is maintainable in the absence of an undertaking to pay compensation.

Dharmo Narain v. *Sreemutty Dassee*, 18 W. R. 440, referred to.

A party is not liable in damages for procuring an erroneous decision.

Appeal against the decree of the Subordinate Judge of Purnea, dated the 18th of April, 1912.

Mr. *S. P. Sinha* and Babu *Jogendra Nath Mukherjee*, for the Appellants.

Dr. *Rash Behary Ghose*, Babu *Golap Chandra Sarkar*, Dr. *Dwarka Nath Mitra* and Babu *Rishendra Nath Sircar*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against the judgment of the learned Subordinate Judge of Purnea, dated the 18th March 1912. The suit was instituted to recover from the defendants Rs. 1,91,932-8-6, as damages for malicious prosecution of a civil suit brought against the plaintiffs. On the 1st of December 1896, the executor of the father of the defendant No. 1 instituted a suit in the Court of the Subordinate Judge of Purnea against the present plaintiffs for the purpose of obtaining an injunction restraining the present plaintiffs from erecting an indigo factory on the land let for agricultural purposes, and on the same date an application was made *ex parte* to the Subordinate Judge from an interlocutory injunction restraining the defendants till the trial of the suit from proceeding with the erection of the buildings. The learned Subordinate Judge on that application granted

the interlocutory injunction prayed for. An appeal was preferred against that order to the District Judge who dismissed the appeal.

That suit came on for hearing before the Subordinate Judge on the 30th of September 1899. The learned Judge decreed the suit and granted a perpetual injunction restraining the erection of an indigo factory on the land. The present plaintiffs appealed against that decree to the District Judge who, on the 16th of August 1900, reversed the decision of the Subordinate Judge and dismissed the suit. The present defendants, who were then the plaintiffs in that suit, the original plaintiff having previously died, preferred an appeal to this Court against the decision of the District Judge. On the 1st of June a Division Bench of this Court (Banerjee and Pargiter, JJ.) reversed the decision of the District Judge and restored the decree passed by the Subordinate Judge. The present plaintiffs then appealed to His Majesty in Council and on the 1st of June 1907 the decree passed by this Court was set aside and the judgment of the District Judge restored.

The proceedings in this Court are reported in *Surendra Narain Singh* v. *Hari Mohan Misser* (1) and before the Judicial Committee in *Hari Mohan* v. *Surendra Narayan Singh* (2). The proceedings having terminated in favour of the present plaintiffs, they have brought this present suit to recover damages for malicious prosecution of the suit for an injunction. The learned Subordinate Judge has dismissed this suit on the ground that it is barred by limitation. The first question for our decision is, is such an action as the present maintainable? The rule in England is very clear that a suit such as the present cannot be maintained. As was observed by Bowen, L. J., in the case of the *Quartz Hill Gold Mining Co.* v. *Eyre* (3): "In the present day and according to our present law the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probale cause, will not support a subsequent action for malicious prosecution." This general rule is, no doubt, subject to certain exceptions in cases where the proceedings involve "either scandal to reputation or the possible loss of liberty to the person." But the exceptions would not include a suit such as the present. This general rule, I think, must apply to India except in so far as the same has been modified by Statute. Section 95 of the Code of Civil Procedure, 1908, provides: "(1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section, (*a*) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or (*b*) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding Rs. 1,000, as it deems a reasonable compensation to the defendant for the expense or injury caused to him." The section also enacts that "an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction." This section in effect takes the place of the undertaking in damages which is usually required in England from a plaintiff as a condition of a grant of an interlocutory injunction in a pending suit in his favour, except that under section 95 the damages are limited to Rs. 1,000. The history of such undertaking is given by Jessel, M. R., in the case of *Smith* v. *Day* (4).

I now come to the case that has been principally relied upon by the plaintiffs in this appeal, namely, the case of *Nand Kumar Shaha* v. *Gaur Sankar* (5). That case was a reference by a Small Cause Court Judge. The questions referred for the opinion of this Court were, *first*, whether a fresh suit for compensation on account of damages incurred in consequence of obtaining improperly an injunc-

(1) 31 C. 174; 9 C. W. N. 87.
(2) 34 C. 718; 11 C. W. N. 794; 6 C. L. J. 19; 9 Bom. L. R. 750; 17 M. L. J. 361; 2 M. L. T. 399; 4 A. L. J. 497; 34 I. A. 133 (P. C.).
(3) (1883) 11 Q. B. D. 674 at p. 690; 52 L. J. Q. B. 488; 49 L. J. 249; 31 W. R. 668.
(4) (1882) 21 Ch. D. 421; 31 W. R. 187; 48 L. T. 54.
(5) 13 W. R. 305; 5 B. L. R App. 4.

tion under section 92 of Act VIII of 1859, can be entertained when the question has been once brought forward for decision before an Appellate Court but rejected on a distinct ground and *secondly*, if the suit can be admitted on the ground of its not being decided on its merits by the Appellate Court, is the cause of action to be considered as having accrued from the 18th of August 1868, the date of the decision of the Munsif or from the 23rd of November 1869 when the cross-appeal by the plaintiff was dismissed ? The learned Judges (L. S. Jackson and Glover, JJ.) in answering the questions referred to them remarked that section 96 of Act VIII of 1859 (which for the present purpose is the same as section 95 of the present Code) would not debar the Small Cause Court from entertaining the suit. They do not, however, express any opinion on the question whether the cause of action set up by the plaintiff was or was not a good cause of action although, no doubt, their judgment implies that the cause of action was sufficient. No authority is cited in the course of the judgment and the Counsel who argued the case before us were unable to cite to us any other authority either in England or in India in which a plaintiff has recovered damages against a defendant who had obtained maliciously and without probable cause an interlocutory injunction. I must confess that the case of *Nand Kumar Shaha* v. *Gour Sunkur* (5) appears to me to be a questionable authority in so far as it decides that a plaintiff can maintain a suit for damages against a defendant for maliciously and without probable cause obtaining an interlocutory injunction. *Nand Kumar Shaha* v. *Gour Shankar* (5) was decided by this Court on the March 1870. In the Limitation Act of 1871 first appears Article 86, fixing a period of limitation in which a suit must be brought to recover compensation for damages caused by an injunction wrongfully obtained, the Article in the present Act of 1908 being Article 42. The reason for the insertion of Article 86 in the Act of 1871 was obviously the decision in *Nand Kumar Shaha* v. *Gour Shankar* (5). But of course nothing in the Limitation Act can give a party a right of suit unless such a right exists independent of the Limitation Act [*Harinath* v. *Mothur Mohun* (6)]. Another case that has been relied upon is the case of *Chunder Kant Mookerjee* v. *Ramcoomar Koondoo* (7). But all that case decided was that a suit will lie for bringing a suit in the name of a third party maliciously and without reasonable or probable cause whereby the party against whom the action is brought sustains damage. This had already been decided by the Court of Common Pleas in the case of *Cotterell* v. *Jones* (8).

No case has, however, been cited before or authority shown to us to suggest that if a party miliciously and without probable cause brings a suit for a perpetual injunction and succeeds at the trial, but the judgment is reversed on appeal, he is liable in damages for the injury caused by the injunction. Besides, the decision of the Court of first instance granting the injunction would indicate that the suit was instituted under such circumstances as would induce a prudent man to act. The want of probable cause is not to be inferred because of mere evidence of malice [*Turner* v. *Ambler* (9)].

The result, therefore, is that there is no case in the books of a suit for damages against a defendant for maliciously and without reasonable or probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. The only case in which a suit of a similar nature was maintained with reference to an interlocutory injunction is *Nand Kumar Shaha* v. *Gaur Sankar* (5), the authority of which, I think, is questionable. But assuming that case to be a binding authority for that proposition, the interlocutory injunction in the present case ceased and came to an end when the Subordinate Judge at the trial on the 30th of September 1899 granted a perpetual injunction. The present suit was not instituted until the 13th of May 1910. Under Article 42 of the Indian Limitation Act, 1908, time begins to run from the date when the injunction ceases. Any right of suit that the plaintiffs might have with reference to the

(6) 20 I. A. 183; 21 C. 8 (P. C.).
(7) 22 W. R. 138; 13 B. L. R. 530.
(8) (1851) 11 C. B. 713; 138 E. R. 655; 87 R. R. 754; 21 L. J. C. P. 2; 16 Jur. 88.
(9) (1847) 10 Q. B. 252; 16 L. J. Q. B. 158; 6 Jur. 346; 116 E. R. 98; 74 R. R. 278.

obtaining of the interlocutory injunction is, therefore, barred by limitation. It is further to be noticed that nowhere in the plaint in this suit is it stated that the suit for an injunction was instituted or prosecuted without reasonable or probable cause. It would appear, however, that the plaintiffs' allegations in support of want of reasonable and probable cause are that the defendants were actuated by malice and that the suit for an injunction ultimately proved unsuccessful, when the decree of this Court was set aside by His Majesty in Council.

Such an allegation, however, is not a sufficient allegation of want of reasonable or probable cause. The fact that the Subordinate Judge granted the injunction and a similar view was taken by a Division Bench of this Court, although their opinion ultimately proved mistaken, shows that it could not be said that there was a want of reasonable or probable cause in instituting and prosecuting the suit [see the judgment of Couch, C. J., in *Chunder Kant Mookerjee* v. *Ramcoomar Koondoo* (7)].

In the result I agree with the conclusion arrived at by the learned Subordinate Judge, though for different reasons. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree that if relief is sought by the plaint on the ground that the previous suit, which was a suit for a perpetual injunction, was instituted maliciously and without reasonable and probable cause, that is not a good cause of action. Paragraph 15 of the plaint, however, points rather to the issue of the interlocutory injunction as the cause of action on which the plaintiffs rely. The interlocutory injunction is treated as though it subsisted up to the date of the order of His Majesty in Council. I agree that the interlocutory injunction was *ipso facto* dissolved by the decree of the first Court granting a perpetual injunction and that assuming that damages may be claimed by suit for "wrongfully" obtaining such an injunction, the present suit as a suit for damages is barred by limitation under Article 42 of the Schedule of the Limitation Act. As to the word "wrongfully," section 95 of the Civil Procedure Code of 1908 seems to contemplate the possibility of a suit being brought to recover compensation in respect of a temporary injunction applied for on insufficient grounds or in a suit instituted without reasonable and probable cause. It is at the least doubtful whether such a suit is maintainable in the absence of an undertaking to pay compensation [*Dhurmo Narain* v. *Sreemutty Dassee* (10)]. But if it be maintainable, it would, no doubt, be governed in regard to limitation by Article 42. The conduct imputed to the defendant in such a suit would be in its nature tortious or wrongful. It is idle to say that the suit could not have been instituted until the determination of the appeal to the Privy Council. The words of Article 42 are clear. Time runs from the date "when the injunction ceases."

In point of substance the damages which the plaintiffs say they have suffered, were due principally to the permanent injunction granted by the Court of first instance and the High Court. In view of the result of the appeal to the Privy Council, those decisions must, no doubt, be regarded as erroneous, but as the learned Subordinate Judge points out, a party is not liable in damages for procuring an erroneous decision. A successful appellant is entitled, under sub-section (1) of section 144 of the Code, to such restitution "as will, so far as may be, place the parties in the position which they would have occupied" but for the decree which has been varied or reversed. Sub-section (2) lays down that no separate suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1). I do not know whether the plaintiffs could have obtained any relief under these provisions I am disposed to think not. The removal of the permanent injunction restored the *status quo ante* so far as it could be restored. But however that may be, at any rate the plaintiffs cannot obtain by suit any relief which they could have obtained under section 144 by application. They cannot in this suit obtain any relief by way of restitution.

The result is that the plaint, whatever

(10) 18 W. R. 440.

construction be put upon it, discloses no cause of action except possibly a cause of action to which the bar of limitation applies.

On the facts, so far as they appear, it would be very difficult to say that the previous suit was instituted without reasonable and probable cause or that the temporary injunction was applied for on improper or insufficient grounds. But as I understand we do not decide the appeal with reference to that consideration.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL FROM ORDER
No. 20 OF 1913.
February 11, 1914.
Present:—Justice Sir Asutosh Mukerjee, Kt., and Mr. Justice Beachcroft.
NIRODE BARANI DEBYA AND ANOTHER—APPLICANTS—APPELLANTS
versus
BHOLANATH SARKAR AND ANOTHER—OBJECTORS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 17—Minor, appointment of guardian for, principle of—Welfare of minor, fundamental principle—Hindu Law,—Discretion of Court in appointing guardian, when interfered by Appellate Court.

Section 17 of the Guardians and Wards Act, which provides for the appointment of a guardian for a minor, does not mean that the welfare of the minor should be subordinated to the requirements of the law to which the minor is subject. It is a well-established principle that the welfare of the child is the paramount consideration in appointing a guardian for him, although regard must be had to the recognized rights of guardianship under the law to which the minor is subject. In other words, in a choice between fitness and propinquity, the former must prevail.

Tota Ram v. *Ram Charan*, 8 Ind. Cas. 785; 7 A. L. J. 1149; 3 A. 222, *Muthuveerappa Chetti* v. *Pennuswami Chetty*, 13 Ind. Cas. 16; (1911) 2 M. W. N. 561; 10 M. L. T. 477: 22 M. L. J. 68; *Beattie* v. *Johnstone*, 1 Ph. 17 at p. 34; 10 L. J. Ch 300; 5 Jur. 671; 41 E. R. 537; *Johnstone* v. *Beattie* 10 Cl. and Fl. 42 at p. 122; 7 Jur. 1023; 8 E. R. 657; 59 R. R. 23, *Akima* v. *Azeem*, 9 W. R 334 *Sohna* v. *Khalak Singh*, 13 A. 78; A. W. N. (1891) 1; *Mashin* v. *Maung Chit Pan*, 2 U. B. R. 408, followed

Under the Hindu Law, the nearest paternal relatives have no legal right to guardiansh ip on the death of the parent of the child and in the absence of the father or the mother or the guardian appointed by the father, the selection of a guardian for a Hindu minor is to be made by the Court as it represents the Ruling Power subject, no doubt, to the principle that ordinarily the paternal kindreds are entitled to preference over the maternal kindreds. In other words, the fundamental principle to be considered is, what is for the welfare of the particular minor?

Kristo Kissor Neoghy v. *Kadermoye Dossee*, 2 C. L. R. 583; *Re Gulbai and Lilbai*, 32 B. 50; 9 Bom. L. R. 923, followed.

Although a Court of Appeal will not lightly interfere with the discretion of the Court of first instance in the mattar of appointment of a guardian, yet where weighty reasons have been made out, the order of the first Court will be set aside.

In re Kaye, 1 Ch. App. 387 at p. 389; 12 Jur. (N. S.) 350; 14 L. T. 388; 14 W. R. 597, referred to.

In the circumstances of the present case the maternal uncle was preferred to the paternal uncle.

Appeal against the order of the District Judge, Murshidabad, dated 22nd November 1912.

Mr. *Sinha*, with him Babu *Hara Prashad Chatterjee*, for the Appellants.

Babu *Dwarkanath Chakravarti* and *Sarat Chandra De*, for the Respondents.

JUDGMENT.—The question in controversy in this appeal relates to the appointment of a guardian of the property of an infant, whose father died on the 13th April 1912, leaving behind him, his mother, his widow, two daughters and six brothers. Two months after the death of the father, an application was made by the mother of the infant and his maternal uncle for appointment as joint guardians of his person and property. The application was opposed by the grandmother and by one of the paternal uncles. In so far as the guardianship of the person is concerned, the mother has been appointed and there is no question that she is the proper person to have custody of her infant son. The present dispute relates to the guardianship of the property. The District Judge has decided in favour of the paternal uncle on the ground that under the Hindu Law preference should be given to the paternal kindred and that unless the maternal kindred is proved to be in a substantial degree a more suitable person than the paternal kindred, the latter should be appointed. The District Judge has further stated that, upon the evidence, he was not satisfied that the maternal uncle was pre-eminently more suitable for the office than the paternal uncle and that the ordinary rule should not be broken in

favour of the maternal uncle, inasmuch as the paternal uncle was not found unsuitable.

On behalf of the mother and the maternal uncle, this order has been assailed on the ground that the District Judge has not looked at the question from the correct standpoint, that the essential matter for consideration is the welfare of the minor, and that this would be secured by the appointment of the maternal uncle in preference to the paternal uncle. In our opinion, this contention is well-founded and must prevail.

Section 17 of the Guardians and Wards Act provides that in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of the section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. This does not mean that the question of welfare of the minor is to be subordinated to the requirements of the law to which the minor is subject. It is, on the other hand, a well-established principle that the welfare of the child is the paramount consideration, although regard must be had to the recognised rights of guardianship under the law [*Tota Ram* v. *Ram Charan*(1); *Muthuveerappa Chetti* v. *Ponnuswami Chetty*(2); *Beattie* v. *Johnstone* (3); *Johnstone* v. *Beattie* (4)] or, as it has sometimes been put, in a choice between fitness and propinquity, the former must prevail. [*Akima* v. *Azeem*(5); *Sohna* v. *Khalak Singh* (6); *Mashin* v. *Maung Chit Pan*(7)]. We cannot consequently accept the view that the paternal uncle must be appointed unless the maternal uncle is proved to be pre-eminently more suitable for the office. The real question is, whose appointment is likely to be more beneficial to the infant?

We may further observe, as was pointed out by Sir Richard Garth, C. J., in the case of *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (8), under the Hindu Law, to which the minor in the present case is subject, the claims of relatives to the guardianship of an infant stand upon quite a different footing from those of parents. The nearest paternal relatives have no legal right to the guardianship on the death of the parent of the child, and in the absence of the father or the mother or the guardian appointed by the father, the selection of a guardian for a Hindu minor is to be made by the Court, as it represents the Ruling Power, subject, no doubt, to the principle that ordinarily the paternal kindreds are entitled to preference over the maternal kindreds, in other words, as remarked by Mr. Justice Davar in *Re Gulbai and Lilbai* (9) the fundamental point to be considered is, what is for the welfare for the particular minor? Let us examine the position in the light of these principles.

In the case before us, it has been incontestably established by the evidence that the paternal uncle of the infant lived separate from the father, that the brothers were not on friendly terms, and that after the death of the father of the infant, the brother did not even attend his *sradh* ceremony. The paternal uncle did not, during the life-time of the father of the infant, take any interest whatsoever either in the infant or in the estate of the father himself. On the other hand, the evidence indicates that the maternal uncle was on friendly terms with the father and he was also well-disposed to his younger sister, the mother of the infant. As regards solvency, there is not much to choose between the paternal uncle and the maternal uncle. Both of them are in debt, although possibly the maternal uncle is indebted to a larger extent than the paternal uncle, who was constrained to admit that his dwelling-house was subject to a mortgage. It is plain that if the property of the infant is placed in charge of the maternal uncle, the mother who has been appointed guardian of the person of her infant son is likely to have greater facility in receiving the profits and in applying them for the benefit of the minor than if the properties were placed in the hands of the paternal uncle who has never been friendly either to her late husband or to herself. On the

(1) 8 Ind. Cas. 785; 7 A. L. J. 1149; 33 A. 222.
(2) 13 Ind. Cas. 16; (1911) 2 M. W. N. 561; 10 M. L. T. 477; 22 M. L. J. 68.
(3) (1841) 1 Ph. 17 at p. 34; 10 L. J. Ch. 300; 5 Jur. 671; 41 E. R. 537.
(4) (1843) 10 Cl and Fl. 42 at p. 122; 7 Jur. 1023; 8 E. R. 657; 59 R. R. 23.
(5) 9 W. R. 334.
(6) 13 A. 78; A. W. N. (1891) 1.
(7) 2 U. B R. 408.
(8) 2 C. L. R. 583.
(9) 32 B. 50; 9 Bom. L. R. 923.

other hand, there has been considerable estrangement between the mother of the infant and her brother-in-law, as is clear from the fact that he maintained, although unsuccessfully, the position that she was of unsound mind and was not able to take care either of herself or of her child. In these circumstances we are of opinion that, although the discretion of the Court of first instance in the matter of appointment of a guardian will not be lightly interfered with by a Court of Appeal [*In re Kaye* (10)], weighty reasons have been made out why this appeal should be allowed and the order of the District Judge set aside, in so far as he has appointed the paternal uncle as the guardian of the property of the infant.

We appoint Bhola Nath Banerjee, the maternal uncle, as guardian of the property of the minor, subject to the following conditions. In the first place, the guardian must furnish security as required by the District Judge. In the second place, the guardian must undertake to file accounts every three months in Court, such accounts, when filed, to be open to inspection by the paternal relations. In the third place, if the guardian makes any application to the Judge for alienation of the property of the infant, notice thereof would be given to the paternal relations. In the fourth place, as soon as the outstanding debts due to the father of the infant are realized, the guardian will bring the money into Court to be invested or applied in such manner as the District Judge may from time to time direct. Each party will bear his own costs both here and in the Courts below.

Appeal allowed.

(10) 1 Ch. 387 at p. 389; 12 Jur. (N. S.) 350; 14 L. T. 388; 14 W. R. 597.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 13 OF 1914.

June 16, 1914.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

BENI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM CHANDRA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit brought on hundi *executed in consideration of sum due on account—Subsequent suit on account—Cause of action.*

A certain sum was due from the defendant to the plaintiff on an account between them. In consideration of the sum so due the plaintiff drew a *hundi* on the defendant and the latter accepted it. The defendant, however, did not pay the *hundi* and the plaintiff had to pay it. The plaintiff then brought a suit to recover the sum due on the *hundi* and the suit was dismissed. The plaintiff then brought a second suit to recover the sum due on account:

Held, that the second suit was not barred by Order II, rule 2, of the Civil Procedure Code, inasmuch as the cause of action of the latter suit was different from that of the former.

Preo Nath Mukerji v. *Bishnath Prasad*, 29 A. 256; A. W. N. (1907) 41; 4 A. L. J. 85, referred to.

First appeal from an order of the District Judge of Cawnpore, dated 21st November 1913.

FACTS.—There were money dealings between the plaintiffs and the defendants and accounts were settled and balance finally struck on 16th October 1909. There were no more dealings afterwards. It was agreed that the money due would be paid in various ways and some sums were paid and instalments of Rs. 50 a month were promised to be paid. It was also agreed afterwards that the plaintiffs would draw upon the defendants a *hundi* of Rs. 500 and the defendants would pay the money on due date. Plaintiffs drew a *hundi* on the defendants, which they accepted but did not pay its money on the due date. Plaintiffs first brought a suit on the basis of the *hundi*, which was dismissed. They now brought the present suit for recovery of the balance due. The defence was that the suit was barred by Order II, rule 2. The learned Subordinate Judge dismissed the suit as barred by Order II, rule 2. On appeal, the District Judge decided that the suit was not so barred and remanded the case for decision on the merits. The defendants appealed to the High Court from the order of remand.

Dr. *S. M. Suleman* (with him Dr. *S. N. Sen*), for the Appellants:—When once a debtor acknowledges his liability to pay a fixed sum and promises to pay the same in different ways, and when there is a failure to pay, there is only one cause of action for bringing the suit. Here the amount due under the *hundi* was really the part of the whole amount due. When the plaintiffs brought the first suit, they ought

KOHMI v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 203 OF 1914.

May 4, 1914.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

KOHMI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 379, 442, 457, 511 —Trespass in cattle enclosure—'Building,' meaning of —Attempt to commit theft.

The mere surrounding of an open space of ground by a wall or a fence of any kind cannot be deemed to convert the open space into a "building" within the meaning of section 442, Indian Penal Code, and a person entering such an enclosure with intent to commit theft of cattle cannot be convicted under section 457 of the Code. But he is guilty of an offence under sections 379/511, as the attempt to commit theft may be said to have begun when he entered the enclosure.

Appeal from the order of the Sessions Judge, Gujranwala Division, dated 21st January 1914, convicting the appellant.

Lala *Radha Kishen*, for the Appellant.

Mr. *C. Bevan Petman*, Government Advocate, for the Respondent.

JUDGMENT.—Kohmi has been convicted by the Sessions Judge of Gujranwala of an offence under section 457, Indian Penal Code, and in view of the fact that he has been convicted three times previously of offences under Chapter XVII of the Indian Penal Code, he has been sentenced to transportation for life.

The allegation of the prosecution is that the appellant committed lurking house-trespass by night by entering the cattle enclosure of Lashkar with the intent to commit theft of his cattle.

The cattle enclosure in question is not attached to any house, but is merely a piece of ground enclosed on one side by a wall and on the other three sides by a thorn-hedge.

The first point raised by the appellant's Counsel is that the cattle enclosure in question is not a building within the meaning of section 442, Indian Penal Code. *Prima facie* we do not see how the mere surrounding of an open space of ground by a wall or a fence of any kind can be deemed to convert the open space into a building. It is certainly not a building as the term is usually understood, and we are supported by authorities in our view that it is not a building within the meaning of section 442. In *Sucha Singh* v. *Empress* (1) it was held that a cattle-fold or pen with a thorn-hedge round it was not a building. This view was re-affirmed in *Emperor* v. *Ramzan* (2) in which the accused had entered the complainant's cattle pen to prosecute his intimacy with a young unmarried woman. In *Shera* v. *Empress* (3) it was held that a courtyard consisting of a walled enclosure with four *kothas* or chambers opening into it, and an outer door or a gate leading into a side street, was a building. That case is very clearly distinguishable from the present.

The learned Government Advocate has not been able to quote any authority in support of the proposition that the cattle enclosure in question is a building. We, therefore, agree with the appellant's Counsel that the conviction under section 457, Indian Penal Code, cannot be maintained.

On the merits we see no reason to disagree with the finding of the learned Sessions Judge that the appellant really did make his way into the cattle enclosure, entrance being effected by making a hole in the hedge, and we also have not the least doubt that his intention was to commit theft of the cattle. There are, no doubt, certain discrepancies in the evidence, but these have been discussed by the Sessions Judge and we agree with him that they are not material. The question then remains, of what offence is the appellant guilty?

His Counsel suggests that the only offence of which he can be convicted is that of criminal trespass under section 447, Indian Penal Code. The learned Government Advocate, on the other hand, urges that he should be convicted of the offence of attempting to commit theft under sections 379/511, Indian Penal Code. Appellant's Counsel contends that at most his client had made preparation for committing theft and that he had not as yet made any attempt to commit theft.

The real difficulty in a case of this sort arises in determining, where the act passes from preparation into an indictable attempt.

Sir James Stephen in his Digest of Criminal Law, Article 49, defines an attempt to commit

(1) 57 P. R. 1887 Cr.

(2) 28 P. R. 1905 Cr; 118 P. L. R. 1905; 2 Cr. L. J. 420.

(3) 35 P. R. 1879 Cr. (F. B.).

a crime as "an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case."

Applying this definition to the present case we have no doubt that the attempt began when entry was effected into the enclosure by making a hole in the hedge. This was the first act which formed part of a series of acts which would have constituted an actual theft if appellant had not been interrupted.

We, therefore, hold that the appellant can be convicted of attempting to commit theft under sections 379/511, Indian Penal Code. We, therefore, accept the appeal and, setting aside the conviction and sentence, convict appellant, instead, of an offence under the aforesaid sections and sentence him to 1½ years' rigorous imprisonment, including two months' solitary confinement.

The fact that he has previously been convicted does not make him liable to enhanced punishment in the present case where he has only been convicted of an attempt to commit theft, and we have sentenced him to the maximum term of imprisonment prescribed for such an offence.

Appeal accepted; Sentence reduced.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 288-B OF 1914.
November 4, 1914.
Present:—Mr. Justice Robinson.
NGA PAN HLAING AND OTHERS—
ACCUSED—APPLICANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 448, 511—Attempt to commit criminal trespass—Criminal Procedure Code (Act V of 1898), s. 227—Charge, amendment of.

Entry on a verandah may not amount to house-trespass, but such entry coupled with an attempt to push open the door, does amount to an attempt to commit the offence. Those who accompany the accused but remain looking on without entering on the complainant's property are not guilty of criminal trespass even if they abuse.

When a Magistrate amends the charge, he should not write over the original charge but should leave it on the file for reference, if necessary, and should write the new charge separately and correctly date it.

Review of the order of the Township Magistrate of Henzada, dated the 20th June 1914, passed in Criminal Regular No. 62 of 1914.

Mr. *Halkar*, for the Applicant.

JUDGMENT.—The accused have been convicted of an attempt to commit house-trespass. Complainant's house had been stoned for several nights and she has laid a complaint against several of the accused for it.

The headman, fearing the stoning night again, went with several others and stayed in the house. The accused came up around with sticks and *daws*. Pan Hlaing and Pan Ngon mounted on the *panetchut* and the door was closed in their faces. The rest remained on the ground below.

The question argued is that the conduct does not amount to any offence. As regards the two who tried to enter, I can see no reason for interference. Entry on a verandah may not amount to house-trespass, but such entry coupled with an attempt to push open the door does amount to an attempt to commit the offence. In any case it would amount to criminal trespass and I see no reason to interfere.

As regards the rest they, no doubt, came there but remained below looking on. They did nothing more than perhaps abuse. They did not enter on complainant's property and, therefore, are not guilty of criminal trespass.

I reverse the conviction of Ngwe Saing, Ngwe Naing, Ngwe Paing, Lu Ni and Thein Yin. The fines, if paid, must be refunded.

The Magistrate has amended the charge by writing over the original typewritten charge. He should never do this. The original charge must remain on the file for reference, if necessary. He has also most carelessly left the original date 18th May, though the amended charge should be dated 19th June.

Conviction reversed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 183 OF 1914.

August 25, 1914.

Present:—Mr. Justice Ayling.

In re KUPPILI PRAKASAROW—PRISONER—APPELLANT.

Post Office Act VI of 1898), s. 52—Misappropriation of Postal money order—Evidence, value of—Mere suspicion, whether sufficient evidence—Oral or documentary evidence to prove statements made in departmental inquiry, whether admissible.

Where the only evidence against the accused, charged with misappropriating a Telegraphic money order, is that the postal account contained entries of delivery on dates different from those on which the actual deliveries were made, that merely creates a suspicion and is not sufficient to prove misappropriation.

Oral or documentary evidence as to the statements made by a Postman in the course of a departmental inquiry are not admissible in evidence in his absence.

Appeal against the order of the Court of Session of the Vizagapatam Division, in Case No. 9 of the Calendar for 1914.

Mr. *P. Grant*, for the Government.

JUDGMENT.—The appellant, a branch Postmaster, has been convicted of secreting a registered letter addressed to one Chodipilli Yerrayya (P. W. No. 5), an offence under section 52 of the Post Office Act.

In my opinion the evidence is not sufficient to justify a conviction. Up to a certain point the evidence is clear enough. I agree with the Sessions Judge in holding that the sum of Rs. 100 due to the P. W. No. 5 under a Telegraphic money order, which is shown in the branch Post Office accounts as disbursed on the 3rd April 1913, was not really paid to P. W. No. 5 till the 22nd April 1913; also that the registered letter in question which was received there on the 12th April 1913 and is shown in the books as delivered on the 17th April 1913, was never delivered at all, and was secreted by somebody. But I find no evidence from which a Criminal Court would be justified in concluding that it is the appellant who secreted it. The only motive for secreting it was to conceal the temporary misappropriation of the Rs. 100 due under the Telegraphic money order. Now there is no evidence to show that this sum was misappropriated by the accused, and not by the Postman K. Appalasawmy. The great defect in the prosecution case is the failure to examine this man as a witness, and in his absence oral or documentary evidence as to the statements made by him in the course of the departmental inquiry are not admissible. The money was ultimately paid to the prosecution witness No. 5 by K. Appalasawmy and by the acting Postman, P. W. No. 6, going together and this man, P. W. No. 6, admittedly signed entries in the Post Office account, recording the delivery of the registered letter on the 17th April 1913. The contradiction between Exhibits A and B is, in my opinion, rather a point in favour of the defence: if the branch Postmaster were the criminal, or cognisant of the offence, one would expect him to see that his accounts tallied.

The case against the appellant does not amount to more than grave suspicion. His conviction and sentence must be set aside.

Conviction set aside.

CALCUTTA HIGH COURT.

CRIMINAL RULES NOS. 1226 AND 1227 OF 1914.

September 18, 1914.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

THE SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL—PETITIONER

versus

MANMOHAN ROY AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 239—Same transaction, determining factor of—Continuity and community of purpose and object.

In deciding whether offences are so connected as to form one and the same transaction, the determining factor is not so much proximity in time as continuity and community of purpose and object.

Section 239 of the Criminal Procedure Code is merely an enabling section and does not in any way trammel the discretion of the Court.

Mr. *Norton* and Mr. *S. P. Sinha*, Counsel, and Babu *Manindra Nath Banerjee*, for the Petitioner.

Mr. *B. Chuckerbutty*, Counsel, and Babus *Monmotho Nath Mukerjee*, *Jogendra Nath Majumdar* and *Jitendralal Banerjee*, for the Opposite Party.

SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* MANMOHAN ROY.

JUDGMENT.—These two connected Rules have been tried together.

In Rule 1226 we are concerned with three accused persons, Mon Mohan Roy, Deno Nath Pal and Narain Chandra Dutt.

Mon Mohan was a loader in the service of the East Indian Railway at Krishtopur. Deno Nath is a merchant carrying on business in molasses at Kushtia. Narayan is Deno Nath's *gomasta*.

One of Mon Mohan's duties as a loader was to enter upon what are called consignment notes the true weight of goods despatched, and the case against the accused was that sometime between July 1911 and March 1913 they had entered into a conspiracy to defraud the Railway in respect of the freight payable on such goods. It was further alleged against them that on the 6th March 1913, the accused Mon Mohan accepted from Deno Nath through Narayan a sum of Rs. 8 as an illegal gratification and in consideration of that sum and in pursuance of the aforesaid conspiracy, understated on a consignment note the weight of a certain consignment by some 163 maunds and so joined with his two co-accused in defrauding the Railway of the sum of Rs. 34, being the freight payable on the difference between the true weight and the weight stated.

The charges framed against Mon Mohan were charges of offences under section 120B, section 420, and section 161 of the Indian Penal Code. The charges against the two co-accused were of offences under section 120B, section 420 and section 161 read in each case with section 109. Conviction followed on all the charges.

In Rule 1227, we are concerned with the same Mon Mohan and the same Deno Nath and with a third person named Janoki, who is the son of Deno Nath. In this case the charges framed were in respect of the same or a similar conspiracy and of three similar acts of fraud committed in pursuance of the conspiracy on or about the 1st November, the 7th November 1912 and the 16th day of January 1913. The sum involved on each of these three occasions was a sum of Rs. 17-4. As in the first case there were also charges in respect of two alleged gratifications said to have been paid to Mon Mohan, one sum on or about the 1st and a second sum on or about the 6th November 1912. In this case also on all the charges conviction followed.

On appeal the learned Sessions Judge of Howrah held in each case that the several offences charged under section 120B, section 420 and section 161 and under section 420 and section 161 read with section 109 could not be said to have been committed in the course of one and the same transaction and that the trials were, therefore, vitiated by misjoinder. He, therefore, set aside the conviction and sentences in each case, leaving it open to the Crown to take such further proceedings as it might be advised.

Against these orders of the learned Sessions Judge, the Crown has moved this Court and having had the advantage of hearing learned Counsel or Pleaders on both sides, we are satisfied that in each case the learned Sessions Judge has fallen into error. In deciding whether offences are so connected as to form one and the same transaction the determining factor is not so much proximity in time as continuity and community of purpose and object. In the present case that test, we are of opinion, is clearly satisfied. It has been suggested that this view may lead to the joinder of an embarrasing multiplicity of charges, but we may observe that section 239 is merely an enabling section and does not in any way trammel the discretion of the Court.

As to a further question whether section 239 is controlled by section 234 of the Code we need not in this case, and do not, express any opinion.

For these reasons we set aside the orders of the Sessions Judge now under consideration and in each case direct that the appeals be re-heard and determined on the merits.

Orders set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 618 OF 1914.
CRIMINAL REVISION PETITION No. 524 OF 1914.
October 21, 1914.
Present:—Mr. Justice Sadasiva Aiyar.

MUNIAN CHETTY AND ANOTHER—ACCUSED Nos. 1 AND 2—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 256—Conviction for less serious offence when facts disclose more serious offence, whether should be set aside—Failure to question accused if he is willing to cross-examine prosecution witnesses, effect of.

A conviction for a less serious offence need not be set aside merely because the facts disclose a more serious offence, provided the Court has jurisdiction to try the offence of which it has convicted

In re Mohideen Batcha Sahib, 21 Ind. Cas. 688; 14 Cr. L. J. 640; 25 M. L. J. 484, followed.

A failure to ask the accused, after framing the charge, whether he is willing to cross-examine the prosecution witnesses again, is a mere irregularity and the conviction is not thereby vitiated.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Tirukoilur, in Criminal Appeal No. 42 of 1914, preferred against the judgment of the Court of the Stationary Third Class Magistrate of Kallakunchi, in Calendar Case No. 502 of 1914.

Mr. *T. Pattabhirama Aiyar*, for the Petitioners.

ORDER.—In *In re Mohideen Batcha Sahib* (1) Ayling, J., held that "provided the Court had the power to try the offence of which it has convicted the accused, it is not necessary to quash the conviction merely because the facts disclose a more serious offence which the Court was not competent to try, unless the accused was prejudiced or the sentence was inadequate." That case was very similar to the present case, a lower class Magistrate having convicted the accused of theft in that case when the facts disclosed robbery. I fully agree with that decision.

As regards the ground that the trial Magistrate did not ask the accused persons after framing a charge whether they wished to cross-examine the prosecution witnesses again (section 256, Criminal Procedure Code) that is a mere irregularity and I am not satisfied that it has prejudiced the accused who had (as appears from the records) fully cross-examined the prosecution witnesses before the charge was framed. This point, again, seems not to have been pressed or even argued before the Appellate Magistrate.

I, therefore, reject the petition.

Petition rejected.

(1) 21 Ind. Cas. 688; 14 Cr. L. J. 640; 25 M. L. J. 484.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1198 OF 1914.
September 16, 1914.
Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

SREEMANTA CHATTERJEE—PETITIONER

versus

SURENDRA NATH BISWAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 209—Accused, whether can be committed on evidence to be given in future—Magistrate, when bound to discharge.

A commitment of an accused to the Sessions must depend on evidence actually before the Court and not on evidence that may be given in future.

A Magistrate is bound to discharge an accused under section 209, Criminal Procedure Code, if he believes that he has committed no offence.

Criminal revision from an order of the Magistrate of Khulna committing the accused to the Sessions.

Messrs. *Norton* and *P. L. Roy*, Counsel, and Babus *Dasarathi Sanyal*, *Bankim Chandra Sen* and *Debendra Narayan Bhattacharjee*, for the Petitioner.

Mr. *B. Chakravarty*, Counsel, and Babu *Manindra Nath Banerjee*, for the Opposite Party.

JUDGMENT.—The petitioner was a *naib* in charge of a *Zemindary Cutchery* in the District of Khulna in an estate the headquarters of which are in Bhawanipur. He had held this position for some years, but in 1912 his connection with the estate ceased and he was called on to render accounts, which he did in July 1912. A year later charges of criminal breach of trust and falsification of accounts were brought against him by one of the employees of the estate. The complaint was dismissed, but the District

Judge ordered further inquiry in respect of two items in the accounts. The petitioner was summoned and after an inquiry lasting for over four months, during which time only six witnesses were examined, the Magistrate discharged the accused declining to commit him to the Sessions. The Sessions Judge was then moved and he ordered the petitioner to be committed to the Sessions on two charges under section 477A, Indian Penal Code, of falsification of accounts. The petitioner then obtained this Rule calling on the District Magistrate to show cause why the order of commitment should not be set aside.

The first of the two items is one of Rs. 158 odd. On the receipt side of the accounts the entry of the sum follows six entries of small sums, which added together amount to Rs. 158 odd. Five entries of small sums amounting to Rs. 89 odd follow. The total of the eleven entries of small sums is Rs. 248 odd. The petitioner says that the item of Rs. 158 merely represents the total of the six small sums which precede it and not a sum separately received. Consequently he made an entry of a similar sum on the other side of the account to balance it. The complainant's case is that the entry of Rs. 158 represented a separate sum received. The Magistrate accepted the version given by the accused, but the learned Judge without expressing any opinion in the matter, but merely remarking that it was for the jury to determine which version was true, has ordered a charge to be framed in respect of this item.

The matter would appear to be concluded by the evidence of the witness Natabar given for the prosecution. He was the Tahsildar who collected money and sent it to the *Naib* at the *Cutchery*. He says that during the period covered by the entries referred to above, he did not send more than Rs. 248 odd. There is no other evidence on the record that in fact more than this sum was sent. Mr. Chakravarty argues that evidence will be forthcoming at the Sessions trial that Natabar in fact did send more than Rs. 248 odd. But a commitment must depend on evidence actually before the Court and not on evidence that may be given in future. As the evidence stands—and the prosecution had ample opportunity for producing all available evidence—it is clear that no separate remittance of Rs. 158 was received by the accused. There is, therefore, obviously no evidence that the alleged false entry of Rs. 158 on the expenditure side was in fact a false entry or anything but an entry to balance the mistaken entry of Rs. 158 on the receipt side.

The other alleged false entry is one of Rs. 219. It appears that the office had a running account with a Pleader who submitted bills for services rendered from time to time and was from time to time paid certain sums, though it does not appear that the sums paid corresponded with the amounts of the bills. In this way it appears that Rs. 1,148-12-0 were paid to the Pleader, while his bills were only passed for amounts aggregating Rs. 967. The result of this was the Pleader had been paid Rs. 181-12-0 in excess of the amount due to him. The figure is entered as an item on the credit side. Then comes the entry of Rs. 219 on the debit side. This entry was in respect of a bill submitted by the Pleader in 1904 for work done in that year. The bill was incorrect and one for Rs. 226 was subsequently substituted for it, passed and entered in the accounts in 1904. However, the incorrect bill was in fact passed by the Manager in 1911. The petitioner says that the entry of Rs. 219 was a *bona fide* mistake and the Magistrate has accepted that view. The learned Judge considers that because the bill for Rs. 226 was paid in 1904, the entry in the accounts of the incorrect bill for the same work must *prima facie* be a falsification of accounts. He appears entirely to have overlooked the fact that the Manager passed the bill in 1911 and that apart from other considerations, even though the bill might be for work done in 1904, the *Naib* could hardly be expected to look up the accounts of 1904 to ascertain if the work had been paid for in that year, when he had the Manager's signature seven years later passing the bill. The learned Judge does not, however, express any definite opinion on the alternative theories of the prosecution and the petitioner. He says that is for the jury. The learned Judge appears to be of opinion that the Magistrate exceeded his jurisdiction in expressing an opinion on the merits of the accused's defence and in accepting that defence. It is clear from section 209, Criminal Procedure Code, that a Magistrate is to discharge an accused if he finds there are not sufficient grounds for committing him for trial. Obviously a Magistrate is

bound to discharge an accused if he believes that he has committed no offence. That is the case here.

To return to the disputed item. The prosecution relies on the Pleader's statement that this sum of Rs. 219 was not paid to him. It is very difficult to make anything clear out of this part of the case. The system of accounts is most confused and the very lengthy argument which we have had from learned Counsel on both sides has made confusion worse confounded. From their arguments I have had no assistance to enable me to appreciate how the accounts were kept and on examination of the evidence, I have fared no better. But this does appear from the record that entries on the expenditure side do not necessarily mean expenditure in fact. For instance, it appears that entries would be made in respect of the Pleader's bills before they had been passed by the head office, and entries would be made of matters which concerned that circle of the estate though payments were not actually made from that *Cutchery*. These entries would be balanced by entries on the other side of the account. A system better calculated to lead to confusion and to give opportunity for peculation it would be hard to conceive. But this method of accounts has been going on for years and apparently has been accepted by the estate. The entry of Rs. 219 does not apparently represent a payment, but an entry of something due to the Pleader, against the entry of an over-payment of Rs. 181-12 on the other side of the account. Whatever may be the precise meaning of the entry, it is clear that with so hopelessly confused a system of accounts, no jury would in the circumstances of this case convict on the footing that the entry was a deliberately false one. In fact neither the learned Judge nor learned Counsel has pointed out how it is proposed to support the prosecution as to this item beyond the production of the entry and the Pleader's statement that the sum of Rs. 219 was not paid to him, which is nobody's case.

I think the Rule should be made absolute and the order of the Sessions Judge directing commitment of the petitioner be quashed.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 549 AND 550 OF 1914.

December 4, 1914.

Present:—Mr Justice Ayling and Mr. Justice Hannay.

EMPEROR—APPELLANT

versus

IN NO. 549 OF 1914

P. R. GANAPATHY IYER—ACCUSED

IN NO. 550 OF 1914.

PERUMAL—ACCUSED.

Madras City Municipal Act (III of 1904), s 409, cl. (19)—By-law framed thereunder—"Food," meaning of —Ærated waters, whether food.

The term "food" does not include "drinks" and, therefore, in the absence of a special inclusion a person exposing for sale ærated waters unwholesome and unfit for human consumption does not commit any offence under by-law 177 framed under section 409 (19) of the Madras City Municipal Act.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Fourth Presidency Magistrate, Egmore, Madras, in Calendar Cases Nos. 15569 and 15570 of 1914 on his file.

FACTS.—The accused is a coffeehotel-keeper in Madras and was supplying to the public coffee, etc., and also ærated waters such as soda which he purchased from manufacturers.

The Municipal Authorities examined some of the soda water bottles, and found on examination by the Chemical Examiner, that the water used in preparing the soda water was of the most impure kind. They accordingly prosecuted him under the by-law framed under section 409, clause (19), of the Act. The Fourth Presidency Magistrate (Mr. P. Narayana Menon) held that he could not be convicted under that by-law as "soda water" cannot be said to be "food" within the meaning of that by-law, and acquitted him. The Municipal Authorities with a view to obtain a decisive ruling on the point requested Government to file an appeal against the said acquittal to the High Court. The present appeal is against that order of acquittal.

The *Crown Prosecutor*, for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Accused.

JUDGMENT.—In these cases the Local Government appeals against an order of acquittal in Calendar Cases Nos. 15569 and 15570 of 1914 on the file of the Presidency

Magistrate. In both cases the charge against the accused was that they had exposed for sale ærated waters unwholesome and unfit for human consumption contrary to by-law 169 framed under section 409 (19) of the Madras Ciy Municipal Act (III of 1904), an offence punishable under by-law 177.

By section 409, clause 19, of the Act the Corporation is authorised to make by-laws to provide "for the prevention of the sale or exposure for sale of unwholesome meat, fish or provisions; and securing the efficient inspection and sanitary regulation of shops in which articles intended for human food, or drugs, are kept or sold." The by-law in question (No. 169) has evidently been framed with reference to the first part of clause 19, as the second part of that clause relates to inspection and the sanitary regulation of shops.

The by-law is as follows :— "No person shall expose for sale or keep for the purposes of sale any article intended for human food which is unwholesome or unfit for human consumption." The decision of the cases before us turns on the question whether the word "food" in the by-law includes drinks or not. The Magistrate has held that it does not. The learned Crown Prosecutor contends that the word "food" does include drinks and in support of his contention refers to the definition of food given in the Standard and Century Dictionaries, in the English Sale of Food and Drugs Acts and in section 251 of the Bengal District Municipalities Act (III of 1884). Admittedly the word "food" in ordinary parlance would not include "drinks" and there is nothing in the dictionaries referred to which would support a contrary view. It is argued, however, that in the law the word "food" does include every article used for food or drink by man other than drugs or water. This, no doubt, is the definition of the term "food" in the English Sale of Food and Drugs Acts (see Halsbury's Laws of England, Volume XV, page 5), but it is evident that that definition was made for the purposes of those Acts and it is so stated in the passage in Halsbury's Laws of England which is above referred to. Similarly with regard to section 251 of the Bengal District Municipalities Act. By that section "food" is defined to include every article used by man for food or drink except drugs or water. But there again, the definition was introduced into the Act by an amendment in 1886 and has special reference to that Act alone. The fact that it was found necessary to introduce the definition by a subsequent amendment of the Act is, of course, a point against the contention of the learned Crown Prosecutor. It is also pointed out by the learned Vakil for the accused that the Madras City Municipal Act can hardly be construed by reference to a Mofussil Act of Bengal.

There is no definition of the term "food" either in the Madras City Municipal Act, nor apparently in the corresponding Acts in Calcutta or Bombay. The point which militates most strongly against the meaning which the learned Crown Prosecutor seeks to apply to the term "food," is the fact that in the body of the Madras Act itself in several places the words "food" and "drinks" occur, indicating that it was not intended that the latter term should be included in the former. See sections 357 and 358. It is difficult in the face of these sections to hold that the term "food" in the by-law in question does include drinks. It is immaterial for the purposes of these cases that the Magistrate has held that ærated waters and lemonade are not "provisions" within the meaning of section 409 (19), as the word "provisions" does not occur in the by-law under which the prosecutions were brought. It may be mentioned that in the dictionaries referred to by the learned Crown Prosecutor the word "provisions" is given as synonym of "food."

The Municipal Council has special powers with reference to the manufacture of ærated waters under section 328 of the Act. Possibly this may have been thought a sufficient safeguard by the Legislature for securing the purity of ærated waters. However that may be, as there is nothing in the Act or by-laws to support the view for which the Crown Prosecutor contends, namely that the term "food" includes "drinks" other than drugs or water, the conclusion at which the lower Court has arrived on the point must be upheld. The acquittals are right and these appeals are accordingly dismissed.

Appeals dismissed.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 591 AND 592 OF 1914.

November 12, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Beachcroft.

IN CRIMINAL APPEAL NO. 591.

HARSHA NATH CHATTERJEE *alias* MOTI LAL CHATTERJEE—APPELLANT

versus

EMPEROR—

AND

IN CRIMINAL APPEAL NO. 592.

KHAGENDRA NATH CHAUDHURI *alias* SURESH CHANDRA CHAUDHURI —APPELLANT

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), *ss.* 4, 14, 19 (6), 20—*Fire-arms, whether includes parts of fire-arms—Possession of part of fire-arms—Manufacture of fire-arms—Penal Code (Act XLV of* 1860), *ss.* 109, 116, 120*B—Punishment on conviction under section* 120*B — Abetment—Joinder of charges—Transaction—Criminal Procedure Code (Act V of* 1898), *s.* 239.

Unless there is something repugnant in the subject or context, wherever the word "arms" occurs in the Indian Arms Act, it has got to be read as including "parts of arms." By section 4 of the Act the word "arms" also includes "fire-arms." Therefore, the word "fire-arms" as used in section 14 includes "parts of fire-arms."

The word "fire-arms" only means "arms that are fired by means of gun-powder or other explosive."

Possession of parts of fire-arms is prohibited by section 14 read with section 4 of the Indian Arms Act.

Ahmed Hossein v. *Queen-Empress*, 27 C. 692; 4 C. W. N. 750, and *Emperor* v. *Dhansingh*, 5 Cr. L. J. 435; 3 N. L. R. 53, followed.

An offence under section 20 of the Indian Arms Act is different from an offence mentioned in section 19 (6). The only additional element necessary to constitute an offence under section 20 is that the possession should be in such manner as to indicate an intention that such act may not be known to any public servant.

The keeping of arms under section 19 (*a*) of the Indian Arms Act must be a keeping for sale, not keeping only.

The term "transaction" in section 239 of the Criminal Procedure Code is not synonymous with the term "offence." A "transaction" cannot be said to be complete as soon as the offence is committed. It is clear that so long as the conspiracy continues, the transaction which began with the forming of the common intention continues.

Superintendent and Remembrancer of Legal Affairs, Bengal v. *Monmohan Roy*, 26 Ind. Cas. 307, followed.

For an offence under section 120B, Indian Penal Code, punishment is provided by section 109 of the Indian Penal Code if an offence has been committed; but if an offence has not been committed, punishment is limited to the extent provided by section 116. Perhaps, strictly speaking, in the former case there should not be a conviction for conspiracy but for abetment of an offence, for conspiracy followed by an act done to carry out the purpose of the conspiracy amounts to abetment.

Appeals against the orders of the Additional Sessions Judge of 24-Parganahs.

IN APPEAL NO. 591 OF 1914.

Messrs. *N. Sen & S. C. Roy*, Counsel, and Babu *Kshitish Chandra Neogi*, for the Appellant.

IN APPEAL NO. 592 OF 1914.

Mr. *S. C. Roy*, Counsel, and Babu *Ramani Mohun Chatterjee*, for the Appellant.

Hon'ble the *Advocate-General* and Mr. *N. Gupta*, Counsel, and Babus *Hemendra Nath Mitra* and *Nirode Chandra Chatterjee*, for the Crown in both the appeals.

JUDGMENT.

FLETCHER, J.—These are two appeals by the two accused against their conviction and the sentences passed on them by the learned Additional Sessions Judge of the 24-Parganas.

The two accused were charged before the learned Sessions Judge with having committed offences under the three heads. The first charge against the accused was that they had in their possession or under their control certain arms in contravention of the provisions of section 14 of the Indian Arms Act (XI of 1878.) The second charge was that they had in their possession or control such arms in contravention of section 24 of the Indian Arms Act in such a manner as to indicate the intention that such act might not be known to any public servant. The third charge was that during a period, from the 2nd of December 1913 to the 26th January 1914, they conspired to manufacture or keep fire arms in contravention of the provisions of section 5 of the Indian Arms Act. The two Assessors who assisted the learned Judge at the trial were of opinion that both the accused were guilty of the offences charged against them under the first two charges, but that they were not guilty of the offence charged under the third charge. The learned Judge, however, convicted the two accused under all the three charges and sentenced each of them to undergo the following terms of imprisonment, namely under the first charge one year's rigorous imprisoment and under the second and third charges three years' rigorous imprisonment—the sentences to run concurrently.

HARSHA NATH CHATTERJEE v. EMPEROR.

The facts of the case lie in a narrow compass. On the 25th of January last Mr. Denham, Deputy Commissioner of Police, received certain information. In consequence of this information Mr. Denham, accompanied by the Inspector-General of Police and certain other superior Officers proceeded to a one-storied house in Victoria Road, Baranagore. Early in the morning of the 26th January they arrived at the house. The door of the house having been forced, the party entered. The first accused, Harsha Nath *alias* Moti Lal, was found in the room that abuts on the road. In a room on the other side of the courtyard portions of firearms and certain tools were found. Two receipts for the rent of the house were also found. The accused Harsha Nath was arrested. He declined to make any statement with reference to the things found in the house. A search list was then drawn up in the presence of witnesses and the party left. Constables in plain clothes were posted at the house with instructions to arrest any one who might come to the house. The first person to do so was the water-carrier Chinibas Neka, who has been called as a witness for the prosecution. About 10 or 10-30 of the same night, the accused Khagendra in his statement fixes the hour as 8 or 8-30, the accused Khagendra arrived at the house and was arrested. The first question that we have to decide is, what was the connexion of the two accused with the house at Baranagore?

That they have some connexion with the house is not denied, nor could it be since both of them were arrested there. The case for the prosecution is that on the 2nd of December last the two accused rented from the witness Bhutnath Sil this house, which is the property of his brother-in-law Nanda Lal De. The accused represented that they were students at the Calcutta Medical College and that owing to the high prices ruling in Calcutta they found it convenient to live at Baranagore. The accused Khagendra gave the name of Khitendra Nath Roy. The rent of the house was fixed at Rs. 11 per mensem and on the 2nd of December Khagendra paid Rs. 7 on account of the rent for that month and received the *cutcha* receipt, Exhibit II. The balance of rent for that month was subsequently paid and a formal receipt, Exhibit 2, was handed over. Another month's rent was subsequently paid and the receipt, Exhibit 1, was given. The *cutcha* receipt is said to have been returned by Khagendra when the formal receipt, Exhibit 2, was given to him. The two receipts, Exhibits 1 and 2, were found at the search on the 26th of January. The witnesses who depose to this part of the case are first Bhutnath Sil. He is employed as travelling agent of Messrs. Osler and Co. His pay is Rs. 90 per mensem *plus* a commission which amounts to Rs. 1,000 to Rs. 1,500 per annum. He is, therefore, apparently a man of respectability. The next witness is Bhutnath's son Bhupendra, a lad of about 14 years of age, and the third witness is Nanda Lal De, a Sub-Engineer employed in the Public Works Department, brother-in-law to Bhutnath Sil. He is also apparently a man of respectability. The house at Baranagore belongs to Nanda Lal De, but is let out and looked after by Bhutnath Sil who or whose family receives rent.

The witness Bhutnath Sil states that on the 2nd of December last two men came to him and after certain negotiations took the house at a rent of Rs. 11 per mensem. A payment of Rs. 7 was made on account of the first month's rent and the *cutcha* receipt, Exhibit II, was given. The man who carried on the negotiations gave the name of Khitendra Nath Roy. The witness is positive that this man is the accused Khagendra and he believes, although he is not certain, that the man who was with him is the other accused Harsha Nath. On that night Bhutnath left Calcutta for the United Provinces and did not return until the 28th of February on which day he gave his evidence before the Enquiring Magistrate. Counsel has attempted to throw doubt on the evidence of Bhutnath on the ground that before his return to Calcutta he was interviewed by a Police Officer. But in the ordinary course if the Police intended to avail themselves of the evidence of Bhutnath, they would have to interview him before calling him as a witness in order to find out what he would be able to prove. I see no reason to doubt the evidence of Bhutnath.

The boy Bhupendra states that on some date in December Khagendra came and paid to him the balance of the rent for that

month. The witness states that he handed to Khagendra Exhibit 2 and received in return the receipt, Exhibit II. Further this witness states that in January the two accused came to him and paid the rent for that month and received the receipt, Exhibit 1. Bhupendra at a subsequent date identified the two accused at the Alipore Jail. This identification took place in the presence of a Magistrate and it is not suggested that the witness did not identify the accused. The witness states that he did not see the accused at the Thana previously. The Sub-Inspector Dwijendra Nath Adhaya says he does not remember whether Bhupendra saw the accused at the Thana. But even if Bhupendra's identification cannot be wholly relied upon, there is a body of evidence that shows conclusively that the house was rented and occupied by both the accused.

Nanda Lal De was called chiefly to prove the receipts for rent. The two receipts, Exbibits 1 and 2, were found at the search. Before the learned Judge a good deal of the cross-examination of some of the witnesses was directed to show that the name Khitendra Nath Roy appearing on these two receipts was written in a different handwriting and with a different ink to the rest of the writing on the receipts. Mr. Denham, however, is positive that these names appeared there when the receipts were found on the search and the search list supports his evidence.

Then the evidence as to the occupation of the house shows clearly that these two accused were in occupation of the same.

The witness Chinibas Neka states that he took water to the house every day at 9 o'clok in the morning. He used to shake the chain and call out, then one of the accused would come and open the door for him. On his leaving the door would be closed again.

The witness Bhagwan Biswal, who is a *mali* in a garden opposite the house, states that he has seen Khagendra both entering and leaving the house. He further states that the doors and windows of the house were always kept shut. The evidence of Jagabandu, Das which was given before the Committing Magistrate, states that the windows and doors always remained shut. He further states that two men lived in the house in the latter part of *Aghram* and they did not mix or talk with the neighbours. Jagabandu died before the trial took place, but his deposition before the Committing Magistrate was put in.

As against this body of the evidence showing the taking and occupation of the house by the two accused, there are the statements of the accused. The accused Khagendra in a written statement, that he filed before the learned Judge, stated that one night about 15 or 16 days before his arrest he met one Dinabandu Bhattacharjee, who he says, was with him at the Dacca Imperial Seminary in the Municipal Market. He states he asked Dinabandhu where he lived and that Dinabandhu said be lived at Baranagore where he worked for a contractor. On Dinabandhu asking a similar question of Khagendra the latter stated that he had no fixed place of abode as the Police were trying to connect him with the Barisal conspiracy case. Dinabandhu then asked Khagendra if he would like to come with him for a day or two and he said he would come next day. Next day accompanied by Dinabandhu he went to the house at Baranagore where he saw the other accused. He left after staying there two or three hours. On the 26th of January he returned to Barnagore at 8 or 8-30 A. M. and was arrested and taken to the Police station. This story is wholly improbable and does not cast any doubt on the direct evidence connecting Khagendra with the house. No trace of this Dinabandhu has been found and there can be little doubt that he does not exist. Further the statement of Khagendra that he was in a public place like the Municipal Market when the Police were searching for him, is highly improbable. On the other hand, his statement that the Police were searching for him may furnish a good reason why he should take this house at Barnagore to escape from the Police. The evidence shows that he was successful in so doing between the 2nd of December and the 26th of January.

The statement of the accused Harsha Nath is that he came to Calcutta about the end of December to seek employment. He used to walk near the Goledighi and having a fine voice he used to sing. In this way he made many

acquaintances including the aforesaid Dinabandhu. Dinbandhu, hearing of the position of Harsha Nath forthwith invited him to come and stay in his house in Baranagore. Harsha Nath says he went to stay there on the 5th or 6th January. Some two or three days before his arrest, Harsha Nath says, Dinabandhu left for "somewhere" on business expecting to return in three or four days. It is remarkable that Harhsa Nath, who was according to his story on terms of intimacy with Dinabandhu, did not know the "somewhere" to which Dinabandhu had gone on business.

The whole story of this accused, commencing with Dinabandhu, who is alleged to be a resident of and employed at Baranagore, taking his walks in College Square, Calcutta, down to Dinabandhu's departure for "somewhere" two or three days before Harsha Nath's arrest, is manifestly untrue.

The evidence leaves no doubt in my mind that the two accused rented this house on the 2nd of December and they were jointly in possession of it on the day of their arrest *viz.*, the 26th of January last.

It is not open to doubt that the tools and portions of fire-arms were found in the house at the time of the search. But it has been argued that the evidence does not establish in whose possession such articles were. Counsel has argued that there is some rule of law that in circumstances such as the present the Court cannot impute possession to either of the accused. There may, however, be joint possession of the articles and the fact as to whose possession the articles were at the date of the search must be decided on the evidence in the case.

Now the evidence establishes that both the accused were in joint possession and occupation of the house. They took the house falsely representing that they were medical students. The evidence on behalf of the prosecution also proves that during the occupation and possession of the accused the door and windows of the house were always kept closed. Why should the doors and windows of the house be kept closed and can any one doubt that in that state of things both the inmates of the house must have been fully aware of what was going on in the house? The evidence leaves no doubt in my mind that both the accused were in fact in possession of these articles.

I will now proceed to consider the case under the three charges that have been framed against the accused. But before doing so I will dispose of an objection raised by Counsel as to the whole trial. It was argued that the whole trial was illegal owing to misjoinder of charges. That, however, clearly is not so. The offences charged in this case were committed in the same transaction and section 239 of the Code of Criminal Procedure authorises such charges to be tried together. If authority be wanted for the course adopted in the present case, the very recent judgment of this Court in *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Monmohan Roy* (1) may be referred to.

Coming then to the particular charges, the first charge against the accused is framed under section 19 (*f*) of the Indian Arms Act, namely of having in their possession or under their control arms in contravention of the provisions of section 14 of the Act. The arms of which section 14 prohibits the possession without license are "fire-arms". Section 4 of the Act says that the word "arms" as used in the Act shall include "parts of arms." That being so unless there is something repugnant in the subject or context, wherever the word "arms" occurs in the Act it has got to be read as including "parts of arms." Moreover, by section 4 of the Act, the word "arms" also includes "fire-arms." That being so, it seems to me obvious that the word "fire-arms" as used in section 14 includes "parts of fire-arms."

Section 4 clearly means that the whole includes the part and when the Act deals with a particular class of arms, such as fire-arms, the section means that parts of fire-arms are included in the word "fire-arms." The word "fire-arms" only means "arms that are fired by means of gun-powder or other explosive."

If section 14 prohibits the possession of arms that are fired by means of gun-powder or other explosive, then clearly having regard to section 4 the possession of parts of such arms is prohibited. That the possession of parts of fire-arms is prohibited by section 14 was decided by this Court in the case of *Ahmed Hossein* v. *Queen-Empress* (2). A

(1) 26 Ind. Cas. 307.
(2) 27 C. 692; 4 C. W. N. 750.

similar view was also taken by the Court of the Judicial Commissioner for the Central Provinces in the case of *Emperor* v. *Dhansingh* (3). In my opinion the learned Judge rightly convicted both the accused of being in possession of fire-arms in contravention of section 14 of the Act. The second charge against the accused was one of being in possession of fire-arms in contravention of the provisions of section 14 in such manner as to indicate an intention that such act may not be known to any public servant. Under the provisions of section 20 of the Act this constitutes a different offence to that mentioned in section 19 (*f*). The only additional element necessary to constitute an offence under section 20 is that the possession should be in such manner as to indicate an intention that such act may not be known to any public servant. The evidence of concealment in the present case is clear and conclusive. The evidence proves that the two accused, falsely representing themselves as medical students, took the house at Baranagore and that the accused Khagendra gave a false name. Further the door and windows of the house were kept closed and also—a very important fact—the accused Khagendra was wanted by the Police and, therefore, would wish to conceal himself and what he was doing. On this evidence an offence under section 20 is proved against both the accused. The third charge against the accused was one of conspiring to manufacture or keep fire-arms punishable under section 120B of the Indian Penal Code read with section 19 (*a*) of the Indian Arms Act. The learned Judge has convicted both the accused of being parties to a conspiracy both to manufacture and keep arms. The learned Judge, however, is clearly wrong in treating the keeping of arms as an offence under section 19 (*a*) of the Indian Arms Act. The offence is keeping for sale, not keeping only. Does then the evidence prove a conspiracy to manufacture arms? Now in cases of conspiracy the agreement between the conspirators cannot generally be directly proved, but only inferred from other facts proved in the case. The facts proved in this case leave no doubt that such a conspiracy to manufacture arms existed between the two accused. First, there is the taking of the house. Next, the finding of a considerable number of pieces of fire-arms on the premises. To what use were these articles to be put? Then, there is the fact of the finding of the tools at the premises. The evidence also shows that there is reason to believe that work had actually been done to some of the portions of fire-arms found at the search. From these facts the Court can and ought to infer that the two accused had conspired together to manufacture arms. On this charge the learned Judge sentenced each of the accused to undergo three years' rigorous imprisonment. That sentence, however, appears to be illegal. Section 120B of the Indian Penal Code provides that the accused in a case of criminal conspiracy shall be punished in the same manner as if he had abetted such offence. The learned Judge found that there was only a conspiracy to manufacture without an actual manufacture. The learned Judge has, however, sentenced the accused under the third charge on the footing that the punishment was provided for by section 109 of the Indian Penal Code. But in that view the punishment for a conspirator is much more severe than the punishment for an abettor. Section 120B provides that they shall be punished the same. The sentence on the accused on the third charge ought, on the findings made by the learned Judge, to have been imposed under section 120B of the Indian Penal Code read with section 19 (*a*)of the Indian Arms Act and section 116 of the Indian Penal Code. Under these sections the maximum sentence that can be imposed on the accused under the third charge is one of nine months' rigorous imprisonment. I think we ought, therefore, to reduce the sentence passed on each of the accused under the third charge to one of nine months' rigorous imprisonment. I see no reason to interfere with the sentence passed under the other two charges. The two appeals will, therefore, subject to the reduction of the sentences passed under the third charge, be dismissed.

BEACHCROFT, J.—I agree. As I was a member of the Bench which decided *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Monmohan Roy* (1), it is perhaps sufficient to say that nothing that I hav heard in argument in this case leads me t

(3) 3 N. L. R. 53; 5 Cr. L. J. 435.

alter the opinion which I then formed as to the legality of trying together charges of conspiracy and of offences committed in carrying out the objects of the conspiracy. But it will be as well to indicate shortly the line of argument taken and the fallacy which underlies it.

The argument was that the possession of fire-arms is a totally distinct offence from the offence of conspiracy to manufacture arms, and as the offence of conspiracy is complete so soon as the persons conspiring have formed a common intention, the two offences cannot be said to have been committed in the same transaction. The fallacy in this argument is that it assumes that the transaction is complete as soon as an offence is committed, in other words, that the term transaction is synonymous with the term "offence." It is clear that so long as the conspiracy continued, the transaction, which began with the forming of the common intention, continued and the first two offences charged were committed in the course of this transaction.

The punishment that may be awarded on a conviction under section 120B seems to vary according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed, the punishment is provided by section 109 of the Indian Penal Code, if an offence has not been committed, punishment is limited to the extent provided by section 116. Perhaps, strictly speaking, in the former case there should not be a conviction for conspiracy, but for abetment of the offence, for conspiracy followed by an act done to carry out the purpose of the conspiracy amounts to abetment. In the present case there has been no finding by the Judge, nor can it on the evidence be found as a act, that the offence was committed. The sentence that can be imposed is, therefore, that provided by section 116.

Sentence reduced.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 594 OF 1914.
CRIMINAL REVISION PETITION No. 503 OF 1914.

December 3, 1914.

Present:—Mr. Justice Ayling.

In re PARVATANENI KAMAYYA—PRISONER—ACCUSED.

Penal Code (Act XLV of 1860), s 193—Giving false evidence, charge of—Contradictory statements, when can be made basis of conviction.

A charge of perjury based on two mutually contradictory statements can be successful only where the two statements are necessary and irreconcilably contradictory of each other.

Where the accused called a person as his relation at one time, by a term not necessarily implying near relationship, and said subsequently that he was not his relation, there is no necessary contradiction between the statements and no conviction for perjury can be sustained on such statements.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Guntur, in Criminal Application No. 30 of 1914, preferred against that of the first Class Sub-Divisional Magistrate of Tenali, in Calendar Case No. 22 of 1914.

Mr. *J. L. Rosario*, for the Hon'ble Mr *T. Richmond*, and Mr. *Vembu Aiyar*, for the Accused.

The *Government Pleader*, for the Crown.

ORDER.—The charge is of making two mutually contradictory statements, Exhibits A and B, of which one or the other must be false. In Exhibit B, dated 1909, petitioner stated that Bhaganiah was the husband of his *Mena Kodalu*. This phrase means "sister's daughter's husband", but is also used to refer to one's father's brother's daughter's daughter. The latter is the actual relationship which Bhaganiah bears to petitioner.

Exhibit A is a statement recorded more than four years later and runs as follows: "Bhaganiah is no relation of mine. I do not know if he is the husband of my *Kodalu*. I do not recollect to have formerly stated that he is the husband of my sister's daughter. He is not related to me. I shall file the statement formerly given."

If this statement be carefully considered, there is nothing in it necessarily con-

tradictory of Exhibit B. The statements about relationship are literally true, the words used ("*bandutvam*") denoting blood relationship. The statement, "I do not know", may be false: but the accused has not been charged with making a specific false statement, and it is difficult to say in which sense he understood the vernacular phrase. His denial of recollection of a statement recorded four years before may very possibly be true.

The practice of charging a man with making two mutually contradictory statements may be convenient, but it can only be successfully used where the two statements are necessarily and irreconcilably contradictory. That is not the case here.

The conviction and sentence are set aside: the fine, if paid, will be refunded.

Conviction set aside; Fine refunded.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 45 OF 1913.

June 26, 1913.

Present:—Mr. Pratt, J. C., and Mr. Kemp, A. J. C.

MIR SHAH NAWAZ KHAN AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, 147, 332—Riot to resist illegal search—Beating Police acting in good faith under colour of their office—Right of private defence—Search beyond limits of Police Officer's station—Criminal Procedure Code (Act V of 1898), s. 165 (1).

Where in the course of a search conducted beyond the limits of a Police Officer's station, a riot broke out with the object of resisting the search and the Police party were beaten:

Held, (1) that the search was illegal;

(2) that the resistence to an illegal search did not constitute an offence under section 332 of the Penal Code;

(3) that the accused had no right of private defence, as the Police were acting in good faith under colour of their office, and even if they had the right, they exceeded it when they beat the Police.

Reg. v. *Vyankatrao*, 7 B. H. C. R. 50 and *Queen-Emperor* v. *Dalip*, 18 A. 246; A. W. N. (1896) 48, referred to.

Mr. *Lalchand Hassomal*, for the Appellants.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—The complainant, Bhiriasing, Head Constable of Railway Police, was sent from Hyderabad to investigate cases of theft from the Railway.

On the 9th and 10th August he was at Mir Hussein's village, where he searched the house of Mohabat and made him join his party as a spy. On the evening of the 10th, he says, the *zemindar* Mahomed Junejo joined him at Mir Hussein's village.

His party consisted of himself, a Railway Constable Abdulla, a District Constable Sheroo, two *paggis* Gul Mahomed and Murad, the spy Mohabat and the *zemindar* Mahomed Junejo.

This party of seven went on the 11th to Ellahi Doro and searched several houses including that of Arab, accused No. 7, where it is said that stolen property was found. The party spent the night of the 10th at the water-wheel of one Sohbat Mari and on the 11th went to Kahi, a village of the Mir accused No. 1. They took with them Arab and the property found in his house.

At Kahi on the 11th they searched the house of Sawan, accused No. 2, attached some property suspected to be stolen and arrested him. They then proceeded to search the house of Khirir, accused No. 16.

In the course of this search a riot took place, the three Policemen were beaten the two arrested persons, Arab and Sawan, escaped and the attached property disappeared.

It is for offences in connection with this riot that the appellants have been convicted under section 395 and section 332 read with section 149, Indian Penal Code, the lower Court finding that the common object of the riot was to steal the attached property and to obstruct the Police in the discharge of their duty.

As to the fact of the riot there is no doubt, The Mir, accused No. 1, does not deny that a riot took place. Khirir admits that a fight occurred when the Police were searching his house. Arab and Sawan admit that their houses were searched.

In spite of this admission the defence have been at great pains to show that Mahomed Junejo was not present. The defence appear to attach an exaggerated importance to his evidence because he is the only eye-witness of any position. The only reason for doubting the presence of Mahomed Junejo is that

he was not named in the telegram sent that evening from Tando Adam by Bhiriasing. But this omission is not surprising for Mahomed Junejo fled as soon as the riot occurred. Bhiriasing probably thought it unlikely that he would be a witness and named only those who came with him to Tando Adam. On the other hand Mahomed Junejo is named in the first information said to have been recorded at 4 P.M. the next day at Hyderabad station. It is contended that this was not really recorded till 4 P.M. It is to be regretted that the Sessions Judge did not record the original information. What is on the record is a copy and as this is timed 4 P.M., it may be assumed that it was not recorded till then. But even on this assumption it is incredible that the Police should have invented Mahomed Junejo's name by 4 P.M. the next day for Mahomed Junejo says that he went straight from the scene of the offence to his village and did not see the Police again until the 17th. The defence were alive to the absurdity of this argument and so Gul Mahomed, the *paggi*, a witness who is hostile to the prosecution so far as the case is against the Mir, says that he and Murad went to Hyderabad the next day and saw Mahomed Junejo in the company of the Sub-Inspector. I believe Gul Mahomed has been won over to say this. Murad contradicts him and so does Mahomed Junejo. The suggestion, of course, is that the Sub-Inspector was coaching Mahomed Junejo before the first information was recorded. This is on a par with the evidence of the defence witnesses, pages 240-243, that while the case was before the Committing Magistrate, Mahomed Junejo was brought by the Police to Kahi to receive a further coaching on the spot. This evidence is so manifestly false that the learned Pleader for the Mir refrained from referring to it. Other points have been made with a view to suggest that Mahomed Junejo was not present. His name appears on the *punchnamas* but the *punchnamas* were not given to Mr. Stewart till the 18th and may, it is said, be forgeries. Sohbat Mari leaves him out of the list of persons who stayed at his water-wheel on the night of the 10th. I need not discuss these in detail. It is sufficient to say that the very fact that Mahomed Junejo is a reluctant witness shows that he was not invented by the Police or his signature falsely added to the *punchnamas* and that Sohbat Mari gave a different account when examined by the Magistrate under section 164, Criminal Procedure Code.

I am satisfied that Mohamed Junejo was present. There are thus seven prosecution eye-witnesses of the riot.

But before discussing their evidence it will be convenient to notice the account given by the accused.

Accused No. 1, while admitting the riot, had not the curiosity to stir from his *otak* and did not see what happened. Of the other 19 accused before the Sessions Court only two, Khirir accused No. 16, and his son Usif, accused No. 17, give an account of what took place. Usif only says that he saw the Police beating his father. Khirir says he had a fight with the Police, as they insisted in searching his house although his daughter-in-law was in child-bed. This story is not supported except by one defence witness Gian, page 215, who says that the Police got the better of the fight with Khirir. This is absurd, for the beaten Police had to leave the village without making any arrests. Again Gul Mahomed, whom Khirir describes as one of his rescurers and who is to some extent a witness hostile to the prosecution, says that Khirir did not object that there was a woman in his house, page 59.

The truth must, therefore, be extracted from the evidence of the seven eye-witnesses for the prosecution.

Three of these witnesses, the two *paggis* and the spy, do not admit the presence of the Mir, accused No. 1, but with this exception all the witnesses give the same version of the riot. The story is that while Khirir's house was being searched, a gun shot was heard and that the Mir then appeared carrying a gun and leading a gang of about 40 Mohanas, who beat the Police, rescued Arab and Sawan and carried off the attached property. The Mir then returned to his *otak* and one of his followers then came and picked up Abdullah and took the Police to the *otak* where the Mir offered them money in order to persuade them to carry the matter no further.

Now there are many discrepancies and exaggerations in this version, but as to the central fact of the Mir's presence there can, we think, be no doubt. Even the two *paggis*

and the spy admitted his presence when their statements were recorded before a Magistrate on the 18th. He was named in the first telegram sent from Tando Adam station and he was named by the Police on their way to that station to Ismail *paggi* and to Alibux *paggi*. It is proved that the riot started with a gun shot and ended with a visit of the beaten Police to the Mir's *otak*. As to the gun shot a very feeble explanation is suggested by the defence. It is said that the Mir's brother was shooting in the jungle half a mile away and that he did fire the shot. But a shot fired half a mile away would scarcely attract attention and the finding of a fresh cartridge wad near the *otak* makes it practically certain that the gun was fired at the *otak*. This must have been fired either by the Mir or at his orders. Again it is incredible that the Police after being beaten by the Mohanas would have had the hardihood to risk another hammering by going to the *otak* and there attempting to blackmail the Mir. It is far more probable that they went at the invitation of the Mir who had realised the folly of his conduct and wished to hush up the whole affair. The Mir's own account of his conduct points to a guilty conscience. The riot occurred within 400 yards of his *otak*, yet he says he did not intervene to prevent the riot and he rendered no assistance to the Police after the riot. He remained at Kahi for the next three days and left just three hours before the arrival of the Assistant Superintendent of Police. His motive is clear—for Sawan and Khirir are admittedly his *haris* and he, no doubt, resented houses near his *otak* being searched. I have, therefore, no doubt that the Mir was one of the rioters.

As to what happened during the riot the evidence must be treated with great caution. There are more than the usual number of discrepancies and many of these seem to be due to wilful exaggeration. It is evident that the Mir never crossed the *karia* in front of Khirir's house, but that he encouraged the rioters and showed himself with his gun in order to intimidate the Police. The *karia* was not easy to jump and it is unlikely that a man carrying a gun would jump across it. All the witnesses told the Deputy Superintendent of Police that the Mir was on the other side of the *karia* and so did Sheroo constable before the Committing Magistrate. The version now given that the Mir came up within two paces of Khirir's house is pure fiction. So is the ridiculous story of constable Abdullah that Bhiriasing expostulated with the Mir and that he said, "silence, *badmash*", and that Abdullah then put his turban at the Mir's feet. None of the other witnesses nor even Bhiriasing himself mentioned this incident. I also disbelieve the story that the Mir was shouting all the times "Release the prisoner, get the property. Beat them." This is too obviously intended to supply evidence as to the common object of the riot. The only words attributed to the Mir by Sheroo constable before the Committing Magistrate were, "do not leave them." There was no occasion to use force to release the prisoners, Arab and Sawan. They were not bound or secured and must have joined the rioters at once. There is no evidence that the rioters went at once for the attached property. The Police scarcely refer to the property, although some of it was heavy bags of sugar. There is some evidence that Phul, accused No. 13, was seen later in the day making off with a bundle, and on the 18th he dug up some property and gave it to the Police. This property, it is suggested, was some of the attached property, but it is sufficient to say that it does not tally with the property described in the *punchnamas* or that said to have been in Khirir's house. It seems to me clear that although the loss of the attached property was one of the results of the riot, yet the taking of that property was not the common object of the riot. Gul Mahomed is in many respects not a reliable witness, but I think he truly states the object of the riot when he says: "they fought with the Police for searching their houses" (page 57).

We are satisfisd that the other six accused convicted by the Sessions Judge were also among the rioters. They were picked out at careful identification tests held before the Assistant Superintendent of Police. Accused Nos. 27 and 16 were admittedly present and accused Nos. 5, 10 and 13 are identified as persons who actually struck the Police.

The question that now remains for consideration is, what offence, if any, have the accused committed?

MIR SHAH NAWAZ KHAN v. EMPEROR.

It is admitted that the original wrong-doers were the Police. Bhiriasing was officer in charge of the Hyderabad Railway Police Station and had no authority to search beyond the limits of that station: section 165 (1), Criminal Procedure Code. He was aware of this and wrote to the officer in charge of the Tando Adam Police station, who sent him Sheru constable. Even if Kahi had been in the limits of the Tando Adam station, Sheru's presence gave Bhiriasing no authority to search. Sheru should then have made the search under a written order of the officer in charge of his station: sections 166 and 165 (3), Criminal Procedure Code. Kahi is, however, in the limits of the Tando Allahyar station. The officer in charge of that station had given no sanction and Bhiriasing had, therefore, no legal authority to search houses in Kahi.

No doubt, in spite of the illegal search, the Police would still be justified in arresting suspected persons under section 54, Criminal Procedure Code, or attaching suspected property under section 550 of the same Code. The maxim that no man can take advantage of his own wrong does not apply, for, as said by Baron Bramwell in *Hooper* v. *Lane* (1), it means "that no one shall gain a right by his own wrong and not that if he has a right, he shall lose it or the power of exercising it by a wrong done in connection with it." If, therefore, the object of the riot had been to release the prisoner and the attached property, the accused would have been guilty as found by the Sessions Judge of offence under section 332, for in so arresting and attaching, the Police were acting in the discharge of their duty. But we have found that the object of the riot was to resist the search and, in making the searches, the Police were not acting in discharge of their duty. Section 332 will not, therefore, apply—while on the other hand the accused under section 99, Indian Penal Code, have no right of private defence, for the Police were acting in good faith under colour of their office. Of the many cases on this point it is sufficient to refer to *Reg.* v. *Vyankatrav* (2) and *Queen-Empress* v. *Dalip* (3) and, even if the accused had the right of private defence, they exceeded it when they beat the Police. The offences of which they are guilty are those of hurt and rioting. It will be sufficient to deal with the case as one of rioting, as the Sessions Judge has only convicted of one offence in respect of the riot and the hurt. The conviction of dacoity cannot stand, for the common object of the rioters was certainly not theft.

We reverse the convictions and sentences of all the appellants under section 395, Indian Penal Code. We alter the convictions of all the appellants under sections 332 and 149, Indian Penal Code, to one under section 147, Indian Penal Code.

We reduce the sentence on appellants Sawan (accused No. 2), Ibrahim (accused No. 5), Arab (accused No. 7), Hussein (accused No. 10), Phul (accused No. 13) and Khirir (accused No. 16) to four months' rigorous imprisonment under section 147, Indian Penal Code.

The Mir, accused No. 1, is the chief offender but after anxious consideration, we have decided to deal more leniently with him. We are influenced partly by the fact that any sentence of imprisonment would be a life-long punishment to him and partly by our conviction that it was merely folly and over-weening conceit that led him to commit this offence. We reduce the sentence on Shah-nawaz, accused No. 1, to a fine of Rs. 1,000 or in default one month's simple imprisonment. We further order under section 106, Criminal Procedure Code, that he execute a bond himself in Rs. 5,000 with two sureties in Rs. 2,500 each to keep the peace for three years.

Sentences modified.

(1) (1857) 10 Eng. Rep. 1368; 108 R. R. 186; 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 3 Jur. (N. S.) 1026; 6 W. R. 146.

(2) 7 B. H. C. R. 50 Cr.

(3) 18 A. 246; A. W. N. (1896) 48.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 271 OF 1914.

May 20, 1914.

Present:—Mr. Justice Scott-Smith.

MUHAMMAD SIRDAR—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 24, 464, 477A—Wrong entries in Revenue registers—Fraud or dishonesty, no finding of—Intention—Offence, whether committed

Where the accused, a *patwari*, made wrong entries in the Revenue registers, but where there was no finding that he did so with intent to defraud or dishonestly, within the meaning of section 24, Indian Penal Code, he did not make a false document as defined in section 464, nor did he fraudulently alter any book or register within the meaning of section 477A of the Penal Code.

Appeal from the order of the Sessions Judge, Shahpur Division, at Sargodha, dated the 16th March 1914.

Messrs. *Fazl-i-Hussain* and *Devi Das*, for the Appellant.

Mr. *B. Bevan Petman*, for the Respondent.

JUDGMENT.—The appellant, Muhammad Sirdar, a *patwari*, has been convicted by the Sessions Judge of Shahpur of an offence under section 466/477-A, Indian Penal Code, and has been sentenced to three months' rigorous imprisonment.

The offence of which appellant has been convicted is, to put it briefly, that he made unauthorised entries in the *khatauni partal* book and *jamabandi* in regard to the status of certain donees of land at Gunjial, namely, Khan Muhammad and Bahadur '*with intent to damage the donees and cause gain to the proprietors.*'

The words in italics are those used by the Sessions Judge in his finding and it will be noticed that no intent to defraud or to cause *worngful* gain or *wrongful* loss has been found in express words.

The effect of the entries made by the appellant was to show Khan Muhammad and Bahadur as *malikan qabza, i.e.*, as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors.

The deed under which these persons acquired their rights makes no mention of the *shamilat* and as the Sessions Judge remarks, " it is a moot point of law as to whether a deed of gift not specifying the *shamilat* rights as going with the area gifted, does or does not carry with it the rights in the *shamilat*."

Ordinarily the onus would lie upon a donee to prove that he was entitled to *shamilat* when the deed of gift is silent on the point, and apparently recognizing the justice of this the Revenue Authorities have directed that in future cases of gift, a gift which does not specify the conveyance of *shamilat* rights shall be regarded as one without such rights and shall be so entered in the records.

It would, therefore, appear that the proper entry as regards the status of the donees in question should have been that they were *malikan qabza*. Upon this point Mr. Leigh, Settlement Officer, as P. W. No. 1, stated—

"The entry of *malik qabza* may be a correct interpretation of the status of the proprietors, there has been no decision on that point. The essence of the accused's offence is that he made an entry in the *jamabandi* altering the recorded status without any authority to do so."

Ata-ul-Rahman, *girdawar*, P. W. No. 2, was the principal witness for the prosecution. He was present when the appellant made the entries complained of; his statement that appellant made them surreptitiously without his knowledge has been held by the Sessions Judge, and, in my opinion, rightly, to be untrue.

As to what really took place the learned Judge relied upon the evidence of Fatteh Khan, *lambardar*, P. W. No. 6, who stated that "while the accused and Ata-ul-Rahman were sitting together, the proprietors (*i.e.* co-sharers in the holding other than the donees) came to them with the deed of gift, that after accused had read the deed he pointed out to Ata-ul-Rahman that Khan Muhammad and Bahadur should be entered as *malikan qabza*, that the *girdawar* refused to make any alteration" and then said to accused in effect, "If you want to make any alteration make it yourself", which accused proceeded to do and then went away.

From this man's evidence and from the report P. K. made by Ata-ul-Rahman to the Naib-Tahsildar, it is clear that there must have been many people present when this took place. There was a dispute as to the *status* of the donees and the *patwari*,

having regard to the deed of gift and to the Revenue rules, was of opinion that they should be shown as *malikan qabza*; he wanted the *girdawar* to make an entry accordingly and when the latter refused to do so, he made it himself.

The above facts appear to me undoubtedly to suggest the inference that appellant made the entries in accordance with what he considered they ought to be and not with any intention to defraud, or to cause wrongful gain or loss to any one. Had his motive been dishonest or fraudulent, he would hardly have made the entries openly and after a discussion with his superior officer as to what they should be.

The chief points relied upon by the Sessions Judge, as indicating a dishonest intention, are—

(1) the writing in the *partal* book of the words, *malik qabza darj hain* ;

(2) the making of the entry in the *jamabandi* in ink instead of pencil ;

(3) the Sessions Judge says the entry of the above words in the *partal* book was a mis-statement. This is so, if it was meant to refer to the previous entry in the *jamabandi*, but appellant probably meant it to refer to the entry as corrected by him. As regards the entry in the *jamabandi* being made in ink. it must be remembered that appellant erased it very shortly afterwards, and his explanation of his conduct is possibly quite true.

He certainly acted in flagrant disregard of the Revenue rules, but I cannot see that these two points override the strong presumption of *bona fides* which, in my opinion, arises from the circumstances under which the entries were made.

The Settlement Officer thought the punishment of dismissal would suffice for the appellant's infraction of the rules, and did not think it necessary to order a prosecution. It was only when a further charge of making away with the *jamabandi* was brought against him, a charge which the Sessions Judge finds was manufactured by Ata-ul-Rahman and of which appellant was acquitted, that a prosecution was ordered.

The Assessors were unanimously of opinion that when appellant made the entries he had no intention of causing harm to any one, and I have no hesitation in agreeing with them.

I have shown in the beginning of this judgment that there is no express finding by the Sessions Judge that appellant made the entries with intent to defraud or dishonestly, within the meaning of section 24, Indian Penal Code, in other words, there is no finding that he made a false document as defined in section 464, or that he fraudulently altered any book or register within the meaning of section 477A.

It is not shown that the making of the entries was likely to deprive the donees of any right to which they were entitled: the effect might merely have been to show correctly their status which was previously shown incorrectly. A correction of an entry in a Revenue Record might prevent a person getting a share in the *shamilat*, but he could not be defrauded of something to which he had no right. A main ingredient of the offence, therefore, is wanting, and even on the Sessions Judge's findings I would hold that the conviction is unsustainable.

I accept the appeal and, setting aside the conviction and sentence, acquit appellant and discharge him from his bail.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 273 OF 1914.
(TAKEN UP No. 12 OF 1914.)
August 18, 1914.

Present:—Mr. Justice Oldfield.

In re RASAMMAL—ACCUSED.

Penal Code (Act XLV of 1860), s. 302—Murder by grandmother of her grandchild—No justification—Sentence, appropriate—Circumstantial evidence, whether alone sufficient to pass death sentence—Lenity to woman—Rule of practice—Sex of accused, whether determining factor in passing death sentence—Principle to exercise discretion misconceived—Revision—High Court, power of interference.

Where an old woman of 50 years of age, who had long hated her daughter-in-law and resented her intrusion and had worked herself up to a frenzy of hatred against her, taking advantage of her absence from the house, entered it and murdered her five years' old grandchild with horrible cruelty, and nothing was alleged by her or suggested on her behalf which could, if established, have afforded any sort of legal or moral justification, the

mere fact that the case rests on circumstantial and not direct evidence should not affect the passing of death sentence.

Per *Ayling, J.*—Comparative lenity to women is a commonly accepted rule of practice though, needless to say, not of law, but in dealing with an atrocious crime like this the mere sex of the criminal should not bar the imposition of a sentence which would be considered appropriate in the case of a man.

Per *Seshagiri Aiyar, J.* (*dissenting*).—Where a conviction is based purely upon circumstantial evidence, it is an element to be taken into consideration in determining the nature of the sentence. Where, in addition to it, there are the facts that the prisoner is a woman 50 years old and a period of four months has elapsed from the date of her conviction, no case is made out for altering the sentence of transportation for life into one of death.

Per *Oldfield, J.*—Where the principle on which a Sessions Judge exercises his discretion is misconceived, a High Court can interfere in revision with that exercise of discretion.

The criminal revision case and the appeal (Criminal Appeal No. 269 of 1914) coming on for hearing on the 20th July 1914, upon perusing the appeal petition, the judgment of the lower Court and the records submitted in accordance with the proceedings of this Court, dated 21st April 1914, and upon hearing the arguments of Mr. *P. R. Srinivasa Aiyangar*, Counsel, on behalf of the prisoner appointed under G. O., dated 17th December 1884, No. 3273, Judicial, and of Mr. *J. C. Adam*, for the Public Prosecutor on behalf of the Government, and the cases having stood over for consideration until the 28th of July 1914, the Court (Ayling and Seshagiri Aiyar, JJ.) delivered the following

JUDGMENT.

AYLING, J.—The accused in this case, a woman of 50 years of age, has been convicted of the murder of her grandson, a child of five, and sentenced to transportation for life. Against this conviction and sentence she appeals. The case has, at the same time, been taken up in revision under section 435, Criminal Procedure Code, by this Court, and accused has been called upon to show cause why she should not be sentenced to death.

The prosecution evidence shows that for some time prior to the date of the child's death, 1st December 1913, there had been acute ill-feeling in the family. Accused's son, the father of the child, had discarded his wife (Prosecution Witness No. 1) four years ago and had been living with a woman of another caste at Erode. Accused's husband, an old man of 70, taking pity on his destitute daughter-in-law, allowed her and her child to live in the family house and made some provision for her maintenance. This was fiercely resented by the son and by accused: and repeated quarrels ensued, going to the length of personal violence, and a petition by the old man to have his son bound over to keep the peace. Accused lived separately from her husband, for whom Prosecution Witness No. 1 had to cook. In May 1913, accused's husband executed documents alienating the bulk of his property, partly in favour of Prosecution Witness No. 1 and the deceased child and partly in favour of one of his daughters. It was after this that the ill-feeling became so acute that the Prosecution Witness No. 10 petitioned the Deputy Magistrate, and his son was warned by the Police. Matters appear to have got no better.

On the day of offence just before dawn, Prosecution Witness No. 1 went out of the house to get firewood leaving her child asleep on a cot. During her absence, accused entered the compartment of the house occupied by Prosecution Witness No. 1, and bolted herself in with the child. Screams were heard: the mother rushed back, and neighbours assembled. Accused refused to open the door, and forcibly resisted attempts to break in. The door was eventually burst open and the child was found lying dead, with a fractured skull and six stabs on the body penetrating the lung, liver, abdomen and intestines. Accused, and no one else, was in the room. The weapon used appears to have been a large heavy pointed file (M. O. II), which, according to the most credible evidence, was found struck in the earth of the floor.

We have the evidence of nine witnesses (Prosecution Witnesses Nos. 1 to 9) to the effect that accused was found in the room under the above circumstances. The evidence has been very fully and carefully discussed in the judgment of the Additional Sessions Judge, who has accepted, and acted upon it. I see no reason whatever to differ from him, and in fact very little argument on the correctness of the conviction was addressed to us by the learned Counsel who represented accused.

Her defence has been that the child either

died a natural death, or was killed by some one else: and that on her return to the village that morning she was seized and tied up and the case concocted against her. No evidence is adduced in support of this story.

I have no hesitation whatever in confirming the conviction.

There remains the more difficult question of whether the sentence imposed is adequate, or whether it imperatively calls for enhancement. The atrocious nature of the crime will be apparent from the facts which I have set forth above. There seems to be no doubt that accused, who had long hated her daughter-in-law and resented her intrusion, had (in the words of the Additional Sessions Judge) worked herself up to a frenzy of hatred against her and, taking advantage of her absence, entered the house and murdered the innocent child with horrible cruelty. I have looked in vain for any extenuating circumstances. Accused has alleged immoral relations between her husband and Prosecution Witness No. 1. How far this, if true, could be taken in extenuation seems to me very doubtful; but there is not a particle of evidence to support the idea, which is most improbable. It is suggested that she may have been instigated by her son who paid her a visit the previous evening. This is pure surmise and, if true, would not materially assist her. It is suggested that she may have been anxious to recover the property alienated by the old man: but the murder would not have this effect, and however far she may have had an eye on this, it seems clear that blind and furious hatred against Prosecution Witness No. 1 and her child was the real dominating motive. There is evidence that she had on a previous occasion nearly suffocated the child: and, as has been seen, from first to last she has exhibited no sign of regret. Pleas of extenuating circumstances have been set up for, and not by, her.

The Additional Sessions Judge has refrained from imposing the extreme sentence on the sole ground that there is no direct evidence of her crime. It should be unnecessary to point out that this is no reason at all. The mere fact that the case rests on circumstantial and not direct evidence should not affect the sentence. If the evidence, whichever it be, leaves a reasonable doubt of the accused's guilt, the accused is entitled to acquittal. If it does not, the accused should receive an appropriate sentence. There are cases in which the absence of direct evidence may leave it open to doubt whether the crime may not have been committed in circumstances which would to some extent extenuate the accused's guilt and the doubt thus engendered may rightly affect the Court in determining the sentence to be imposed. But this is not such a case: the evidence adduced discloses enough of the circumstances of the crime to preclude the possibility of the existence of undisclosed extenuating circumstances.

The sex of the criminal and the lapse of time since the crime and the trial are the other circumstances which have been urged before us on behalf of accused.

Comparative lenity to women is a commonly accepted rule of pratice, though, needlest to say, not of law: but in dealing with an atrocious crime like this, I cannot admit that the mere sex of the criminal should bar the imposition of a sentence which would be considered appropriate in the case of a man.

There only remains the delay. The crime was committed on 1st December 1913. Accused was convicted on 23rd March 1914. The calendar of the case (including a printed copy of the judgment) was received in this Court on 14th April 1914. Three days later, the learned Judge of this Court, who perused the same, ordered the case to be taken up in revision, records to be called for and printed, and the case to be posted after notice to accused and the Public Prosecutor. The vacation began on May 3rd and it was, of course, impracticable to post the case before that. It would, in the ordinary course, have come before my learned brother and myself, sitting on the mid-vacation Bench, but it was apparently postponed in order that it might be dealt with in connection with the appeal which accused had filed, and which was received on 28th May 1914. Both have been heard together within a week of the re-opening of the Court.

It seems to me that there has been no undue delay in disposing of the matter. Sentimental objections may, no doubt, be urged against the substitution of a death sentence for one of transportation for life, which has been imposed by a competent Court in the exercise of its

discretion. I fully appreciate these. But section 439, Criminal Procedure Code, specifically empowers this Court to enhance a sentence on revision. If these objections prevailed this power would be rendered nugatory, at any rate so far as murder cases are concerned: logically it is difficult to see why other cases should not stand on the same footing. This Court will, of course, always be reluctant to enhance a sentence particularly when it means imposing the extreme penalty of the law: but I do not think we should shrink from doing so when, as in the present case, the atrocious nature of the crime seems to call for it and where the original Court has been influenced in determining the sentence by a wholly wrong idea.

I have given very careful thought to this case: and it seems to me that if ever there was a case in which a death sentence was imperatively called for, it is this case.

I would, therefore, set aside the sentence of transportation for life and sentence accused to be hanged

SESHAGIRI AIYAR, J.—I agree that the conviction is right. It was a cruel murder. The immediate cause of the murder was the transferring to the deceased boy and his mother a good portion of his property by Prosecution Witness No. 10, the husband of the accused. This unnatural murder was, therefore, dictated by motives of spite and revenge. I do not agree with Mr. Adam that the object was to secure property. The appeal must be dismissed. I am of opinion that the case for enhancement of punishment should be dismissed as well. The Sessions Judge has applied his mind to the question of sentence and has come to the conclusion that the extreme penalty of the law should not be imposed. I see no sufficient reason for interfering with his discretion. I am not prepared to say that where a conviction is sustained purely on circumstantial evidence' that is not an element to be taken into account in determining the nature of the sentence, though by itself it may not be a sufficient ground for not passing the sentence of death. There are other considerations in this case. The accused is a woman. She is fifty years of age. It is now four months since she has been convicted. Each one of these circumstances may not by itself justify the reduction of the sentence. Taken together they are sufficient to justify me in holding that there is no ground for interfering with the discretion of the Sessions Judge. I would, therefore, reject the case for enhancement of sentence.

BY THE COURT.—In the result, the appeal is dismissed and the revision case referred for the orders of a third Judge.

This criminal revision case coming on for hearing under the provisions of section 429 of the Code of Criminal Procedure on the 14th August 1914 upon perusing the judgment in Criminal Appeal No. 269 of 1914 and Criminal Revision Case No. 273 of 1914 on the file of the High Court dismissing the criminal appeal and referring the criminal revision case for the orders of a third Judge, the record submitted in accordance with the proceedings of this Court, dated 21st April 1914, and upon hearing the arguments of Mr. *P. R. Srinivasa Aiyangar*, Counsel, on behalf of the prisoner appointed under G. O., dated 17th December 1884, No. 3273 Judicial, and of Mr. *J. C. Adam* for the Public Prosecutor on behalf of the Government and the case having stood over for consideration till this day, Mr. Justice Oldfield delivered the following

JUDGMENT.—The question is whether sentence of death should be passed on accused instead of the sentence of transportation for life, which she has already received. It comes before me in consequence of disagreement between two learned Judges.

The learned Sessions Judge in compliance with section 367 of the Criminal Procedure Code recorded his reason for not passing sentence of death in the words: - "I take into consideration the fact that there is no direct evidence of accused's crime;" that is, as I understand him, no evidence of any eye-witness of the act by which death was caused. It is not contended that this reason corresponds with any general rule, sanctioned by authority. Mr. Justice Ayling has given reasons, which I respectfully adopt, for holding that such a rule could have no sound foundation. I add that it would be useless in many cases, because, if the evidence of an eye-witness is available, it is not necessarily or apart from the indirect evidence, which corroborates it, the sole or chief ground for the Court's conclusion.

No doubt, as the same learned Judge observed, the fact that the evidence is indirect may legitimately affect the sentence

in the circumstances of the particular case, as for instance by rendering admissible the possibility of extenuating facts or motives, which the accused cannot be expected to prove strictly. But that is not in question here. The exact motive for accused's act may be uncertain. But nothing has been alleged by her or suggested on her behalf, which could, if established, have afforded any sort of legal or moral justification. When the principle, on which the learned Sessions Judge statedly exercised his discretion, was misconceived, there can be no objection to interference with that exercise in revision.

The other matters relied on by accused's Counsel are the sex and age of accused and the delay of a little over four months between the judgment of the lower Court and the hearing here. Certainly they deserve consideration. But they must be weighed against the circumstances of the case. Mr. Justice Ayling has dealt with them fully, and I need not repeat his observations, in which I concur. The murder was, as both learned Judges held, most cruel and it was committed in Coimbatore, a district in which offences affecting life and against the person are too frequent. The case, therefore, is not one for leniency. After careful consideration I am constrained to agree with Mr. Justice Ayling as to the necessity for revision. The sentence of transportation must, therefore, be set aside. The accused is sentenced to be hanged.

Sentence of death passed.

CALCUTTA HIGH COURT.
CRIMINAL RULE No. 1136 OF 1914.
August 12, 1914.
Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.
Thakur JANAKI NATH CHAKRAVARTI —PETITIONER
versus
JNANENDRA NATH CHAKRAVARTI—RECEIVER—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 188—Verbal order to remove obstruction, whether legal—Disobeying such order, whether offence—Criminal Procedure Code (Act V of 1898), ss. 133, 137.

A verbal order to remove an obstruction has not the effect of a final order under section 137, Criminal Procedure Code, and is not lawful, and a person disobeying such an order is not guilty of an offence under section 188, Indian Penal Code.

Revision against an order of the Sub-Divisional Magistrate of Gaibandha, dated 18th May 1914.

FACTS.—This was a Rule obtained by the petitioner calling upon the District Magistrate, Rangpur, to show cause why the proceedings taken against the petitioner under section 188, Indian Penal Code, at the instance of the Sub-Divisional Magistrate of Gaibandha should not be quashed. The proceedings were taken under the following circumstances:—

In 1908 there was a dispute between certain co-sharer *zemindars* about the levy of tolls at Gaibandha Bazar. A proceeding under section 145, Criminal Procedure Code, was taken by the Sub-Divisional Officer who subsequently attached the land under section 146, Criminal Procedure Code, and appointed the opposite party a Receiver to levy tolls, although the *zemindars* continued to collect rent from the shops.

On 8th May 1914 the petitioner, a tenant of the *zemindars*, raised a hut in the Bazar. On 16th May 1914 the Receiver reported to the Sub-Divisional Officer of the raising of the hut and prayed for demolition thereof. On 18th May 1914, the Sub-Divisional Officer went to the spot and called upon the petitioner to pull down the hut, which the petitioner refused to do. The Sub-Divisional Officer flew into a rage and went away. On the same day the Sub-Divisional Officer issued a notice calling upon the petitioner to appear at 1 P.M. for trial under section 188, Indian Penal Code. The petitioner moved against this order and obtained this Rule.

Mr. *K. N. Chaudhuri*, Counsel, and Dr. *Naresh Chandra Sen Gupta*, in support of the Rule.

Mr. *Chaudhuri*.—The order which the petitioner disobeyed was not an order duly made and lawfully promulgated by a public servant.

[SHARFUDDIN, J.—The order cannot be justified either under section 144, Criminal Procedure Code, as it was not a written order or under section 133, Criminal Procedure Code, in a proceeding under Chapter X, as no conditional order seems to have been made.]

JUDGMENT.—In this case the proceedings have been taken against the petitioners

under section 188, Indian Penal Code. They have been taken at the instance of the Sub-Divisional Magistrate of Gaibandha and the order which forms the subject-matter of the proceedings is a verbal order said to have been made by the Sub-Divisional Officer on the 18th May. From the explanation submitted by the Sub-Divisional Magistrate he appears to be under the impression that he was acting under section 133, Criminal Procedure Code, and that his verbal order had the effect of a final order made under section 137, Criminal Procedure Code. This is clearly erroneous and it, therefore, does not appear that there is in this case any lawful order which may appropriately form the subject-matter of a prosecution under section 188, Indian Penal Code. We, therefore, quash the proceedings and make the Rule absolute.

Rule made absolute.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEALS NOS. 705 AND 791 OF 1914.

December 1, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

NGA PO THEIN AND ANOTHER—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 302—Accused's statement not incriminating himself, whether confession—Identification, when sufficient to convict—Grave suspicion, whether sufficient for conviction.

An accused's statement which does not incriminate himself, is not a confession and cannot be used against his co-accused.

Identification, unless conclusive, cannot be made the basis of a conviction, specially when the identifiers are nervously upset and do not mention the striking features of the accused in their first information.

The gravest suspicion against the accused will not suffice to convict them of a crime unless evidence establishes it beyond all doubt.

Appeal from the order of the Additional Sessions Judge of Toungoo, dated the 8th of September 1914, passed in Sessions Trial No. 68 of 1914.

JUDGMENT.

PARLETT, J.—Nga Po Thein and Nga Tun Tin have been convicted of murder and abetment of murder respectively and have been sentenced, the former, to death and, the latter, to transportation for life. They are relatives. Po Thein is 19 years of age and Tun Tin about 17, as is shown by his appearance, by his statement to the Magistrate the day after his arrest and by the defence evidence. In Court, however, he gave his age as 15.

Between 3 and 4 P.M., on the 14th April 1914, three *Karen* women were returning to their village, Pyinmanya. They were in single file, Ma Pa Le Bo in front, then Ma The Nu and Ma Dun E behind. At the edge of some jungle they met two men each with a *da*, who inquired whether they had seen any buffaloes; saying they had not, the women went on.

The plan filed shows that the women were going southwards and the men northwards. When Ma Pa Le Bo and Ma The Nu had gone, according to the plan, about 100 yards, they heard Ma Dun E call for help and turning round, they saw her only eleven yards behind them. The taller of the two men they had previously met was pulling her and cutting her with the *da*. Ma The Nu says they were struggling over a *da* and the man cut Ma Dun E over the head with it. The other man was standing close by. The witnesses at once started to run to their village, only some 600 yards away, and Ma Dun E came running after them calling out to wait for her to come up. She had a cut on her head and both her arms were nearly severed and she was unable to go far. Ma The Nu went to the village for help and she was taken in. She died after a few hours. The wound on the head was not of a very serious nature, but in the absence of surgical aid death from either of the severed arms was inevitable. Head constable Mg. Tun Zan from Intagaw Police Station two miles away went to the village and took Ma Pa Le Bo's report which, however, gives few details and does not mention that the men had previously met and accosted them. Tun Zan says both she and Ma The Nu seemed to be in a state of nervous collapse and said they were unable to recognise either of the men. The next day Sub-Inspector Mg. Maw took over the investigation. Upon questioning the two women they said they were completely upset and shaken and asked him to defer his examination of them and, as their faces

showed him that they were much upset with fear, he did so.

Inquiry showed that two men had earlier on the afternoon of the crime been seen by some herdsmen on the road on which Ma Dun E was and about half a mile south of the scene of the crime. There is no satisfactory identification by any of them of either of the accused as one of the men they saw. On the 18th February, however, information was obtained from Mg. Po Ko of Kywepia village, about a mile south of the scene of the crime, that on the afternoon when it occurred he saw two men in his village, the taller of whom asked him if he had seen a buffalo. He had seen this man five days earlier at Mg. Twe's house in his own village. Mg. Twe stated that the man in question had given himself out as the son of one San Shun, whom he knew, and that he had come from Damathaik Pagoda festival. San Shun is the father of Nga Po Thein, first accused, and lives at Intagaw, two miles from the scene of crime, and Po Thein was known to Sub-Inspector Mg. Maw as he was formerly in the Police. On the same day Ma Po Le Bo and Ma The Nu were again examined by Mg. Maw and professed their ability to recognise Ma Dun E's assailants and gave some description of them.

On the 19th February it was learnt that Po Thein and 2nd accused, Tun Tin, a relative and close friend of his, had left their village to go and clear *taungya*. On the 20th Mg. Maw with two constables and several others found them cutting *taungya* with one Nga Hmat, but as soon as the party appeared the three ran away and escaped. Mg. Maw subsequently learnt that about 7 A. M. on the morning of the crime the two accused and seven other men were given a quart and a half of country spirit by Mg. Po Thaing of Intagaw whom they then assisted in winnowing his paddy, that about noon the two accused left saying they were going to Kywepia. It is not suggested that they were intoxicated and considering the number of men who shared the spirit and the interval that had elapsed since taking it, they can no longer have been appreciably under its influence.

On the 4th March Mg. Maw says he came upon Po Thein asleep in the jungle, but did not recognise him at once and he escaped before he could apprehend him. On the 23rd March Ma The Nyun's house in Intagaw was burnt down and near it was found a letter, Exhibit C, purporting to come from the two accused and to be signed by the first accused and threatening to murder three men in the village in revenge for villagers plotting to catch them. Mg. Myo, 12th P. W., whc professes to know Po Thein's handwriting and to identify it in two other letters, Exhibits D and F, which Po Thein admits that he wrote, says that Exhibit C is not in Po Thein's handwriting. He was not asked on what he based this opinion, nor did he point out how the handwriting in Exhibit C differed from that in Exhibits D and F. In my opinion the internal evidence of the three letters points strongly to their common authorship. If, however, Po Thein did write Exhibit C it only goes to show, as is sufficiently clear on other grounds, that all this time he and Tun Tin were in hiding in the vicinity. On the 5th April information was laid to the Police that the two accused had kidnapped a boy of the village, named San Chi, and had extorted a ransom of Rs. 200 for his release. They then left the neighbourhood. Po Thein's letters, Exhibits D and F, led to Tun Tin's arrest in Hsipaw in the Shan States at 6 P.M. on the 20th June and Po Thein's arrest on the following day. At 11 A.M., on the 21st June, Tun Tin made a long confession, Exhibit A, to a Magistrate. The gist of it, so far as this case is concerned, is that Po Thein accepted the liquor Po Thaing offered him and was drunk. After winnowing Po Thaing's paddy they went to the well in Pyinmangu village to bathe, then to the Damathaik Pagoda and then into the country. Po Thein said he was tired and wanted to sit down, the three *Karen* women came along Po Thein followed them while Tun Tin remained sitting. In a little while he heard a noise, stood up and saw Po Thein and a *Karen* woman struggling 50 yards off. Po Thein hit her with a *da* over the head once and came running towards him and they both ran into the jungle and subsequently went home. He now says that this confession is untrue and was made because Mg. Maw tutored him to do so. As the Sessions Judge points out, it does not incriminate Tun Tin himself and cannot be

taken into account against Po Thein. I agree with him that it should be left out of consideration altogether. Both accused say that after finishing work at Po Thaing's threshing floor they returned to their homes in Intagaw and never went near the scene of crime at all. They pretend that they ran away from the *taungya*, not because they recognised the Police in the party but because they thought they were head-hunters who, they had heard, infested these jungles. Po Thein denies escaping from Mg. Maw a second time. They say they went to the Shan States to get work. Their defence evidence, if believed, only accounts for their presence in their village till 3 to 4 P.M. and is far too indefinite to establish the possibilty of their being at the scene of the crime when it was committed. On the 25th June the accused were brought to Pegu and on the 1st July a parade was held in the lock-up at which Ma Pa Le Bo and Po Ko identified both the accused. A month later Ma The Nu did the same. The convictions have been based upon the identifications by the two *Karen* women and upon the accused's conduct after the date of the crime. The Judge considered that the parade was fairly held, the Township officer being present, and that the women could not have seen them at any time between the 25th June and the 1st or in the case of Ma The Nu, the 31st of July. But proof of a meeting with the accused is not necessary to throw doubt on the identification. The possibility that they might have received a hint as to the personal appearance of the men arrested has certainly been in no way precluded. The Judge notes that "each accused has a peculiar cast of visage which no one could help remembering. Po Thein's eyes protrude and he has curiously emphasized features. Tun Tin has a very noticeable appearance and shape of head and face." This would lead one to expect that their features would impress themselves on the two women's memories when they first met and asked them about the buffaloes and before anything happened to shake their nerves. This meeting, it must be noted, is not mentioned in Ma Pa Le Bo's first information report made the same evening. Both of them said definitely that they would not remember the men if they saw them again. In Ma Pa Le Bo's case at any rate this cannot be attributed to mere nervousness, as she was then sufficiently collected to make a statement of considerable length to Mg. Tun Zan. The next day they told Mg. Maw that they were still too upset to answer any more questions or even to communicate the simple fact that they thought that they could identify the men.

This was not said till the 18th and the description then given was merely that one was tall and dark without a moustache and the other short. It contained no mention of the striking personality of either accused. It must be borne in mind that it was on this day that Po Ko and Mg. Twe gave their information, and since Mg. Maw as their fellow-villager knew the 1st accused, the son of San Shan, well and doubtless also his relative and close friend, Tun Tin, his suspicions must have been directed towards them at least from that day. The events of the next few days shewed every one who the suspects were. That the two *Karen* women should not learn their names is hardly to be supposed and it is easy to understand that they may have gathered some hint of what they were like.

Ma Pa Le Bo's conduct at the parade is described as follows: "She walked up and down 5 or 6 times before picking out the two accused. She said, 'These are like the men.'" Ma The Nu, no doubt, picked them out at once, but this was a whole month later. Ma Pa Le Bo's behaviour seems hardly like that of a woman upon whose memory the striking features of the two men had made an indelible impression. The Judge considered that the neurotic and highly strung temperaments of these women sufficiently explained their apparently strange behaviour. In view of Ma Pa Le Bo's first information report I doubt if this view can be accepted in her case. It appears to me, moreover, that if they were in fact so thoroughly scared by the occurrence that it took them four days to recover sufficiently to be able to say that they could recognise the men, they are not persons whose identification of those men made four to five months later can be relied upon.

As to the accused's conduct after the crime, it was, no doubt, such as might be expected from guilty persons; but it cannot be said that it is inconsistent with their innocence of this particular crime. Mg. Maw certainly suspected them from an early date and whether or not their journey to the jungle to cut *taungya* was induced by their knowledge of such suspicions, it is quite clear that they became cognisant of the fact that he was after them on the 20th February and however foolish it may have been on their part, it is at least intelligible that they should thereafter keep in hiding until suspicion was diverted from them or they could get away. The charge of kidnapping and extortion made against them on the 5th April is sufficient explanation of their absconding to the Shan States.

In my opinion though there may be the gravest suspicion against the two accused of having committed this crime, it cannot be said that the evidence establishes it against them beyond reasonable doubt.

I would reverse the convictions and sentences and acquit both the accused.

FOX, C. J.—I concur.

Conviction reversed.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 493 OF 1914
CRIMINAL REVISION CASE No. 625 OF 1914.
(TAKEN UP No. 34 OF 1914.)
November 16, 1914.
Present:—Mr. Justice Ayling and
Mr. Justice Kumarasawmy Sastri.
MUNIANDI *alias* MUNISWAMY NAIDU
—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Circumstantial evidence—Death sentence—Age of accused, whether to be considered in imposition of death sentence.

Where the appellant was found guilty of having murdered a child of eight years, and the Sessions Judge who tried him imposed a sentence of transportation for life, having regard to his youth and to the fact that the evidence was purely circumstantial:

Held, that in the circumstances of the case the High Court was not prepared to interfere with the sentence.

There is no rule or principle of law which prohibits the imposition of a death sentence in cases where the evidence is purely circumstantial.

Per *Ayling, J.*—Where the Court is satisfied beyond reasonable doubt of the guilt of the accused, the fact that the evidence is circumstantial and not direct, is not a factor which should *per se* affect the sentence.

Per *Kumaraswamy Sastri, J.*—A consideration of the species of evidence on which the guilt of an accused is found should not of itself determine the nature of the evidence.

Circumstantial evidence like any other must, in every case, be tested and weighed and prevail or not by its own inherent proving force.

Queen-Empress v. *Sami*, 13 M. 426; 1 Weir 290, referred to.

Per *Ayling* and *Kumaraswamy Sastri, JJ.*—Age of the accused is a factor which ought to be taken into consideration in determining the sentence to be imposed.

Emperor v. *Jasha Bewa*, 11 C. W. N. 904; 6 Cr. L. J. 154, followed.

Appeal against the order of the Court of Session of the Ramnad Division at Madura in Case No. 21 of the Calendar for 1914.

FACTS.—The facts of the case sufficiently appear from the judgment.

Mr. *C. K. Mahadeva Iyer*, for the Appellant:—The evidence is wholly circumstantial and no conviction can be safely based thereon. Further, the sentence cannot be enhanced. See *In re Vemulada Janaki* (1) and *Queen-Empress* v. *Sami* (2). In any event the age of the accused ought to be taken into consideration. *Emperor* v. *Jasha Bewa* (3).

Mr. *P. R. Grant*, for the *Public Prosecutor*, for the Crown:—The fact that evidence is circumstantial is no ground for not acting upon it or not awarding the extreme sentence (Wills on Circumstantial Evidence, 6th Edition, page 49). The murder in the present case is a cold-blooded one and deserves the extreme penalty of the law.

JUDGMENT.

AYLING, J.—I have had the advantage of perusing the judgment of my learned brother, and as regards the conviction need only say that I entirely agree with him that accused's guilt has

(1) 2 Weir 736.
(2) 13 M. 426; 1 Weir 290.
(3) 11 C. W. N. 904; 6 Cr. L. J. 154.

been proved beyond all reasonable doubt and that the conviction must be confirmed.

It is only as regards the sentence that I feel constrained to add a few words.

The crime in this case was of the most atrocious character. The victim was a little girl of eight who, as the Sessions Judge says, had been a constant visitor to the accused's house and had been made a pet of by accused and his wife. This child was cruelly murdered by accused for the sake of her gold necklace and other ornaments—the most sordid of motives for a most inhuman act. On the face of it, it is difficult to imagine a case calling more imperatively for the extreme penalty allowed by law.

The Sessions Judge has refrained from it for two reasons: (1) the circumstantial nature of the evidence, (2) the youth of the accused who is said to be aged 18.

As regards the first, speaking with all respect to expressions of opinion to the contrary, it seems to me no reason at all. I am aware that eminent Judges of this and other Courts have been averse to imposing or confirming death sentences where the evidence is purely circumstantial, but I have never seen a case in which any Judge has laid down any principle for the guidance of others that such a sentence should not be imposed. The Sessions Judge says: "In Referred Trial 25 of 1886 No. Kernan, J., has laid down the rule that in cases where the evidence is circumstantial, it is not safe to pass the extreme sentence of death." A reference to the report [given in *In re Vemulada Janaki* (1)] shows that the learned Judge did nothing of the kind. He expressed it as his individual opinion, but was very careful to add that he quite agreed with Brandt, J., that no rule to that effect could be laid down. Brandt, J., in the very same case, has most lucidly set forth what in my humble judgment is the correct view, that where the Court is satisfied beyond reasonable doubt of the guilt of the accused, the fact that the evidence is circumstantial and not direct, is not a factor which should *per se* affect the sentence. I had occasion to consider the same point in a recent case* and am glad to be fortified in my view by the opinion of Oldfield, J.

I do not wish to say anything which might be interpreted as fettering the discretion of Judges of original Courts in deciding which of the sentences allowable under section 302, Indian Penal Code, should be imposed: but I feel bound to express dissent from the view, which seems to be somewhat commonly held, that there is any unwritten rule or principle standing in the way of the imposition of a death sentence in cases where the evidence is purely circumstantial.

The second point, that of age, is undoubtedly one which no Court should leave out of consideration in determining the sentence to be imposed. Whether in the present case accused's youth is such as to outweigh the aggravated circumstances of a crime is a very difficult question. I may go so far as to say that if the Sessions Judge in the exercise of his discretion had imposed a death sentence, I should have been opposed to reducing it. But the substitution of a death sentence for one of transportation is a measure which must always be undertaken with reluctance; and having regard to the view taken by my learned brother I do not feel bound to differ and to necessitate a reference to a third Judge. I would, therefore, confirm both the conviction and sentence in this case.

KUMARASAWMY SASTRI, J.—The appellant has been found guilty of having murdered a girl of eight years for the sake of her jewels and sentenced to transportation for life. Both the assessors found him guilty and the Sessions Judge agreeing with them imposed the lesser penalty on the ground of the youth of the accused (who is about 18 years) and the circumstantial nature of the evidence. The accused appeals against this conviction and he has been called upon to show cause why the sentence should not be altered into one of death.

* Reference appears to be *In re Rasammal*, 26 Ind. Cas. 324; 16 Cr. L. J. 29—*Ed.*

There can be little doubt that the girl Pethammal, who was residing with her parents at Virudupatti (where the accused also lives), was murdered and that her dead body was found in a trunk at Madura. The medical evidence shows that death was caused by a wound on the neck and there is absolutely nothing to support the suggestion made at the trial that the wound was caused after death.

The evidence adduced by the prosecution shows (1) that the girl came to the house of the accused on the day she disappeared and was last seen there; (2) that there were blood stains in a room in the house; (3) that the accused went to Madura with the trunk M. O. and was arrested at Madura Railway Station that night; (4) that while in Madura the accused sold a gold *saradu* belonging to the deceased girl; (5) that the body of the murdered girl was found in Madura inside the trunk M. O.; (6) that the trunk in which the body of the girl was found and the blood-stained knife and *veshti* belonged to the accused.

I agree with the Sessions Judge in holding that there is absolutely no ground for disbelieving the evidence given by the wife of the accused, who is a girl 14 years old. Her evidence puts it beyond doubt that the accused and the deceased girl were in the room shortly before the accused left the house with the trunk in which the body of the girl was found. The accused himself took the Police to the person to whom he had disposed of the jewel worn by the girl. On this part of the case there is no explanation why the accused went to Madura or how he came by the jewel of the deceased girl. I have gone through the evidence carefully and am unable to come to any other conclusion than that the accused was rightly convicted.

The question as to the sentence to be passed is one that presents considerable difficulty. The learned Sessions Judge who has written a very careful and considered judgment has, after taking all the circumstances of the case into consideration, sentenced the accused to transportation for life. The accused is only 18 years old and the evidence is mainly circumstantial.

These facts have often been taken into consideration in passing sentences for murder and cases have occurred where the High Court has refrained from passing the death sentence even in cases of deliberate murder. In *Queen-Empress* v. *Sami* (2) Justices Shephard and Muthusami Iyer were of opinion that the fact that the evidence of guilt was wholly circumstantial, justified them in sentencing the accused to transportation for life. A similar view was taken by Justice Kernan in *In re Vemulada Janaki* (1). Mr. Justice Brandt, however, rightly points out in the above case that a consideration of the species of evidence on which the guilt of an accused is found should not of itself determine the nature of the sentence.

I do not desire it to be understood that the Court is bound in every case to pass the lesser sentence when the evidence is circumstantial. The following passage in Wills on Circumstantial Evidence (page 49 of the 6th edition by Justice Wills) is in point " * * * * For sometime back it has been the fashion with a great many people to treat 'purely circumstantial evidence' as implying an inherent weakness and as necessarily more or less unsatisfactory. There is hardly a case of murder in which a reprieve is sought or a conviction appealed against in which something of the kind is not urged. Fortunately there has been no recent judicial utterance countenancing such a general proposition, and the Judges have been fully alive to the fact that circumstantial evidence, like any other, must in every case be tested and weighed, and prevail or not by its own inherent proving force."

If the case rested only on the circumstantial nature of the evidence I would in the present case enhance the sentence. I am, however, of opinion that the age of the accused is a fact that might well be taken into consideration in determining what sentence is to be passed in cases of murder. In *Emperor* v. *Jasha Bewa* (3) age was held to be a sufficient ground for passing the lesser sentence even when the accused is guilty of a deliberate and heinous murder. I do not think that in the present case any exceptional circumstances exist which make it desirable that I should in the

exercise of the revisional powers of the High Court interfere with the discretion exercised by the Sessions Judge.

I confirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.
CRIMINAL RULE No. 1701 OF 1914.
November 20, 1914.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Teunon.
GULLI SAHU—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Extradition Act (XV of 1903), ss. 7 (2), 15—*Execution of warrant by District Magistrate—Revisional power of High Court*—Habeas Corpus—*Criminal Procedure Code (Act V of* 1898), *s.* 491.

Where a warrant is issued by a Political Agent under section 7 of the Indian Extradition Act, its execution by a District Magistrate in accordance with the Act is an executive act and the High Court has no power to interfere in the exercise of its revisional powers. There is nothing in this view which in any way conflicts with the power of the High Court to interfere otherwise than by way of revision. Thus, the power of the Court to interfere under section 491 of the Criminal Procedure Code is untouched by this decision.

If a fugitive criminal arrested under section 7 of the Indian Extradition Act considers himself aggrieved, he can invoke the action of the Government under section 5 of the same Act.

Messrs. *B. Chakravarti, K. N. Chaudhuri*, Counsel, and Babu *Rajendra Prasad*, for the Petitioner.

Mr. *Sultan Ahmed*, Counsel, (Deputy Legal Remembrancer), and Babu *Probodh Chandra Chatterjee*, for the Crown.

JUDGMENT.—The applicant, Gulli Sahu, has obtained a Rule calling in question the legality of his arrest under the Indian Extradition Act of 1903. The Rule was granted with some hesitation, for great doubt was felt as to the Court's jurisdiction to interfere in the exercise of its revisional powers. This doubt was well-founded. The powers of the Act were set in motion by the Political Agent in and for the State of Nepal who issued a warrant addressed to the District Magistrate of Darbhanga for the arrest of the applicant, Gulli Sahu, and his delivery as in the warrant described.

The applicant is a Nepalese subject who had fled from Nepal to British territory. The case against him is that he has committed or is supposed to have committed murder and that is an extradition offence. The proceedings thus fell within section 7 of the Act. Sub-section 1 empowers a Political Agent to issue a warrant addressed to a District Magistrate for the arrest of a person by whom an offence has been committed or is supposed to have been committed. Sub-section 2 provides that the warrant so issued shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants.

It has not been suggested that we should or could revise what was done by the Political Agent; but we have been asked to interfere with the proceedings of the District Magistrate in British India. But the District Magistrate's sole function was to execute the warrant, and notwithstanding his eccentric procedure and pronouncement, this in effect is what he has done. And as in so doing he performed in accordance with his legal duty an executive act, we have no power to interfere in the exercise of our revisional powers. That this is the true effect of the Indian Extradition Act, 1903, is, we think, apparent from an examination of its scheme. Chapter II of the Act deals with the surrender of fugitive criminals in the case of Foreign States, and where a requisition is made for such surrender the Government may issue an order to a Magistrate to inquire into the crime. The method of inquiry is described, and a power to commit the fugitive criminal to prison to await the orders of the Government or to release him on bail is vested in the Magistrate.

Then it is enacted that the Magistrate shall report the result of his inquiry to the Government, and a power is given to the Government to refer to the High Court any important question of law. But it rests with the Government to decide as to the surrender of the fugitive criminal, and section 15 empowers the Government to stay proceedings under the Chapter and to direct any warrant issued under it to be cancelled and the person for whose arrest a warrant has been issued to be discharged.

KANAKUYYA v. EMPEROR.

Chapter III, on the other hand, deals with the surrender of fugitive criminals in case of States other than Foreign States. Nepal is such a State, so that it is with this Chapter that we are concerned. In cases falling under this Chapter a similar procedure is prescribed where proceedings are initiated by a Political Agent. In that case no inquiry is directed and the determination of the Political Agent is regarded as sufficient, subject to the Government's power of interference under section 15.

Where, however, a State, not being a Foreign State, itself makes a requisition for the surrender of an accused person, then the procedure of section 3, which is in Chapter II, is prescribed. including the inquiry and report by the Magistrate. An examination of the whole Act and a comparison of its provisions confirm the view that where a warrant is issued by a Political Agent under section 7, its execution by the District Magistrate in accordance with the Act is an executive act and the Court cannot interfere in revision with such execution. There is nothing in this view which in any way conflicts with the power of the Court to interfere otherwise than by way of revision. Thus the power of the Court to interfere under section 491 is untouched by this decision, for that is a power not created by the Extradition Act or exercisable by way of revision but vested in Presidency Courts to protect the liberty of the subject in appropriate cases, whatever may be the occasion of deprivation of which complaint is made.

If a fugitive criminal arrested under section 7 of the Indian Extradition Act considers himself aggrieved, he can invoke the action of the Government under section 15. This Court, however, has no power of revision and so the Rule must be discharged.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 639 OF 1914.
CASE REFERRED No. 63 OF 1914.
October 30, 1914.
Present:—Mr. Justice Oldfield.

KANUKAYYA AND ANOTHER—ACCUSED
versus
EMPEROR—PROSECUTOR.

Reformatory Schools Act (VIII of 1897), s. 9 (1) (2)—Magistrate not empowered under s. 8 of Act—Procedure—Case to be submitted to District Magistrate and not to his immediate Appellate Magistrate.

A second class Magistrate, not empowered to act under section 8 of the Reformatory Schools Act (VIII of 1897), should after convicting the accused, submit the case to the District Magistrate for passing sentence under section 9 (2) of the Act, and not to the joint Magistrate to whom the second class Magistrate may be immediately subordinate.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Kistna, in his letter dated 1st September 1914.

ORDER.—The procedure in the lower Courts was clearly wrong. The joint Magistrate's order under section 9 (2), Act VII of 1897, must be set aside.

The case is remanded to the second class Sub-Magistrate of Bezwada, in order that he may convict first and third accused and either sentence them or submit their case under section 9 (1) to the District Magistrate with a record of his opinion that they are proper persons to be inmates of a reformatory school. If he takes the latter course, the District Magistrate will then, after sentencing them, pass an order under section 9 (2), if so advised.

Case remanded.

AZHIMANILA VEETTIL KANNU PILLAI *v.* KAYINARI GOPALAN NAIR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 3 OF 1913.

October 23, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

AZHIMANILA VEETTIL KANNU PILLAI—PLAINTIFFS—APPELLANT

versus

KAYINARI GOPALAN NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, rr. 2, 5—Pleading—Construction—Evidence Act (I of 1872), s. 58—Malabar Law—Chetties, whether governed by Malabar Law.

Per *Tyabji, J.*—Whether or not a matter is open upon the proceedings sufficiently to give the Court the right to form a judgment upon it, must be dependent upon the particular facts and upon the allegations in, and form of, the pleadings.

Pleadings should be regarded with the following considerations:

(1) Allowance must be made for a very inaccurate mode of setting forth the claims of persons and the answers or defences to them.

(2) The responsibility of clearly perceiving and raising points, which arise upon the pleadings and the evidence and the proper adjudication of which is essential for the ends of justice, rests on the Court as much as on the parties or their Pleaders.

(3) The Court must look, not to the mere wording of the plaint, but to the issue which was settled for trial and to the manner in which the case was treated in the lower Courts.

(4) Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

Sayad Muhammad v. *Fatteh Muhammad*, 22 C. 324 at p. 331; 22 I. A 4; *H. H. The Nawab Nazim of Bengal* v. *Amrao Begum*, 21 W. R. 59 at p. 60; *Natha Singh* v. *Jodha Singh*, 6 A. 406; A. W. N. (1884) 140; *Kunj Behari* v. *Keshav Lal*, 28 B. 567 at p. 572; 6 Bom. L. R. 475; *Ganoo* v. *Sidheshwar*, 26 B. 360; 4 Bom. L. R. 58; *Apaya* v. *Rama*, 3 B. 210 at p. 213; *Chowdhri Murtaza Hussein* v. *Bechunnissa*, 3 I. A. 209 at p. 215; 26 W. R. 10; *Nathu Bhai* v. *Mulchand*, 3 Bom. L. R. 535; *Rajah Rup Singh* v. *Rani Baisni*, 7 A. 1 at 11; 11 I. A. 149; *Cropper* v. *Smith*, (1884) 26 Ch. D. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60; *Dhani Ram* v. *Bhagirath*, 22 C. 692 at p. 712; *Madhopersad* v. *Gajadhar*, 11 C. 111; 11 I. A. 186 (P. C.); 8 Jur. 694; 4 Sar. P. C. J. 574; Rafique and Jackson's P. C. No. 85, referred to.

Per *Oldfield, J.*—Where the parties are Chetties residing in Malabar, the Malabar Law is not applicable to them in the absence of a special allegation that it is so.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 170 of 1912, preferred against that of the Court of the Additional District Munsif of Calicut, in Original Suit No. 54 of 1911.

Mr. *T. R Ramachandra Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—This second appeal turns primarily on whether the learned Subordinate Judge was entitled to deal with it on the basis that 3rd defendant was entitled to half the plaint property or the equity of redemption over it, as transferee from one Thangamma. That is whether plaintiff's transferor Ammu Amma, widow of Ayyavu Chetty, and Thangamma, widow of Ayyavu's brother, Kutty Chetty, were entitled to it jointly, Ayyavu having admittedly died last.

As my learned brother proposes to confirm the Subordinate Judge's decision on this point, I deal only shortly with the argument addressed to us that the parties went to trial on the basis of Ayyavu's sole ownership of the property at his death and that the decision was to be given in accordance with the ordinary Hindu Law. If these two contentions are correct, Thangamma, widow of a deceased co-pareener, could have had no right to the property, whatever the method by which Ayyavu acquired it, and no interest in it after her husband's death except by way of maintenance. The position with reference to them is to be gathered from the issues and 3rd defendant's written statement. The former do not in any degree support the 3rd defendant. The latter contains no suggestion that the property was acquired by Kutty Chetty, Thangamma herself or any one except Ayyavu. It further contains no suggestion that the ordinary Hindu Law is inapplicable to the parties. They are Chetties and though they reside in Malabar, I have been shown no authority for an assumption that the Malabar Law is applicable to them in the absence of a special allegation that it is so. An attempt has been made to supply the place of such an assumption by reference solely to the use of an expression in the Malayalam written statement, which can, we are informed, be translated either "heir" or "representative" of Ayyavu. But I cannot see my way to treat this as equivalent to the putting foward of a plea which should have been advanced in explicit terms. That plea was no doubt put forward before the District Munsif, but only in argument

and in consequence of certain loose and evidently worthless statements in the cross-examination of one of plaintiff's witnesses. Of this surprise plaintiff has every right to complain. The case is, in my opinion, simply one of a title alleged, intentionally and owing to uncertainty regarding its nature, in indefinite and ineffective language, and I think that the District Munsif was right in treating the attempt to particularise it after plaintiff's first witness's very questionable evidence, as an afterthought. I would, therefore, allow the appeal.

As my learned brother's judgment confirming the lower Appellate Court's decision on this point must prevail, I have no objection to the modification he proposes in the decree. In supersession of the lower Appellate Court's decree plaintiff must be given a decree for the redemption of a half share of the property. Time will be three months. He will, of course, have to obtain actual possession by means of a partition suit. Proportionate costs throughout will be allowed.

TYABJI, J.—The plaintiff sues to redeem a *kanom* mortgage, which was assigned to the 2nd defendant and by him to the 3rd defendant. The contest is between the plaintiff and the third defendant. The latter claims to be an assignee also of the equity of redemption of a moiety of the property. The plaintiff resists the 3rd defendant's claim to a moiety of the equity of redemption on the ground that the 3rd defendant's predecessor-in-title, one Thangamma, had no interest in the property. Thangamma (the predecessor-in-title of the 3rd defendant, and Ammu Amma (the predecessor-in-title of the plaintiff) were widows of two brothers, Kutty Chetty and Ayyavu Chetty, respectively. Kutty Chetti predeceased his brother Ayyavu.

The question, therefore, is whether the plaintiff is entitled to the whole property subject to the mortgage and as such entitled to redeem the whole of it, or whether the 3rd defendant is entitled to a moiety of the property and to resist the plaintiff's suit to that extent. This depends upon Thangamma's title to a moiety of the property and that again upon whether Ayyavu Chetty, was sole owner of the property (as the Munsif held) or whether (as the Subordinate Judge held) Ayyavu Chetti and his brother's widow, Thangamma, were each interested in the *jenm* title of the property as members of a *tarwad*. According to the Munsif, Thangamma as the widow of a deceased co-parcener was entitled only to maintenance as against Ayyavu Chetty or his widow.

The point on which the two lower Courts in fact differ is as regards the weight to be given to the evidence tending to show either that Ayyavu Chetty was a follower of the Marumakatayam System, or that he followed the ordinary Hindu Law. This evidence is referred to in paragraph 7 of the Munsif's judgment and paragraphs 9 and 10 of the Subordinate Judge's judgment.

It is argued before us that the Subordinate Judge's finding in favour of the 3rd defendant is opposed to his written statement in which it is alleged that Thangamma "was an heir of the deceased Ayyavu Chetty." The expression "heir" is a translation, I am informed, of the Malayalam word which (as appears from the dictionary) is not of very precise significance and does not necessarily preclude the idea of Thangamma having been entitled to the property jointly with Ayyavu in his life-time. The other paragraphs of the written statement, however, seem to me to make it sufficiently clear that Thangamma and Ammu were alleged by the written statement to stand on a footing of equality, which could not be if one was the widow of the last male owner and the other of a person whose interest in the property had devolved upon a co-parcener. The sixth paragraph of the written statement refers to the "conduct of the plaintiff," which is evidenced by the documents referred to in the said paragraphs of the Subordinate Judge's judgment.

What has, therefore, to be decided by us may be thus formulated—adapting the words of Lord Halsbury:—Whether the question that Ayyavu Chetty was not the sole owner of the property, "was open upon the proceedings sufficiently to give each Court below the right to form a judgment upon the matter." *Sayad Muhammad* v. *Fatteh Muhammad* (1). In that case their Lordships' answer was in the affirmative,

(1) 22 C. 324 at p. 331; 22 I. A. 4. (P. C.).

though the contention taken before them (*viz.* "the question of the capacity of the Diwan") "was not prominently raised, at all events in the first instance."

Whether or not a matter is "open upon the proceedings sufficiently to give the Court the right to form a judgment upon it" must, it is evident, be dependant upon the particular facts and upon the allegations in, and form of, the pleadings. As my learned brother takes a view different from mine, it is necessary to refer to the authorities by which I am bound to guide myself.

In a case already cited, Lord Halsbury delivering the opinion of the Privy Council says: "Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues."

This being the object of pleadings, I must allude to four considerations which are beyond controversy: (1) "Allowance must be made for, what our experience tells us exists here, a very inaccurate mode of setting forth the claims of persons and the answers or defences to them. It would be quite incorrect to look at a plaint in these Courts in the same manner as a declaration in an English Court." *H. H. The Nawab Nazim of Bengal* v. *Amrao Begum* (2). These words of Sir Richard Couch, C. J., were cited and followed in *Natha Singh* v. *Jodha Singh* (3). See also *Kunj Behari* v. *Keshav Lal* (4) (Jenkins, C. J., and Betty, J.), *Ganoo* v. *Sidheshwar* (5).

(2) "The responsibility of clearly perceiving and raising points, which arise upon the pleadings and the evidence and the proper adjudication of which is essential for the ends of justice, rests on the Court as much as on the parties or their Pleaders." See the observations of Westropp, C. J., in *Apaya* v. *Rama* (6) and of the Privy Council in *Chowdhri Murtaza Hussein* v. *Bechunnissa* (7); *Sayad Muhammad* v. *Fatteh Muhammad* (1); per Chandavarkar, J., delivering the judgment of himself and Jenkins, C.J., in *Nathu Bhai* v. *Mulchand* (8). See also *Ganoo* v. *Sidheshwar* (5).

(3) It would seem to follow, therefore, that in regard to the construction of pleadings the primary (though not the only) consideration is, not so much what a careful draftsman would intend to express if he had used the words in question, nor what meaning the Court or the opposite party ought to have put on these words, but in what sense, as a matter of fact, the words were understood. The Court "must look not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was treated in the lower Courts:" *Rajah Rup Singh* v. *Rani Baisni* (9). See also *Chowdhri Murtaza Hussien* v. *Bechunnissa* (7).

(4) "Courts do not exist," said Bowen, L. J., "for the sake of discipline, but for the sake of deciding matters in controversy: *Cropper* v. *Smith* (10). This was cited and followed by Bannerji, J., in *Dhani Ram* v. *Bhagirath* (11) and Norris, J., "entirely concurred with his observations" (page 706). Bowen, L. J., in *Cropper* v. *Smith* (10) was dissenting from his colleagues. But the difference in the views of the learned Judges does not seem to have been based on any difference as to the principle in question.

The principles of decision that are applicable cannot indeed be disputed. The difficulty lies in applying them. I will for this purpose refer to *Sayad Muhammad* v. *Fateh Muhammad* (1) and *Chowdhri Murtaza Hussein* v. *Bechunnissa* (7), which I have already cited, and to a third Privy Council decision, *Madhopersad* v. *Gajadhar* (12).

In the case last cited, the plaintiff could not obtain proprietary possession as claimed by him, unless he proved (1) consideration, (2) notice of foreclosure. The District Judge decreed the plaintiff's suit. In appeal the Judicial Commissioner decided both points against the plaintiff. The Privy Council did not accept the Judicial Commissioner's

(2) 21 W. R 59 at p. 60.
(3) 6 A. 406; A. W. N. (1884) 140.
(4) 28 B. 567 at p. 572; 6 Bom. L. R. 475.
(5) 26 B 360; 4 Bom L. R. 58.
(6) 3 B. 210 at p. 213.
(7) 3 I. A. 209 at p. 215; 26 W. R. 10.
(8) 3 Bom. L R 535.
(9) 7 A. 1 at p 11; 11 I A 149.
(10) (1884) 26 Ch D 700; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R 60.
(11) 22 C. 692 at p. 712
(12) 11 C. 111; 11 I. A. 186 (P. C); 8 Ind. Jur. 694; 4 Sar. P. C. J. 574; Rafique and Jackson's P. C. No. 85.

finding as to the absence of consideration (page 116): "It was contended on the part of the appellant that, inasmuch as the defendants had in the Court below rested their case solely on the absence of consideration for the mortgage and had admitted in their written statement that they received some notice of foreclosure, and no issue as to the validity of the foreclosure had been raised in the Court of the District Judge, the defendants were precluded from questioning the regularity of the foreclosure proceedings before the Judicial Commissioner, although they took the point in their grounds of appeal; and that the Commissioner had no power to inquire into those proceedings:" pages 116 and 117. Their Lordships held that section 8 of Regulation VII of 1806 imperatively required notice, and then said at page 118: "To construe the pleadings in the District Court, as a binding admission that the respondents had received due notice, according to the Regulation of 1806, in the foreclosure proceedings, would be to apply to pleadings in India a stricter construction than is usual. The Judicial Commissioner had the subject brought before him by the grounds of appeal; he had power to take additional evidence, or to frame a new issue, which it is to be presumed that he would have done had it been necessary, and had the parties desired it. In their Lordships' judgment he had, at the least, a discretion to inquire into the subject if he thought fit, and they are not prepared to say that he exercised that discretion so wrongly that his judgment ought to be reversed. Although the Vakil for the mortgagors appeared before the Judicial Commissioner, argued the question of foreclosure, and adduced evidence upon it, it does not appear that any application was made for the settlement of an issue on this question, nor was it suggested, nor is it now suggested, that further evidence of the regularity of the foreclosure proceedings was obtainable."

On such a point as I am considering, no two cases can be on all fours. I note, for instance, that in the case last cited the fact which the plaintiff had to prove was, by the Regulation, "imperatively prescribed as a condition precedent" to the plaintiff's suit. In the present case it was a condition precedent to the plaintiff's success to show that Ayyavu Chetty, his predecessor-in-title, was sole owner of the property. There is no doubt a distinction between the two cases and Order VII, rule 5, was not a part of the Civil Procedure Code when the case of *Madhopersad* v. *Gajadhar* (12) was being considered by the Privy Council. But the question is, how the written statement should be construed for the purpose of Order VIII, rules 2—5, and section 58 of the Indian Evidence Act. On this question it seems to me that the cases I have cited are a sufficient guidance.

In this particular case I find nothing to indicate that the plaintiff was in any way taken by surprise: Order VIII, rule 2. No objection is shown to us as having been taken to evidence being adduced on the point. Both the lower Courts considered it, and the District Munsif decided it in favour of the plaintiff, the Subordinate Judge against him. The grounds of appeal to the lower Appellate Court fully and explicitly cover it. Had the objection been taken to its being raised in the first Court or had either of the lower Courts itself drawn the attention of the parties to the statement in question [See *Nathu Bhai* v. *Mulchand* (8) and the cases above cited], such amendment as might have been "necessary for the purpose of determining the real questions in controversy between the parties," might have been allowed or ordered: Order VI, rule 17.

It seems to me for these reasons that the appellant cannot succeed on the contention that the question of whether Ayyavu Chetty was sole owner could not have been considered by the lower Appellate Court.

The only other question argued before us was that assuming that the point was open for consideration, Exhibits I, II and III are of no avail to the defendant, because they are consistent with the plaintiff's case, Thangammal having been made to join in them for greater caution. The point is one for the consideration of a Court adjudicating upon facts. It cannot be said that there was no evidence on which the Subordinate Judge could have found as he did; and I do not understand the appellant to contend before us that there was no evidence for the finding.

While, however, the lower Appellate Court's findings of fact must, in my opinion, prevail, I do not think that the dismissal of

the suit was the proper decree to make. The 3rd defendant "offered to partition and surrender one-half of the lands on receipt of the half of the *kanom* amount" (paragraph 5 of his written statement). The decree should, therefore, in my opinion, have provided for redemption on those terms and ought to be amended to that effect. The plaintiff will have three months for payment. The parties will have their proportionate costs throughout.

Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1100 OF 1909.

May 2, 1914.

Present:—Mr. Justice Shah Din.

AMAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHOLA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession -Title, proof of—Burden of proof—Revenue Records, entry in—Boundary dispute, proceedings in—Title, test of.

In a suit for possession it is for the party who comes into Court to oust the other party to establish the alleged superior title.

The proceedings of a Revenue Court demarcating the boundary lines of villages are not the only test of title to any land included in a village.

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 19th July 1909, reversing that of the Subordinate Judge, Jullundur, dated the 31st March 1909, dismissing plaintiffs' claim.

Mr. *Santanam*, for the Appellants.

Mr. *Badr-ud-Din Kureshi*, for the Respondents.

JUDGMENT.—The facts of this case are fully stated in the judgment of the Subordinate Judge and it is unnecessary to repeat them here. The Counsel for the appellants has contended that the Divisional Judge is wrong in stating that the plots in dispute, 41 *kanals* 4 *marlas* and 67 *kanals* 8 *marlas*, had gone over to the Domeli side as the result of avulsion, and I find that there is no satisfactory evidence on the record in support of the Divisional Judge's view on this point. The Subordinate Judge says that the land on both sides of the *nala* is subject to the action of the water and used to disappear from one side and re-appear on the other by a gradual and imperceptible process, but that in no case did the land ever go from one side to the other by avulsion in the shape of a *gatti*. Counsel for the repondents has been unable to show that the Divisional Judge has stated the facts correctly on this point.

It has been further urged by the appellants' Counsel that the Divisional Judge has misunderstood his clients' position and the decision of the Subordinate Judge when he says that the principal plea advanced by the defendants is one of adverse possession and that the Subordinate Judge seems to have dismissed the suit mainly on this ground.

What the appellants substantially pleaded in the first Court was that the land in suit had for the last 50 years formed part of their village Domeli and been in their possession as owners, though they also pleaded that if the respondents were proved to have been the owners of the land, they had lost their ownership by reason of adverse possession on the part of the appellants.

The record shows that the appellants have been in possession of the land in suit ever since it has been brought under cultivation, *i.e.*, for a period of between 20 to 30 years, and in the Settlement Records of the Kapurthala State of the years 1872-73 and 1891-92, the appellants have been recorded as owners of the land. So far as the Settlement Records of the Jullundur District are concerned, although both the plots in suit were apparently entered as part of the Musapur Estate in the first Settlement of 1850-51, in the revised Settlement of 1884-85 the plot of 67 *kanals* and 8 *marlas* was not so shown. Of the plot of 41 *kanals* 4 *marlas*, one-half was shown as *banjar* in the Settlement of 1884-85 and belonging to the proprietors of Musapur, but the possession of the cultivated portion has always remained with the appellants.

The appellants having been in possession of the whole land for a long series of years, it is for the respondents, who have come into Court as plaintiffs and who want to oust the appellants from their possession, to establish their alleged superior

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title. They rely in support of their title upon the demarcation of the boundary line between the two villages by the Revenue Officers of the Jullundur District and of the Kapurthala State in 1905, but the boundary line as fixed by those officers was not accepted as correct by the appellants, and it is not the only test of title to the land in dispute, as held by the Divisional Judge. It is not even the best test of title, because it is not quite clear from the proceedings of the Revenue Officers of the Jullundur District and the Kapurthala State on what *data* their decision was based and what authority they had for coming to a decision so as to settle the question of title to the land, which had been debatable ground between the two villages for a long series of years, but of which the possession had all along remained with the appellants.

I hold that the plaintiffs have failed to prove their title to the land in dispute, and I accordingly accept this appeal and reversing the decree of the Divisional Judge, restore that of the first Court with costs.

Appeal accepted.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1096 OF 1910.

July 14, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

SHUJA-UD-DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat AISHABI—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (f)—Suit for administration of estate—Suit for accounts—Valuation for jurisdiction and Court-fees identical

No doubt a suit for administration of an intestate estate is in some respects a suit of a unique kind, but after all it has many features in common with a suit for winding-up an insolvent estate, or a suit for dissolution of partnership with taking of accounts and allotment to each partner, after all debts, etc., are settled up, of his net share. In all of these suits the taking of accounts is a prominent and necessary feature and the mere fact that, after accounts have been taken, the Court, *ex necessitate rei*, acts in winding-up on rather different lines in the different classes of cases, does not take any of them out of the purview of the 'suit for accounts.'

A suit 'for an account of any property and for its due administration' falls within the purview of section 7 (*iv*) (*f*), Court Fees Act. The valuation of such a suit for the purposes of jurisdiction and Court-fees is the same.

First appeal from the decree of the District Judge, Delhi, dated the 29th August 1910, appointing a Receiver and granting a preliminary decree.

Mr. *Santanam*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Abdul Rashid*, for Mr. *Shah Nawaz*, for the Respondent.

JUDGMENT.—One Shahab-ud-Din died intestate on 1st December 1909. On 16th December his eldest son, Shuja-ud-Din (present defendant No. 1), applied to the District Court, Simla, for Letters of Administration, and on the following day that Court appointed him *ad interim* Receiver. On 18th February 1910 his widow, present plaintiff, entered a *caveat* and nine days later she filed the present suit in the Court of the District Judge, Delhi, asking the Court to administer the estate of the late Shahab-ud-Din and, *inter alia*, to give her her $\frac{1}{8}$th share in it. In different parts of her plaint she valued at Rs. 2,80,000 the property left by deceased, and at Rs. 15,000 the suit "for purposes of jurisdiction" and at Rs. 130 for purposes of Court-fee; and on her plaint she affixed a Court-fee stamp of Rs. 10. Apart from their pleas on the merits and on other points, defendants urged that Court-fee should be *ad valorem* on Rs. 15,000, the value placed by plaintiff herself on her suit for jurisdiction purposes; and the Court below overruled the plea. It did not hold that Rs. 10 was the proper ultimate Court-fee; but in a way, not easy to follow, while applying Article 17 (*vi*), Schedule II, Court Fees Act, which prescribes a fixed fee of Rs. 10, it went on to say that, as parties admitted, "Court-fees will have to be paid in full from the estate or otherwise, after the estate has been ascertained." The Court then proceeded with the case on the merits and having appointed Lala Mohan

Lal, Pleader of Simla, Receiver, gave plaintiff "the usual preliminary decree." This was on 28th August 1910, sixteen days before which date the Simla Court had stayed proceedings in defendant No. 1's case before it.

In appealing here defendants Nos. 1 and 2 again raise the question of Court-fee, and after hearing arguments we are constrained to allow their contention. We are unable to see any reason why such a suit as this should not be taken to be a suit "for accounts" within the meaning of the phrase in section 7 (*iv*) (*f*), Court Fees Act. The phrase is quite general ; and, though the most common and familiar suits for accounts are suits for taking of partnership accounts and by principals against agents, we fail to see why a suit of the kind dealt with in Order XX, rule 13 (1), Civil Procedure Code, which is exactly the suit we have here—*i. e.*, "for an account of any property and for its due administration,"—does not fall within the purview of section 7 (*iv*) (*f*), Court Fees Act, aforesaid. The distinction the lower Court and Mr. Shafi (for plaintiff-respondent) seek to draw between a "suit for accounts" and a suit "for an account of any property" seems to us sophistical ; and it follows that, inasmuch as the suit falls under the section and clause of the Court Fees Act just quoted, it cannot be governed by Article 17 (*vi*), Schedule II, of that Act, which runs: "Every other suit, where it is not *possible* to estimate at a money-value the subject-matter in dispute, *and which is not otherwise provided for by this Act.*" Then looking at section 7 (*iv*), aforesaid, we see that stamp is to be paid *ad valorem* on "the amount at which the relief sought is valued in the plaint or memorandum of appeal." Here plaintiff herself valued the suit for jurisdiction at Rs. 15,000, and, if we turn to section 8 of the Suits Valuation Act, 1887, we see that her valuation for Court-fee at Rs. 130 must be ignored. The valuation for both purposes must be the same, and clearly the valuation for jurisdiction, which led the lower Court to take the case on its own file and resulted in a first appeal to this Court, holds the field. Our finding is that for all purposes this suit must be taken as one of Rs. 15,000 value, and plaintiff should have paid Court-fee of Rs. 625 on that amount. Similarly, defendants-appellants, who were quite justified in the circumstances in appealing on a Rs. 10 stamp, will have to increase their Court-fee also to Rs. 625.

The above is the way we look at the case. We have looked at rulings quoted by Mr. Shafi, but they do not constrain us to change our opinion in any way. We are well aware of the views expressed in *Sardar Dial Singh* v. *Beli Ram*(1); *Anonymous Case* (2) and so forth, and we have no quarrel with the proposition that fiscal enactments should, where ambiguous, be construed in favour of the subject ; but here we see no ambiguity or difficulty. We are also aware that in *Musammat Rukman* v. *Brij Mohan Lal* (3) an administration case suit and appeal alike were apparently heard on a Rs. 10 stamp without demur on the part of defendants or Courts ; but the question agitated before us was not there raised and the ruling, therefore, is no authority.

No doubt a suit for administration of an intestate estate is in some respects a suit of a unique kind, but after all it has many features in common with a suit for winding-up an insolvent estate, or a suit for dissolution of partnership with taking of accounts and allotment to each partner, after all debts, etc., are settled up, of his net share. In this connection we would refer to Civil Procedure Code, first Schedule, Appendix A, Pleadings; (3) Plaints, Forms 41, 42, 43 and 49; (4) Written Statements, Form 14; Appendix D, Decree, Forms 17, 18, 19, 20, 21, 22 (Final decree in partnership case). In all of these the taking of accounts is a prominent and necessary feature ; and the mere fact that, after accounts have been taken, the Court, *ex necessitate rei*, acts in winding-up on rather different lines in the different classes of cases, does not take any of them out of the purview of the aforesaid phrase, suit "for accounts."

Plaintiff is said to be poor. Her learned Counsel asks for three months' time for payment and we grant this prayer. Within three months from to-day plaintiff must make up the Court-fee on the plaint to Rs. 625. If she does so, defendants-appellants

(1) 51 P. R. 1897.
(2) 10 C. 272 at p. 282.
(3) 68 P. R. 1881.

must be prepared on or before next date of hearing to make up *their* Court-fee to a similar figure, if he wishes his appeal to be heard further. If plaintiff fails, no doubt, her suit will have to stand dismissed. If she pays and defendants-appellants fail to pay, their appeal will stand dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 118 OF 1913.

November 10, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

PACHI—APPELLANT

versus

CHARNI AND ANOTHER—RESPONDENTS.

Lunatic—Person of weak memory or weak mental strength, whether of unsound mind.

A man of weak memory or of only ordinary mental capacity or even mere weak mental strength cannot be called an idiot or a man of unsound mind.

Dost Muhammad Khan v. *Ashraf Ali*, A. W. N. (1905) 8; *Rameshwar Tewari* v. *Nageshwar Tewari*, A. W. N. (1905) 43; 2 A. L. J. 154; *Mazharuddin Khan* v. *Serajuddin Khan*, 4 C. L. J. 115, referred to.

Appeal against the order of the District Court of South Malabar, dated the 30th of January 1913, in Civil Miscellaneous Petition No. 475 of 1912.

Mr. *K. R. Subramania Sastri*, for the Appellant.

Messrs. *C. Madhavan Nair* and *K. Govinda Marar*, for the Respondents.

JUDGMENT.—We think that the District Judge was justified on the evidence in coming to the conclusion that the adjudged lunatic has become capable of managing not only himself but also his affairs. No doubt the burden of proof lies heavily on the person who alleges that a person who had been adjudged a lunatic has recovered from his unsoundness of mind, but the evidence in this case is practically all one way, that is, to the effect that there has been a recovery of soundness of mind.

There are, no doubt, congenital idiots as also idiots who have become such through senile decay and idiots who have become such through grief, etc. Such idiots are sometimes capable of managing themselves and are harmless, but are unable to manage any affairs. The medical witness in the case merely says that old age has enfeebled the mind of the 1st respondent and he is not capable of managing "big affairs," but a man of weak memory or of only ordinary mental capacity or even mere weak mental strength cannot be called an idiot or a man of unsound mind [see the cases in *Dost Muhammad Khan* v. *Ashraf Ali* (1) and *Rameshwar Tewari* v. *Nageshwar Tewari* (2). The latter case is reported also in 2 A. L. J. 154. See also *Mazharuddin Khan* v. *Serajuddin Khan* (3)].

An objection not taken in the memorandum of appeal was argued by the appellant's learned Vakil before us. That objection is that the application to the lower Court was made under section 21 of the repealed Act XXXV of 1858, instead of under section 62 of the new Act IV of 1912 which had come into force in March 1912 before the application was filed in October 1912.

It is, however, a well-understood legal rule that all references in documents to provisions in repealed Acts provided those provisions have been re-enacted in the repealing Act, might be construed as references to the corresponding re-enacted provisions. (See analogous rules in section 8 of the General Clauses Act, X of 1897, and section 18 of the Madras General Clauses Act, I of 1891.) The technical objection again merely requires a formal amendment of the petition, and we think it equitable to deal with the case on the footing that such amendment has been made.

No other ground has been argued and we dismiss the appeal with costs.

Appeal dismissed.

(1) A. W. N. (1905) 8.
(2) A. W. N. (1905) 43; 2 A. L. J. 154.
(3) 4 C. L. J. 115.

PREM SINGH *v.* MOKAND SINGH.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 700 OF 1911.

April 11, 1914.

Present:—Mr. Justice Chevis.

PREM SINGH AND ANOTHER—DEFENDANTS—PETITIONERS

versus

MOKAND SINGH—PLAINTIFF—RESPONDENT.

Adverse possession—Dharmsala—Mahant *leaving no legal representative—Founder's right to oust trespasser—Mahant's possession, when becomes adverse to its founder.*

In the absence of a duly appointed *Mahant* of a *dharmsala*, its founder is entitled to oust a trespasser.

The mere long possession by a *Mahant* of a *dharmsala* does never become adverse to its founder, unless the former does some overt act repudiating the latter's title for over 12 years.

Petition, under section 70 (1) (*a*) and (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the decree of the Divisional Judge, Amritsar Division, dated the 24th February 1911, affirming that of the District Judge, Amritsar, dated the 30th May 1910, decreeing plaintiff's claim.

Mr. *Pestonji Dadabhai*, for the Petitioners.

Mehta *Bahadur Chand* and *Lala Hukam Chand* and Bhagat *Govind Das* (for Rai Bahadur Mr. *Sukh Dial*), for the Respondent.

JUDGMENT.—A return has now been made to my order of remand dated 30th November 1911 *. The lower Courts find that the plaintiff's claim to be regarded as the *Mahant* is not made out, but that in the absence of a *Mahant* the plaintiff as owner is entitled to oust a trespasser.

That plaintiff's claim to be regarded as *Mahant* must fail seems to me quite clear. The death of Rangi Ram Singh was the first occasion on which a *Mahant* of this particular *dharmsala* died without leaving a *chela* to succeed him, so there is obviously no custom applicable to this particular *dharmsala* to govern the case, and in the absence of any appointment of the plaintiff as *Mahant* by the *bhek*, I am not prepared to recognize the plaintiff as *Mahant* simply on his own assertions that he can make himself or any one else the *Mahant*.

The next question is whether plaintiff can take possession as owner of the *dharmsala*. There seems to me good evidence that Guru Bhag Singh owned the *dharmsala*. Not only did Rangi Ram Singh clearly own this in the document which he executed on 20th *Baisak*, *Sambat* 1917, but the award filed by the arbitrators in the civil suit between Rangi Ram Singh and the sister (*Guru bahan*) of Guru Jaswant Singh points to Guru Bhag Singh having performed the funeral ceremonies of Guru Jaswant Singh, and installed Rangi Ram Singh as the new *Mahant*. In the above suit Rangi Ram Singh made a statement on 6th June 1859 in which he said Man Singh was son of Bhag Singh. And at the former hearing in this Court it was admitted before me by Counsel for the defendant that plaintiff was the natural son of Man Singh, though it was denied that he was his *chela*. The plaintiff has, therefore, proved his natural descent from Guru Bhag Singh, and even though he has not proved his spiritual descent I think that in the absence of proof that Guru Bhag Singh has left any other spiritual descendants, plaintiff has a right to oust a trespasser. The first Court speaks of the property as *waqf*. It may be *waqf* to a certain extent, but I do not think there are any sufficient grounds for considering that the rights of ownership have entirely ceased to exist.

Then it is urged that Rangi Ram Singh's possession should be regarded as adverse from the date of Guru Bhag Singh's death. But Rangi Ram Singh clearly recognized Guru Bhag Singh as the owner, and himself as holding as *Mahant* only. His possession was not adverse to Guru Bhag Singh and I see no reason to suppose that his possession was adverse to Man Singh on Bhag Singh's death ; I think Rangi Ram Singh's possession was never adverse, and as this suit has been brought within 12 years of Rangi Ram Singh's death I do not regard it as time-barred.

Lastly, it is urged on defendant's behalf that he is not liable to be ousted except by a *Mahant*, and that no *Mahant* has yet been appointed. But though I doubt whether the plaintiff as owner could turn out a *Mahant*, I see no reason whatever to doubt that the plaintiff can, in the absence of a *Mahant*, oust the defendant who is a mere trespasser.

[* See *Prem Singh* v. *Mokand Singh*, 13 Ind. Cas. 62; 30 P. W. R. 1912; 22 P. L. R. 1912 -*Ed.*]

PONNUSAWMY IYER v. PERMAYE.

The applicantion for revision is dismissed with costs.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2199 OF 1912.

October 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PONNUSAWMY IYER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PERMAYE (DIED) AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Possession of co-heir—How far adverse to his co-heirs—Possession when referrable to lawful title, whether can be treated as of trespasser.

Where one of several heirs takes possession of an inheritance, his possession is not adverse to his co-heirs.

Khadersa Hajee Pappu v. *Puthen Veettil Ayissa Ummah*, 6 Ind Cas 50; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447; 34 M. 511, followed.

If the possession of a person can be traced to a lawful title, possession will be referred to such title and would not be treated as the possession of a trespasser.

Where a widow alienated by a deed of gift the property she had got by inheritance shortly before her death in 1895 to *M*, one of four presumptive reversioners who were entitled to succeed to the said property after her death, and he alienated the same to the 1st defendant in 1899 and the suit was brought in 1909 by an alienee from the other reversioners, who sold their shares to him, to recover possession of the said shares:

Held, that the possession of *M* from the death of the widow to 1899 was not adverse to the other reversioners and that, therefore, the 1st defendant was not entitled to tack on *M*'s possession to his own.

Second appeal against the decree of the Court of the Subordinate Judge of Negapatam, in Appeal Suit No. 770 of 1910, preferred against that of the Court of the District Munsif of Tiruvalur, in Original Suit No. 338 of 1909.

Mr. *G. S. Ramachandra Iyer*, for the Appellants.

JUDGMENT.—The plaintiffs are the appellants. They are the purchasers of $\frac{3}{4}$ths share of certain lands which belonged to Arumuga Padayachi. Arumuga Padayachi's widow Anjalai died in 1895, leaving four grandsons by her two daughters. One of the daughters had only one son Manikam and the other daughter had three sons. *Prima facie* all the four grandsons inherited equal shares as the reversioners in Arumuga Padayachi's properties, *i.e.*, each $\frac{1}{4}$th share. One of three sons by one daughter died and his share survived to his two brothers. They sold their $\frac{3}{4}$ths share in 1899 to the plaintiff. Manikam, the other grandson, however, claimed the whole property under a deed of gift from his grandmother Anjalai executed in 1895 shortly before Anjalai's death, and he sold it in 1899 to the first defendant's son, who is now dead and whose rights have now vested in the first defendant. Anjalai had no right to make a gift in 1895 to one of her four grandsons and her gift is clearly invalid. It also appears that Anjalai inherited the property, not as heir of her husband, Arumuga Padayachi, but of her son, Govindan, who survived her husband but predeceased her. Whether Anjalai took the property as mother of Govindan or as widow of Arumuga Padayachi, she was equally incapacitated for making a valid gift beyond her life-time. The lower Courts have dismissed the plaintiffs' suit brought in 1909 as barred by limitation, because Manikam enjoyed the property from 1895 as donee from Anjalai till 1899 when he sold it to the first defendant's son, and the first defendant and the first defendant's son (before her) have been enjoying it from 1899 (from 10 years before suit) and the two periods together make up more than 12 years. It has been held in *Khadersa Hajee Pappu* v. *Puthen Veettil Ayissa Ummah* (1) that when one of several heirs takes possession of an inheritance, his possession is not adverse to his co-heirs. It is also an elementary principle of law that if the possession of a person can be traced to a lawful title, possession will be referred to such title and would not be treated as the possession of a trespasser. As Manikam's possession on Anjalai's death could be traced to his lawful title as one of the reversioners after Anjalai's death (assuming, of course, that Anjalai's son's heirs after Anjalai's death were his sister's sons), Manikam's possession on

(1) 6 Ind. Cas. 50; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447; 34 M. 511.

Anjalai's death should be treated as the possession of one of the lawful heirs and not as that of a person who holds under the title created by Anjalai's gift-deed, which was invalid beyond her life-time. In this view, Manikam's possession between 1895 and 1899 was not adverse to the plaintiff's vendors. Hence the period of his possession between Anjalai's death and the sale-deed to the first defendant's son cannot be tacked on to the possession of the first defendant's son and of the first defendant after 1899.

The lower Courts' decrees are reversed and the suit is remanded to the Court of first instance for re-trial. If the District Munsif finds that the plaintiffs have made a *bona fide* mistake in believing that Govindan did not survive Arumuga Padayachi, he will allow them to amend the plaint by alleging (in the alternative) that the plaintiffs' vendors and their brother Swaminadhan were reversionary heirs of Govindan if Govindan survived Arumugam. If the defendants deny that the plaintiffs' vendors are the heirs of Govindan, the necessary issue or issues will be raised and decided. The appellants' Vakil admits before us on behalf of his clients that Govindan was the last male owner and was not disqualified from inheriting his father's estate and that the mesne profits are only one rupee per year. The costs hitherto incurred by the defendants must in any event be paid by the plaintiffs and they must themselves bear the costs incurred by them in the lower Appellate Court and in this Court. Costs of plaintiffs in the first Court and the costs (if any) hereafter incurred by the defendants will abide.

Decrees reversed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 130 OF 1912.

November 9, 1914.

Present—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

SOMAI AMMAL—PLAINTIFF—APPELLANT

versus

VELLAYYA SETHURANGAM (DIED) AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Landlord and tenant—Lease subsisting—Suit by lessor against trespasser, maintainability of.

A landlord, though he has given a lease to a third person, is entitled for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser.

Ramanadan Chetti v. *Pulikutti Servai*, 21 M. 288; 8 M. L. J. 121, distinguished.

Zamindar of Vizianagaram v. *Behara Suryanarayana Patrulu*, 25 M. 587 at p. 597; 12 M. L. J. 249; *Ambalavana Chetty* v. *Singaravelu Mudaliar*, 15 Ind. Cas. 146; (1912) M. W. N. 669 at p. 680, *Narainsawmy Naidu Garu* v. *Yeeramali Ram Krishnayya*, 5 Ind. Cas. 479; 7 M. L. T. 119; (1910) M. W. N. 221 and 280; 33 M. 499 at p. 501, *Bissessur Dabeea* v. *Baroda Kanta Roy Chowdhry*, 10 C. 1076, *Sarat Chandra Sinha* v. *Nritya Gopal Biswas*, 8 Ind. Cas. 47; 13 C. L. J. 284, referred to.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 85 of 1911, preferred against that of the Court of the District Munsif of Dindigul, in Original Suit No. 666 of 1908.

Messrs. *T. R. Krishnaswami Aiyar* and *K B. Ranganatha Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

HANNAY, J.—The plaintiff sued for a declaration that the suit lands belonged to her and for recovery of possession from the defendants. The District Munsif gave plaintiff a decree as prayed, but on appeal by the 1st defendant the District Judge dismissed the suit on the ground that at the date of suit the plaintiff was not entitled to possession, as there was at that time a lease admittedly outstanding in favour of plaintiff's second witness. The District Judge relied upon the decision in *Ramanadan Chetty* v. *Pulikutti Servai* (1). In appeal before us it is urged that the plaintiff has not admitted that there was an outstanding lease at the date of suit, that the lower Appellate Court ought not to have dismissed the suit on a point not raised by the defendants either in the written statement or at the trial and that even if there was an outstanding lease in favour of plaintiff's second witness, plaintiff was still entitled to recover possession.

There is in fact no admission by the plaintiff in this case that the lease, which she says, she granted to her second witness was subsisting at the date of suit. We agree with the contention that the 1st defendant ought not to have been allowed

(1) 21 M. 288; 8 M. L. J. 121.

to rely in appeal for the first time on a point not raised before the District Munsif which required an investigation into facts, but which plaintiff had not an opportunity of meeting by adducing evidence.

With reference to the 3rd ground above mentioned, the decision in *Ramanadan Chetti* v. *Pulikutti Serrai* (1) was relied upon by the lower Appellate Court. That decision may be distinguished from the facts of the present case, on the ground that it was a case where the tenant had been ousted by a trespasser after having been placed in possession and was apparently unwilling that the landlord should recover possession as he was colluding with the trespasser, whereas in the present case (assuming for the purpose of the argument that the lease to plaintiff's second witness was subsisting at the time of suit) the tenant had not been put in possession at all but was anxious to obtain possession. The evidence of plaintiff's second witness, Parameswara Iyer, is clear on that matter. In these circumstances, the plaintiff's tenant was entitled to require the plaintiff to place him in possession by virtue of section 108 (*b*) of the Transfer of Property Act and the case of *Zamindar of Vizianagaram* v. *Behara Suryanarayana Patrulu* (2) is authority for the proposition that a registered lease, like that in the present case (Exhibit B), operates in the absence of a contract to the contrary as an executory contract to deliver to the lessee such possession as the nature of the property admits, for breach of which contract the plaintiff would be liable in damages to the lessee. In these circumstances, I think that it was open to the landlord (plaintiff) to sue the trespassers in this case to recover possession, notwithstanding the existence of the lease Exhibit B, if for no other reason than to escape liability for such damages. The observations of Sundara Aiyar, J., in the case of *Ambalavana Chetty* v. *Singaravelu Odayar* (3) and of Abdur Rahim, J., in the case of *Narainsawmy Naidu Garu* v. *Veeramali Ram Krishnaya* (4) support generally the view that such a suit as the present is maintainable. In the former case Sundara Aiyar J., after citing *Bissessuri Dabea* v. *Baroda Kanta Roy Chowdry* (5) and *Sarat Chandra Sinha* v. *Nritya Gopal Biswas* (6) as authorities for the view that a landlord can claim against a trespasser that possession should be given to his tenant, observed that there is no inflexible rule of law that a trespasser can refuse to give up possession to a plaintiff simply because a third party may be entitled to possession as against him (the plaintiff). In the later case Abdur Rahim, J., was inclined to the view that if the land is already in the possession of a third person to the knowledge of the lessor and lessee, it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third party from possession thereof, even though no express request is made by the lessee. In these views I concur.

On all the three grounds, therefore, I think this appeal must be allowed. I would set aside the decree of the lower Appellate Court and remand the appeal for disposal upon the issues already framed. I would order costs to abide the result.

SADASIVA AIYAR, J.—I agree that this case should be remanded to the lower Appellate Court for the reasons given by my learned brother for holding that a landlord, though he has given a lease to a third person, is entitled for the purpose of putting his lessee in possession to maintain a suit to eject a trespasser. I have nothing to add to those reasons. The plaintiff's right to eject the defendant cannot, in my opinion, be defeated simply because the plaintiff does not disclose in his plaint the fact that a lessee from him is entitled to get possession from him or the fact that the purpose of his suit is to put such lessee in possession. The defendant can succeed only if he shows that the plaintiff or his lessee has no right to possession, because the defendant is himself entitled to posession either through a title paramount to the plaintiff or derived from the plaintiff or his lessee or that the lessee is unwilling that the plaintiff should get possession during the term of the lease. I do not think that the general expressions in some of the cases quoted by the re-

(2) 25 M. 587 at p. 597; 12 M. L. J. 249.
(3) 15 Ind. Cas. 146; (1912) M. W. N. 669 at p. 680.
(4) 5 Ind. Cas. 479; 33 M. 499 at p. 501; 7 M. L. T. 119; (1910) M. W. N 221 and 280.
(5) 10 C. 1076.
(6) 8 Ind. Cas. 47; 13 C. L. J. 284.

pondents' Vakil to the effect that the plaintiff to succeed in a suit in ejectment must show his present right to possession on the date of suit, are inconsistent with the above views when read in the light of the facts of those particular cases.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1597 TO 1599 AND 2246 AND 2247 OF 1912.

October 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PUSARALA SANYASI AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE GUNTUR COTTON, JUTE AND PAPER MILLS COMPANY, LIMITED, BY ITS JOINT SECRETARIES AND TREASURERS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Company—Articles of Association—Allotment of shares—Allotment by Secretary and Treasurer, validity of—Acceptance of share certificate—Right to impeach—Shares subscribed to owing to fraud and misrepresentation—Right of rescission, when to be exercised.

Where the Articles of an Association do not specifically provide that the allotment of shares should be made by the Directors but, on the other hand, they provide that the general management of the Association shall be by the Secretaries and Treasurers subject to the supervision of the Directors, and that the Directors may from time to time entrust and confer upon them such of the powers, exercisable under the Articles by the Directors, as they may think fit, and the forms of application for the shares put forward the Secretaries and Treasurers as the persons to whom applications were to be made:

Held, that the allotment of shares by the Secretaries and Treasurers was valid.

Allotment is a duty primarily falling on the Directors and if the Directors have no right under the Articles to delegate this duty, then a purely ministerial officer such as the Secretary cannot allot.

Where the judgment of individual Directors is required for allotments by reason of special features, they cannot delegate.

A person to whom shares have been irregularly allotted has the right to apply to have his name taken off the register, but he cannot do so after he has accepted his share certificate.

The contract made by allotment is a contract to issue shares and when the shares have been issued and accepted, the title of the allotee becomes complete and he is in an entirely different position to that occupied by him before allotment.

The right to rescind an allotment of shares on the ground of fraud and misrepresentation must be exercised at the earliest possible moment when the allotee becomes aware of it.

As between private persons the right to rescind a contract on the ground of fraud may actually be lost by the conduct of the persons entitled to apply even within the period provided by the Statute of Limitation for the enforcement of such a right, so in the case of shareholders want of promptitude in repudiating will by reason of its far-reaching consequences always be held fatal to the claim.

Second appeals against the decrees of the District Court of Guntur, in Appeals Nos. 359, 360, 361, 278 and 277 of 1910, preferred against that of the Principal District Munsif of Guntur, in Original Suits Nos. 356, 383, 423, 361 and 359 of 1908.

Messrs. *P. Narayanamurthi* and *M. V. Krishnasawmy Aiyar*, for the Appellant.

Messrs. *K. Srinivasa Iyengar* and *T. Ramachandra Row*, for the Respondents.

JUDGMENT.—These are appeals in five cases out of 555 which were all tried together by consent by the District Munsif of Guntur. They were Original Suits Nos. 356 383, 423, 361 and 359 of 1908 in that Court. All the suits were by the respondents herein, the Guntur Cotton, Jute and Paper Mills Company, Ltd., against persons alleged to be shareholders to recover the amounts of calls due on their shares. Various pleas were raised by the defendants, but the only questions argued here are those raised by the 3rd, 4th and 5th issues which are re-stated by the lower Appellate Court in the 1st, 2nd, 3rd and 4th points for decision.

The first point is whether the defendants have been legally constituted shareholders in the plaintiff Company. It was contended on behalf of the appellants that the allotments were void by reason of their not having been made by the Directors of the Company but by the Secretaries and Treasurers, and that in consequence they were not shareholders. This argument is based on Articles 11 and 12 of the Articles of Association which have been adopted in the place of the statutory articles. Neither of these articles specifically says that the allotment must be made by the Directors. Undoubtedly allotment is a duty primarily falling on the Directors (*vide* Palmer's Company Law, 9th Edition, page 104) and if Directors have no duty under the articles to delegate this duty, then a purely ministerial officer

such as the Secretary could not allot. There is, however, no statutory provision to this effect nor is it to be found in the statutory articles. It may well be that in cases where the judgment of the individual Directors is required for the allotment by reason of special features, they could not delegate. Vide *Howard Ex parte, Leeds Banking Co., In re* (1) a case where under the deed of settlement of the Company the Directors were authorised to dispose of undistributed shares in such manner as in their opinion would best promote the interests of the Company. The Directors passed a resolution that the shares should be allotted according to the discretion of the Manager and two Directors who in fact made the allotment. This was held invalid. But the case before us is of an entirely different nature. First, Article 12 does not in terms provide that the allotment shall be by the Directors. It provides that the money which the Directors shall, on the allotment of any shares being made by them, require to be paid, shall become a debt due etc. At the highest it assumes that the allotment will be made by the Directors. Articles 114 and 115 provide that the general management of the Company shall be carried on, subject to the control and supervision of the Directors, by the Secretaries and Treasurers; while Article 116 provides that the Directors may from time to time entrust and confer upon the Secretaries and Treasurers such of the powers exercisable under the articles by the Directors as they may think fit. The form of application for the shares issued by the Company puts forward the Secretaries and Treasurers as the persons to whom applications are to be made, and not the Directors. It is in these words: "Gentlemen, I beg to inform you that I have sent the sum of Rs. I request that you would be good enough to credit the sum to my account and allot the said number of shares to me. I authorize you to place my name in the register of the members of the Company in respect of the shares which may be allotted to me." It is contended on behalf of the respondents that this is a notice to intending applicants that the Directors had delegated their powers of allotment to the Secretaries and Treasurers, and that, therefore, the applications should be sent to them and not to the Directors. Bearing in mind that all these shares were in fact allotted by the Secretaries and Treasurers, we can come to no other conclusion than that this contention is correct; and we hold that the allotment was in fact regularly made.

(1) 1 Ch. App. 561; 36 L. J. Ch. 42; 14 L. T. 747; 14 W. R. 942.

There is another answer also to the defendants' contention, namely, that they have received and retained certificates of the shares. It may be that a person to whom shares have been irregulary allotted has the right to apply to have his name taken off the register; but we have been referred to no case where this right has been allowed after acceptance of the share certificate. The contract made by allotment is a contract to issue shares and when the shares have been issued and accepted, the title of the allottee becomes complete and he is in an entirely different position to that occupied by him before allotment. *Vide* Halsbury's Laws of England, Volume 5, "Companies," paragraph 291. In view of this finding we do not think it necessary to deal with the question whether there had been a valid ratification of an irregular allotment or whether there had been a condonation of the irregularity by the applicants, both of which points were found by the lower Appellate Court and which being findings of fact would *prima facie* be binding on us.

The next point is whether the defendants were induced to apply for shares by misrepresentation and fraud practised on them by the Company. With regard to Second Appeal No. 2246, the application was sent in as late as the 12th November 1906 and the applicant has not gone into the box to state that he applied for the shares on the faith of the prospectus; and seeing that the prospectus had been issued two years before that, we cannot assume that he did so and on our finding on the first point, this appeal must fail.

It is conceded that the other four appellants applied very soon after the issue of the prospectus, and although they themselves have not gone into the box to prove that they were misled by the prospectus, a large number of applicants of the same date did prove it and the District Munsif did not

require any further evidence on the point. There being a finding of fact that they were so influenced, we could not reverse this without sending the case back for re-trial on this issue so as to give these appellants an opportunity of making that statement good. Mr. K. Srinivasa Aiyangar who appeared for the respondents did not ask us to take this course and we, therefore, accept the finding against the Company by both the District Munsif and the District Judge. The District Judge has not dealt with this question himself in detail, but states in paragraph 12 that he agrees with the lower Court's finding on the point. We think it necessary to ascertain what was the exact fraud and misrepresentation found, for reasons which will appear later. Several allegations were made, some of which were negatived by the District Munsif. But he found that false statements were orally put forward on behalf of the Company, that more than half the shares had been subscribed for and that the prospectus contained the false statement that most of the shares had been sold: *vide* paragraphs Nos. 63 to 65 of the District Munsif's judgment. On these findings he holds that the Company have circulated the above falsehood deliberately to make wrongful gain to themselves and wrongful loss to intending subscribers and that the representations were made with dishonest intention. There is no evidence that they were made to make wrongful gain to themselves or wrongful loss to subscribers. But it is contended that, on the definition of fraud in the Indian Contract Act, section 17, clause (1), this is a fraud, the existence of which makes the contract voidable at the option of the other party.

This is undoubtedly so; and the appellants would *prima facie* have a right to apply to rescind the contract and have their names removed from the register. But the nature of the fraud proved has an important bearing on the question now to be considered, namely, whether their conduct after the knowledge of this fraud had been brought home to them, is such as to disentitle them to the above relief. It is abundantly clear that these appellants received a circular, Exhibit 26-A, from certain Directors of the Company dated the 21st June 1905. This circular specifically contradicted the fraudulent misrepresentation above referred to, made various other charges against the Secretaries and Treasurers and invited the shareholders not to pay any further calls. It was followed by another similar circular from four other shareholders dated the 1st October 1906. So that it is clear that all these parties were put on notice of the fraud in the middle of the year 1905. On the 14th of September 1906, the Directors passed a resolution that share certificates should be sent to all the shareholders, and the plaintiff's first witness deposes that certificates were so sent. It is clear, therefore, that after being put on notice of the frauds, they accepted the share certificates and made no effort to repudiate the contract. Further, the appellant in Second Appeal No. 2246 wrote a letter on the 27th December 1906, Exhibit Z16, in which he asked to be made a Director; while the appellant in Second Appeal No. 1597 wrote to the Company on 6th April 1908 promising to honour a *hundi* to be drawn against him for the amount of the expected call. None of the appellants brought any action to rescind the contract and it was not until all the calls had become due and the respondents filed these suits to recover those amounts that the appellants repudiated their liability as shareholders. These suits were brought in 1907, about three years after the date when they applied for shares and two years after the date when they became aware of the fraudulent misrepresentation as to the number of shares taken up. On these facts both the lower Courts have found that the appellants are debarred from setting up a right to have the contract rescinded as a defence to the suit.

It is urged that this finding cannot be supported in law. Reliance is placed on Article 114 of the Limitation Act for the rescission of a contract, which gives three years from the date when the facts entitling the plaintiff to have the contract rescinded first became known to him, and it is urged that the fact had not become known until 1906, which is less than three years from the date of suit; and it is further contended that the appellants can set up this plea in defence to a suit. Assuming the last proposition to be correct there are, however, other considerations. Even as between ordinary persons there is a limit to the doctrine. Vide *Athikarath Nanu Menon* v. *Erathanikat Komu Nayar* (2), where this Court held that mere

(2) 21 M. 42.

delay within the period will not disentitle a person from claiming relief under section 42 of the Specific Relief Act, but there must be waiver or such conduct or neglect as would justify the Court in refusing the declaration. But when the cases dealing with such claims as between shareholders and Companies are examined, it becomes apparent that a very strict rule has uniformly been applied, even where there was fraud and misrepresentation by the Company such as would *prima facie* entitle a shareholder to rescission, as was decided in *Reese River Silver Mining Co.* v. *Smith* (3). The proposition was stated in *In re Estates Investment Co.; Ashley's* case (4) by Lord Romilly as follows:—"The leading principle in all these cases is this: a man must not play fast and loose; he must not say: 'I will abide by the Company, if successful, and I will leave the Company if it fails;' and, therefore, whenever a misrepresentation is made of which *any* one of the shareholders has notice, and can take advantage to avoid his contract with the Company, it is his duty to determine at once whether he will depart from the Company, or whether he will remain a member." This is the case relied upon by the District Judge.

The question came up for decision before the House of Lords in *Aaron's Reefs Limited* v. *Twiss* (5). There the defendant was induced to enter into a contract to take shares by fraudulent misrepresentations made in the prospectus. An action was brought against him for calls and he pleaded simply that the contract was obtained by fraud. The answer of the Company to this plea was that, even if there was fraud, he could have ascertained the true facts by using due diligence. Lord Halsbury adopted the language of Sir George Jessel in *Redgrave* v. *Hurd* (6), laying down that this plea was no answer and that the Company could not be heard to say, after it has made a fraudulent statement in a prospectus, "we indicated to you the source from which you could find the truth and as you have not availed yourself of this information we are relieved from liability." On facts of this nature, this case would be binding on us. But these are not the circumstances. Here the actual fraudulent misrepresentation was in fact brought to the notice of the shareholders and in dealing with circumstances of this class, Lord Davey in his judgment in the same case lays down the law very clearly. It is not the ground of decision in the case, but as the opinion of a very eminent Equity Judge, who was himself a member of the Privy Council, it is, in our opinion, binding on us. On page 294 he adopts the language of Mr. Justice Mellor in delivering the judgment of the Court of Exchequer Chamber in *Clough* v. *London and North Western Railway Company* (7): "The question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? Lapse of time without rescinding will furnish evidence of an intention to affirm the contract.....Where a person has contracted to take shares in a Company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation for this reason: the presence of his name on the register may have induced other persons to give credit to the Company or to become members of it." The learned Lord also quotes the language of Baggallay, L. J., in *In re Scottish Petroliem Company* (8), expressing a doubt whether the delay of even a fortnight in repudiating the shares after the shareholder is duly informed of all the circumstances and no further investigation is necessary, would not be fatal. It appears, therefore, that on the evidence the Court may come to the conclusion that the shareholder has elected to affirm the contract or may hold that even if he has not definitely made such an election, he has lost his right to repudiate by reason of the delay, the basis of the ruling in the latter case being that it is impossible to say what effect may have been caused by reason of the shareholder allowing his name to remain on the register. It is clear, therefore, that a much stricter rule is applied to shareholders and Companies than is applicable between private parties. Applying this ruling to these facts it may

(3) 4 H. L. 54; 17 W. R. 1024; 39 L. J. Ch. 849.

(4) 9 Eq. 263; 39 L. J. Ch. 354; 22 L. T. 83; 18 W. R. 395.

(5) (1896) A. C. 273; 65 L. J. P. C. 54; 74 L. T. 794.

(6) 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251.

(7) 7 Ex. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.

(8) 23 Ch. D. 413; 49 L. T. 348; 31 W. R. 846.

well be, that the frandulent representation being only as to the number of shares taken up and not affecting the value of the undertaking, the appellants may have elected not to avoid the contract, and even if that inference does not follow, they obviously come within the mischief of the latter rule which equally prevents their relying on the fraud two years after they had notice of it. The law can, therefore, be stated as follows:—That as between two private persons the right to rescind may actually be lost by the conduct of the person entitled to apply, even within the period of the Statute and in the case of shareholders want of promptitude in repudiating will, by reason of its far-reaching consequences, be always held fatal to the claim. In this view we must hold that the appellants have lost their right to repudiate and are, therefore, liable to pay the calls.

The result will be that all the appeals will be dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1174 OF 1913.

October 12, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

LANKA GOPALAM—DEFENDANT No. 1—APPELLANT

versus

LANKA RATNAMMA AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 2 TO 5—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882*), s.* 316—*Auction-purchaser, title of—Date of sale, title complete from—Suit for maintenance filed between date of sale and confirmation of sale—Property, whether charged—*Lis pendens—*Transfer of Property Act (IV of* 1882*), s.* 52.

An auction-purchaser's title even as regards strangers arises on, and in case the sale is confirmed becomes complete with effect from, the date of sale.

Where, therefore, a female institutes a suit for maintenance subsequent to the sale but prior to the date of the grant of the certificate of sale, the sale is not vitiated by the doctrine of *lis pendens*, and the purchaser takes the property free from any charge of maintenance.

Prem Chand Pal v. *Purnima Dasi*, 15 C. 546; *Adhur Chunder Banerjee* v. *Aghore Nath Aroo*, 2 C. W. N. 589; *Dagdu* v. *Panchamsing Gangaram*, 17 B. 375; *Amir Kazim* v. *Darbari Mal*, 24 A. 475; A. W. N. (1902) 145; *Shiam Lal* v. *Nathe Lal*, 7 Ind. Cas. 65; 33 A. 63, distinguished from.

Krishnaji Ravji Godbole v. *Ganesh Bapuji Patvardhan*, 6 B. 139, *Yeshwant Baburav* v. *Govind Shankar*, 10 B. 453, *Chintaman Rao Natu* v. *Vithabai*, 11 B. 588, *Raj Kishen Mookerjee* v. *Radha Madhub*, 21 W. R. 351, *Dagdu* v. *Panchamsing Gangaram*, 17 B. 375, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam, in Appeal Suit No. 56 of 1912 (Appeal Suit No. 454 of 1910 on the file of the Sub-Court, Ellore), preferred against that of the Court of the District Munsif of Tanuku, in Original Suit No. 458 of 1908.

Mr. *M. Patanjali Sastri*, for Mr. *P. Narayana Murthi*, for the Appellant.

Messrs. *G. Venkatramiah*, *N. S. Narasimhachari* and *V. Ramadoss*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The appeal has been argued only on the question whether the 5th defendant's purchase was invalid because it was made *pendente lite* and whether the property in his hands could, therefore, still be made liable for the plaintiff's maintenance at the date of suit.

The law applicable, section 316 of the Code of Civil Procedure then in force, provides generally that, so far as regards the parties to the suit and persons claiming through or under them, the title to property sold, as this was, at Court-sale shall vest in the purchaser from the date of sale certificate. The lower Appellate Court has, however, held that, though the date of the 5th defendant's certificate is subsequent to the date of plaint, that fact is not decisive against him, because (1) the question is not between parties to the suit and persons claiming through or under them and (2) the section does not deprive the purchaser of an equitable title, incomplete until the sale is confirmed, but on confirmation dating back to the date of sale.

As regards (1) the dispute is now between the plaintiff, who is claiming maintenance and a charge in order to its enforcement, and the 5th defendant, purchaser from the 2nd defendant in Court-sale. The plaintiff's claim to maintenance was at the date of the institution of the present proceedings unsecured; in fact it is only through them that she can, if successful,

LANKA GOPALAM v. LANKA RATNAMMA.

obtain the property sold to the 5th defendant as security. The decisions shown us and to be referred to apply section 316, not to the case of a person who had still to establish a claim against the property in dispute and who could do so only on the assumption that the section was applicable, but to cases in which his interest has already been constituted independently.

If, however, the plaintiff is a stranger and her position is not directly covered by section 316, the question remains as to the date on which the sale became final against her. In *Prem Chand Pal* v. *Purnima Dasi* (1) it was held that as regards third parties also the title of the auction-purchaser did not become complete in any sense before the date of confirmation of the sale. This, however, is inconsistent with the later decisions of the same Court, *Adhur Chunder Banerjee* v. *Aghore Nath Aroo* (2) and is doubted in *Dagdu* v. *Pancham-sing Gangaram* (3). These apparently conflicting cases, however, I think, are reconciled with reference to the conclusion regarding the nature of the auction-purchaser's interest at different stages, reached in the two last-mentioned and other cases, on which the lower Appellate Court's second ground of decision is based.

That interest, as described in *Adhur Chunder Banerjee* v. *Aghore Nath Aroo* (2), is "an equitable or inchoate title, which the grant of certificate made absolute and made to relate back to the date of sale;" and the description in *Dagdu* v. *Pancham Singh Gangaram* (3) is similar. The existence of a title of that contingent nature, which could be relied on only after confirmation of the sale had taken place, would not have been material in *Prem Chand Pal* v. *Purnima Dasi* (1) where the question was of the stranger's right or duty to discharge a mortgage before the date of confirmation. It would have been immaterial also in *Amir Kazim* v. *Darbari Mal* (4) where the question was of mesne profits, which the plaintiff could not claim from an earlier date than that on which he might (after confirmation of the sale) have obtained possession. It no doubt has not been shown that another later case, *Shiam Lal* v. *Nathe Lal* (5), can be similarly distinguished, but none of the authorities decided differently. *Prem Chand Pal* v. *Purnima Dasi* (1) seems to have been brought to the Court's notice. Following these cases I agree with the lower Appellate Court that the auction-purchaser's title arises on and, in case the sale is confirmed, becomes complete with effect from the date of sale; and that for the purpose of cases such as the present, this principle is applicable against strangers such as the plaintiff.

The decree of the lower Appellate Court must, therefore, be confirmed, the second appeal being dismissed with costs.

TYABJI, J.—The question on which the appeal depends is whether or not the interest of the 5th defendant in the property, which he claims, was created during the active prosecution of the suit out of which the appeal arises. If so, then it will not affect the plaintiff's rights under the decree, section 52 of the Transfer of Property Act.

That question depends upon the date on which the 5th defendant's interest arose. The appeal has been argued before us, solely with reference to the interpretation of section 316 of the Code of Civil Procedure, 1882. Though the title under that section is made to date from the certificate and not before, it has been held that the express reference to "the parties to the suit" is intended to restrict the operation of the section so as not to affect strangers, *Adhur Chunder Banerjee* v. *Aghor Nath Arroo* (2). A different view has, however, been expressed in *Prem Chand Pal.* v. *Purnima Dasi* (1) and *Amir Kazim* v. *Darbari Mal* (4) and *Shiam Lal* v. *Nathe Lal* (5).

The decision in *Prem Chand Pal* v. *Purnima Dasi* (1) was that the mortgage-debt therein referred to was not merged in the decree for sale from the date of the sale, but only from the confirmation, and in *Amir Kazim* v. *Darbari Mal* (4) and *Shiam Lal* v. *Nathe Lal* (5) the decision was that the date from which the purchaser was entitled to mesne profits and rent respectively was the date of the con-

(1) 15 C. 546.
(2) 2 C. W. N. 589.
(3) 17 B. 375.
(4) 24 A. 475; (1902) A. W. N. 145.
(5) 7 Ind. Cas. 65; 33 A. 63.

firmation. For these decisions, it was necessary to decide when the title vested completely in the purchaser. They do not derogate from the proposition, expressly left untouched in *Amir Kazim* v. *Darbari Mal* (4), that the purchaser acquires an equitable interest from the date of the sale even prior to the confirmation. On this point there is no conflict of authorities. *Krishnaji Ravji Godbole* v. *Ganesh Bapuji Patvardhan* (6); *Yeshwant Baburav* v. *Gobind Shankar* (7); *Chintaman Rao Natu* v. *Vithabai* (8); *Raj Kishen Mookerjee* v. *Radha Madhub* (9) referred to in *Yeshwant Baburav* v. *Govind Shankar* (7), *Dagdu* v. *Panchamsing Gangaram*(3). The second and third cases above mentioned have been referred to by the High Courts other than that at Bombay without dissent. It seems to me, therefore, that as the equitable interest of the 5th defendant was created prior to the institution of the plaintiff's suit, the decision under appeal was right in holding that the doctrine of *lis pendens* did not apply to that interest. I would accordingly dismiss the appeal with costs.

Appeal dismissed.

(6) 6 B. 139.
(7) 10 B. 453.
(8) 11 B. 588.
(9) 21 W. R. 349.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 46 OF 1914.

October 2, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re NIMMAGADDA PEDA NAGANNA —PLAINTIFF—APPELLANT—PETITIONER.

Civil Procedure (Act XIV of 1882), *s.* 521—*Court appointed arbitrator, whether should pass separate award—Aggrieved party, remedy of—Agreement not to appeal, whether binding.*

An agreement not to appeal is binding as between the parties, the consideration being their mutual consent to refer the matter in dispute to the Court as an arbitrator.

Where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting parties to put in objections before passing a decree. Such an award is itself a decree and objections to the award can be raised only by way of appeal against the decree to the Appellate Court, and not by means of applications to the Court itself.

Nidamarthi Mukkanti v. *Thammana Ramayya*, 26 M. 76, at p. 77, *Sita Nath Goswami* v. *Baikuntha Nath Goswami*, 9 Ind. Cas. 296; 38 C. 421, referred to

The application to the Court to act as an arbitrator is not an application to make a reference.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree and judgment of the District Court of Kistna at Masulipatam, in Appeal Suit No. 159 of 1913, preferred against that of the Court of the District Munsif of Bezwada, in Original Suit No. 356 of 1911.

Mr. *B. Narasimha Row*, for the Petitioner.

JUDGMENT.—An agreement not to appeal is binding on the parties, the consideration being their mutual consent to refer the matter in dispute to the Court as an arbitrator.

The application to the Court itself to act as arbitrator is not an application coming under the Civil Procedure Code, Schedule II, paragraphs 1 and 2, which paragraphs clearly contemplate the passing of an order of reference under Schedule II, parapraph 3, the fixing of a time by the Court in that order for the making of the award by the arbitrator (other than the Court) and the Court's not acting further in the matter till the time expires. They all clearly contemplate a reference to a third person or third persons (other than the Court) as arbitrator or arbitrators.

When an award is made by the Court itself acting as arbitrator, there is no separate judgment to be passed as distinguished from the award itself. As said in *Nidamarthi Mukkanti* v. *Thammana Ramayya* (1), the decision of the Court "must be looked on as an award." The Code nowhere contemplates that when the Court itself is the arbitrator, it must first give a separate award, then wait for objections to the award made by itself, hear such objections as a Court to its own award as arbitrator and lastly pronounce judgment on the award if it does not set it aside. The provisions of the Civil Procedure Code, which are naturally applicable and were clearly intended by the Legislature to apply only to awards made by an arbitrator other than the Court and which are clearly inapplicable

(1) 26 M. 76 at p. 77.

and would be almost grotesque when applied to an award made by the Court itself acting as an arbitrator, cannot be invoked in the latter class of awards. The objections to an award permitted under section 521, old Civil Procedure Code, (Schedule II, paragraph 15 of the new Code) and section 522 (last sentence of paragraph 16) can all be taken on an appeal from the decision of the District Munsif acting as arbitrator (which decision is an award in one aspect and which is the decree in the suit in the other aspect) as grounds of appeal in the appeal memorandum, but (as it seems to me) they cannot be taken by way of an application made to the District Munsif himself under the Schedule II.

Even supposing that the District Munsif ought to have first passed an award as arbitrator, and then waited for the parties to file applications before him as a Court to set aside the award made by himself and then heard the objections mentioned in the application and passed a separate judgment and decree confirming the award, it is clear from the grounds of appeal to the Appellate Court that none of the objections mentioned in section 521 (Schedule II, paragraph 15) were urged before the District Court as grounds vitiating the award. Under these circumstances, the irregularity on the part of the District Munsif (assuming it is an irregularity) in not waiting for applications to be filed to set aside his award before treating his award as the judgment in the case, has not affected the merits in any degree and I must decline to interfere in revision under section 115. I do not consider it necessary in this view to deal in detail with some of the observations in *Nidamarthi Mukkanti* v. *Thammana Ramayya* (1) and *Sita Nath Goswami* v. *Baikuntha Nath Goswami* (2), on which Mr. Narasimha Row strenuously relied as containing implications supporting his contention that every one of the provisions in the Arbitration section of the Civil Procedure Code applies even where the Court itself is the arbitrator.

Petition rejected.

(2) 9 Ind. Cas. 296; 38 C. 421.

MADRAS HIGH COURT.

CIVIL APPEAL No. 256 OF 1912.

November 9, 1914.

Present:—Sir John Edward Power Wallis, Offg Chief Justice, and Mr. Justice Seshagiri Aiyar.

KASIVASI SOMASUNDARA THAMBIRAN AVERGAL—APPELLANT

versus

A. T. VENKATANARAYANA PILLAI—RESPONDENT.

Promissory note, suit on—Head of mutt *executing promissory note, whether personally liable.*

The head of a *mutt* is personally liable on promissory notes executed by him, unless he has contracted himself out of such liability.

Edabitter v. *Farraw*, 5 M. & S. 345, 17 R. R. 345; 105 E. R. 1077, followed.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 43 of 1911.

FACTS.—The plaintiff is a money-lender. The defendant is the head of Therupanandal *mutt* in the Tanjore District. On 19th November 1905 the defendant executed in favour of the plaintiff a promissory note for Rs. 13,000 with interest in the following terms:

"Promissory note executed on 19th November 1905, by Kasivasi Somasundara Thambiran Avergal, Therupanandal Adhinamkarta, Kumbakonam Taluk, to A. T. Venkata Narayana Pillai Avergal, son of A. Thiruvengada Pillai Avergal, Banadara Vadaka Veedi, Kumbakonam Cusba, on demand, I *promise to you or order* Rs. 13,000, (thirteen thousand) with interest at 14 per cent. per annum from this date, and get back this promissory note, the amount being made up as follows:—'On.....'

(Signed) in Tamil, one anna label affixed.

Kasivasi Somasumdara Thambiran.

Witness, etc....."

Upon this promissory note, the plaintiff brought a suit. The defence was that the defendant executed the promissory note in his capacity as the Adhinamkarta of the *mutt* and as such is not personally liable on the note, but that a decree could be passed only against the *mutt* properties.

The Sub-Judge held that the fact that the defendant executed the note in his capacity of head of *mutt*, does not exclude his personal liability on the note and accordingly passed a personal decree against the defendant. The present appeal is by the defendant against the said decree, the chief contention being that the defendant

having described himself as the Therupanandal Adhinamkarta, excludes his personal liability on the note.

Mr. *S. Sreenivasa Aiyangar*, for the Appellant.

Mr. *T. Rangachariar* (with him Mr. *S. Muthiah Mudaliar*), for the Respondent.

JUDGMENT.—There is no question here of the defendant having executed the suit promissory note on behalf of other persons. He is the Adhinamkarta or head of the *mutt* and is so described in the document, but there is nothing in this to suggest that he is not personally liable, and the rule is that the maker of such a note as this is personally liable unless he has *contracted himself out of personal liability* [*Leadbitter* v. *Farrow* (1)].

No authority has been cited to show that the head of a *mutt* is not personally liable on promissory notes executed by him as such, and suits on such notes have been very numerous.

The appeal is dismissed with costs.

Appeal dismissed.

(1) (1816) 5 M. & S. 345; 17 R. R. 345; 105 E. R. 1077.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 223 OF 1913.

October 30, 1914.

Present:—Mr. Justice Kumaraswamy Sastri.

RAMALA VENKATASWAMI—DEFENDANT No. 1—PETITIONER

versus

KANUMALLA NARASIMHAYYA AND OTHERS—PLAINTIFFS Nos. 1 AND 10 AND DEFENDANTS Nos. 2 AND 9—RESPONDENTS.

Jurisdiction—Burden of proof—Agraharam *grant—Grantee owner of* kudivaram—*Presumption.*

It is for the party who wants to oust the jurisdiction of Civil Courts to prove the existence of facts which oust jurisdiction.

No presumption arises that the person to whom the *agraharam* had been granted was not the owner of the *kudivaram* at the time of the grant.

Adusumilli Suryanarayana v. *Achhutta Pottanna*, 22 Ind. Cas. 339; 15 M. L. T. 268, 26 M. L. J. 99; *Kidambi Jagannathacharyulu* v. *Pudipiti Kutumbarayudu*, 25 Ind Cas 891; 27 M. L. J. 233, distinguished from.

Indety China Nagada v. *Potu Kanchi Venkatasubbayya*, 8 Ind. Cas. 365; 8 M. L. T. 376; (1910) M. W. N. 639; *Todikonda Buchi Veerabhadrayya* v. *Sonti Venkanna*, 20 Ind. Cas. 769; (1913) M. W. N. 782; 24 M. L. J. 659 followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Kanigiri, in Small Cause Suit No. 141 of 1912.

Mr. *P. M. Srinivasa Aiyangar*, for the Petitioner.

Mr. *L. A. Gorindaraghava Aiyar*, for the Respondents.

JUDGMENT.—There is a conflict of decisions as to the burden of proof in cases where the jurisdiction of a Civil Court is sought to be ousted on the ground that the claim relates to an "estate," as defined in the Madras Estates Land Act. In *Adusumilli Suryanarayana* v. *Achhutta Potanna* (1) it was held that the presumption that the grant was only of the *melvaram*, applied to all cases irrespective of whether the suit was to eject a tenant ort claim rent and that where a defendant raises the question of jurisdiction, the onus is on the plaintiff to show that both the *varams* were granted so as to take the case out of the definition of an estate as given in the Estates Land Act.

The opposite view was taken in *Kidambi Jagannathcharyulu* v. *Pudipiti Kutumbarayudu* (2), where it was held that it lay on the party seeking to oust the jurisdiction of a Civil Court to prove the necessary facts and that there was no presumption that a person to whom the *agraharam* had been granted was not the owner of the *kudivaram* at the time of the grant.

I prefer to follow the decision in *Kidambi Jagannathacharyulu* v. *Kutumbarayudu*(2). The balance of authority is in favour of the view that it is for the defendant who seeks to oust the jurisdiction of a Civil Court to show the existence of facts which oust jurisdiction and that no presumption arises in the case of *agraharam*. In *Indety China Nagadu* v. *Potu Kanchi Venkata Subbayya* (3), it was held that the onus was on the defendant to show that the village came within the definition of an estate and that there was no presumption that an *inam* was

(1) 22 Ind Cas. 339; 26 M. L. J. 99; 15 M. L. T. 268

(2) 25 Ind. Cas 891; 27 M. L. J. 233.

(3) 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376.

granted to a person not owning the *kudivaram*.

This decision was followed in *Tadikonda Buchi Veerabhadrayya* v. *Sonti Venkanna* (4). The case was of *agraharam* and it was held that the onus of proving that the grantee was not the owner of the *kudivaram* at the date of the grant, was on the tenants who sought to oust the jurisdiction of Civil Courts.

I am of opinion that the District Munsif rightly threw the onus on the defendants and that they have not proved that the grant was of the *melvaram* only.

The agreements sued on have been proved by plaintiffs' 2nd witness and the defendants have not ventured to deny the genuineness in the witness-box.

The petition fails and is dismissed with costs.

Petition dismissed.

(4) 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1140 OF 1912.

June 10, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

LATIFUNNISSA BIBI—DEFENDANT—APPELLANT

versus

MAJIDUNNISSA BIBI—PLAINTIFF—RESPONDENT.

Wakf *property—Charge, validity of—Sanction of* Cazee—Ex post facto *approval, whether valid—Deed named as* tamleek *and* tawliatnama, *whether contemplates absolute endowment of entire property.*

A charge created for the purpose of saving a *wakf* property with the sanction of the *Cazee* is binding on the *wakf* property, but in case the sanction is not obtained at the time of creating the charge, an *ex post facto* approval is equally effective and the Court in which the matter comes in for consideration may validate the charge by holding that the required necessity existed.

Nemai Chand Adhya v. *Golam Hossein*, 3 Ind. Cas. 353; 37 C. 179; 14 C. W. N. 535; 11 C. L. J. 317, referred to.

A deed named as a *tamleek* as well as a *tawliatnama* does not contemplate an absolute endowment of the entire property.

Appeal against the decree of the Sub-Judge, Rangpur, dated 22nd January 1912, affirming that of the Munsif, second Court of that place, dated 31st March 1911.

Babu *Mohini Mohan Chakravarti*, for the Appellant.

Moulvi *A. K. Fazl-ul-Huq*, for the Respondent.

JUDGMENT.—One Mohamed Tuquee executed a document called a *tamleek* and *tawliatnama* (a deed of gift and endowment), and provided that the expenses of a certain mosque in Rangpur were to be paid out of the profits of certain properties named therein and the surplus was to be divided in certain shares between his wives, one of whom was made the *mutwalli* with power to nominate a Receiver. The properties came to be held by Akramunnissa and Sarwarunnissa, who were dispossessed by one Mirza Huzurali and had to sue him for recovery of the same. Golam Mustafa and Abu Syed sold their own properties to supply them with the costs of the litigation which terminated in favour of the said ladies and in consideration of this benefaction without which the *wakf* properties would have been lost, they in 1265 executed an *ikrarnama* in favour of the said Golam Mustafa and Abu Syed and agreed to pay them from generation to generation a certain allowance which was made a charge on the said properties. The plaintiffs are assignees of a part of the said allowance from the heirs of the grantees and their suit is for the recovery of certain arrears. Both the lower Courts have decreed the suit with some modification and the defendants appeal.

It has been contended on their behalf that the entire properties were dedicated as *wakf* and the maintenance charge was incompetent as an alienation of *wakf* property. It is said that the surplus proceeds after defraying the costs of the mosque were given to the wives of the grantor by name and on their demise reverted to the *wakf*.

There are two answers to this argument. One is that the charge was created for the purpose of saving the *wakf* properties and was binding on the *wakf*. This would certainly be so if the charge was created under the sanction of the Cazee, but no such sanction has been proved in this case. It has, however, been held in the case of *Nemai Chand Adhya* v. *Mir Golam Hossein*(1), that an

(1) 3 Ind. Cas. 353; 37 C. 179; 14 C. W. N. 535; 11 C. L. J. 317.

ex post facto approval is equally effective and the Court in which the matter comes in for consideration may validate the charge by holding that the required necessity existed, and in this case the Courts below have so held. The soundness of this view has been questioned by Ameer Ali in the 4th edition of his book on Muhammadan Law (See Ameer Ali, Volume 1, page 489). It is, however, not necessary to pursue this matter further, as the second answer is sufficient for the disposal of the appeal. That answer is that the grantor did not contemplate an absolute endowment of the entire property, as the very name of the deed executed by him implies. It was a *tamleek* as well as a *tawliatnama*, a deed of gift as well as a deed of endowment. It was an endowment to the extent of the costs necessary for the purposes of the mosque and a gift of the surplus; this view of the disposition is supported by the successive dealings with the property for more than half a century at least. In this view of the case, we think the Courts below are right and we dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 10 OF 1913.

November 6, 1914.

Present:—Mr. Justice Kumaraswamy Sastri.

KARUMURU VENKATESWAMI—PLAINTIFF—PETITIONER

versus

LANKA TRIPURIAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 7 (b), 104—"Injunction and interlocutory orders" in s. 7, meaning of—Provincial Small Cause Court—Compensation for attachment before judgment, order of—Appeal.

The words "injunction and interlocutory orders" in section 7 of the Civil Procedure Code can only refer to the orders contemplated in Order XXXIX, and those words read together can only mean applications for an injunction and interlocutory orders on such applications.

A Small Cause Court has power to award compensation when it issues an *interim* attachment and dismisses it after the other side is heard and such an order cannot be questioned in appeal.

Petition, under section 115 of Act V of 1908 and section 25 of Act IX of 1887, praying the High Court to revise the order, dated the 14th October 1912, of the Court of the District Munsif of Ellore, in Miscellaneous Petition No. 2146 of 1912.

Mr. *P. Chenchiah*, for Mr. *T. Prakasam*, for the Appellant.

Mr. *N. S. Narasimha Chari*, for Mr. *V Ramadoss*, for the Respondents.

JUDGMENT.—This is a petition under section 115 of the Code of Civil Procedure and section 25 of the Provincial Small Cause Courts Act to revise the order of the District Munsif, awarding defendants Rs. 50 compensation for plaintiff having applied for and obtained an order attaching before judgment in Small Cause Suit No. 672 of 1912.

The order sought to be revised is an order under section 95 of the Civil Procedure Code and is appealable under section 104. I do not think that the fact that the order was passed in a Small Cause suit makes any difference; while admitting the petition, the Hon'able Mr. Justice Miller made a note to the effect that he would be prepared to treat this petition as an appeal against the order. Having regard to the fact that there has been a *bona fide* error, I treat this petition as an appeal.

It is argued by the appellant that the District Munsif had no power to entertain the application for compensation, as there was only an *interim* order directing attachment pending notice and section 7, clause (*b*), of the Civil Procedure Code provides that sections 94 and 95 are not applicable to Small Cause Courts in so far as they relate to injunctions and interlocutory orders. The contention is that where *interim* attachment is ordered pending the return of notice, it is an interlocutory order within the meaning of section 7, clause (*b*).

I am unable to accede to the contention that though a Small Cause Court is empowered to award compensation if it ordered an attachment before judgment after hearing both parties, it cannot do so when it issues an *interim* attachment and dismisses it after the other side is heard. The words "injunctions and interlocutory orders" in section 7, clause (*b*), can only refer to the orders contemplated in Order XXXIX.

Rules 1 to 5 relate to "injunction" and rules 6 to 10 are under the heading "interlocutory orders." The words "injunctions and interlocutary orders" in section 7 should be

read together and can only mean applications for an injunction and interlocutory orders on such applications.

There is nothing in the merits that calls for interference.

The petition fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2021 OF 1913.

November 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

DUPAGUNTLA SUBBA RAO AND OTHERS —PLAINTIFFS—APPELLANTS

versus

GOLLAPUDI ETHIRAJULU—DEFENDANTS —RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (c)—Receipt extinguishing mortgage, whether requires registration—Evidence, admissibility in.

A receipt which evidences not merely a payment of money but also extinguishes the mortgage in virtue of a fresh agreement entered into on the date of its execution, requires registration under section 17 of the Registration Act and is inadmissible in evidence without it.

Venkayya v. *Venkatasubbayar*, 3 M. 53 at p. 56, distinguished from.

Mahomed Kasam v. *Ranu Yesji Naik*, 9 Bom. L. R. 254, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam, in Appeal Suit No. 10 of 1911, preferred against that of the District Munsif of Bezwada, in Original Suit No. 574 of 1911.

Mr. *V. Ramadoss*, for the Appellants.

Mr. *N. Govindarajulu Naidu*, for the Respondents.

JUDGMENT.—While "a receipt which barely acknowledges payment and refers to the payment as a naked fact, does not fall under clause (c), section 17, of the Registration Act," [see *Venkayya* v. *Venkatasubbayar* (1)] a receipt, which indicates not merely the payment of the mortgage-money according to the tenor of the mortgage-deed but mentions the fact of a new agreement, the result of a fresh act of the parties, (wholly different from the tenor of the provisions of the mortgage document as to the mode of the fulfilling of the obligations under it) as the consideration or part of the consideration for the mortgagee's consenting to treat the obligation under the mortgage-deed as satisfied, does require registration. See *Mahamed Kasam* v. *Ranu Yesji Naik* (2).

In this view, Exhibit II does require registration and is inadmissible in evidence.

The lower Appellate Court's decree is reversed and the District Munsif's decision is restored, but there will be no order as to costs in this and in the lower Appellate Court. Time for redemption is extended to three months from this day.

Appeal allowed: *Suit decreed.*

(1) 3 M. 53 at p 56.

(2) 9 Bom. L. R. 254.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 202 OF 1913.

July 22, 1913.

Present:—Mr. Justice Coxe and Mr. Justice Ray.

ABDUL KARIM ABU AHMED KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Nawab Syed ABDUS SOBHAN CHOUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, suit under, whether can be compromised—Compromise before deciding whether endowment is public or not, if lawful.

A suit under section 92 of the Civil Procedure Code, 1908, cannot be compromised if it is proved that the endowment is a public one. The question whether an agreement entered into between the parties in such a suit is or is not a lawful agreement, depends on the question whether the endowment is or is not a public one and so long as it remains subject to controversy whether it is a public endowment or not, it cannot be said to be proved to the satisfaction of the Court that the suit has been adjusted by a lawful agreement.

Gyananda Asram v. *Kristo Chandra*, 8 C. W. N. 404, referred to.

Appeal against the order of the District Judge of Dacca, dated the 15th February 1913.

Dr. *Rash Behary Ghose*, with Babus *Jogesh Chandra Roy* and *Akhil Bandhu Guha*, for the Appellants.

ABDUL KARIM *v.* ABDUS SOBHAN.

Mr. *B. K. Chakravarti*, Counsel, (with Babus *Jnanendra Nath Sarkar* and *Naresh Chandra Sen Gupta*), for the Respondents.

JUDGMENT.

COXE, J.—This appeal arises out of a suit brought under section 92, Civil Procedure Code. The plaintiffs alleged that the defendant had misappropriated certain property dedicated for the upkeep of two mosques, and made several allegations of misconduct against him. They prayed that the defendant might be removed from the *mutwallship* and a new *mutwalli* might be appointed, that a scheme might be framed for the proper discharge of the trust and for various other reliefs. The suit has been pending for a considerable time and several different proceedings have been prosecuted in it.

The present appeal is against the decision of the District Judge refusing to order a certain agreement to be recorded under Order XXIII, rule 3, and to pass a decree in accordance therewith. The ground on which the learned District Judge has refused to record this compromise is that this suit under section 92 cannot be lawfully compromised in this way, and the compromise arrived at is not a lawful agreement within the terms of Order XXIII, rule 3.

The defendant appeals, and it is argued on his behalf that it is not shown that this is a public endowment at all, and that if it is not a public endowment, the suit can certainly be compromised. *Secondly*, it is argued that even if it is a public endowment, the plaintiffs can withdraw from the prosecution of the suit and the compromise does not amount to more than such a withdrawal.

It appears to me quite clear that if this be a public endowment, the suit cannot be compromised by this petition. The case of *Gyananda Asram* v. *Kristo Chandra* (1) is, in my opinion, an authority for this view and it appears to me to be in accordance with commonsense. There is no reason whatever why the worshippers at this mosque, if it be a public mosque, and those who are interested in its management should be prejudiced, as undoubtedly they would be prejudiced, by the stifling of this suit. And it is not, in my opinion, correct to say that the compromise itself is merely the withdrawal of the suit. The first plaintiff agreed, according to the memorandum of agreement that has been placed before us, that the suit should be withdrawn for ample consideration. Paragraph 5 of the memorandum relates to the withdrawal of the suit and the first two paragraphs show that the first plaintiff was to receive a considerable advantage for this writhdrawal. It was not, therefore, a mere withdrawal from the prosecution of the suit, with which the Court, of course, could not interfere. It was an application formally to record a bargain under Order XXIII, rule 3, the terms of which bargain could subsequently be used in evidence by the parties. I think, therefore, that if this be a public endowment, the order of the Judge below is perfectly right.

On the other point, it has been argued that this question, whether or not this is a public endowment, was finally decided between the parties by a decision of the District Judge so long ago as April 1910. That decision was passed in dealing with an application for the appointment of a Receiver and the Judge held that the deed operated to create a public endowment and that the suit was *prima facie* maintainable. He, however, rejected the application to appoint the Receiver, so that it would hardly seem that this decision was necessary for the disposal of that application. It has, however, been argued that ever since then the parties have acted on the view that this matter has been settled. I think for the purpose of the pending proceedings that this view is correct. The parties have ever since that decision apparently gone on the assumption that for the purpose of proceeding with this suit, the endowment must be regarded as a public endowment until the ultimate decision, when the issue on this question will be finally determined. This is strongly indicated by the fact that in the judgment under appeal there is no reference at all to any controversy on this point, and this Court on the 8th February 1912 in dealing with another interlocutory proceeding also seemed to have proceeded on the assumption that while this suit is pending, it must be regarded as one dealing with a public endowment. The defendant cannot be prejudiced by this view

(1) 8 C. W. N. 404.

being taken, for if hereafter it should be found, when the suit is formally tried, that this is not a public endowment, the suit will necessarily fail and he will in no way be injured but rather benefited by the fact that this compromise has not been allowed. On the other hand if this compromise is allowed, the persons interested in the mosque will be very considerably prejudiced, if the suit is disposed of on this compromise and the question whether or not it is a public mosque is not finally determined. The terms of Order XXIII, rule 3, are that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement, the Court shall order the agreement to be recorded and pass a decree. The question whether this is or is not a lawful agreement depends on the further question whether this is or is not a public endowment, and so long as it remains subject to controversy whether this is a public endowment or not, it cannot, in my opinion, be said to be proved to the satisfaction of the Court that the suit has been adjusted by a lawful agreement.

I think, therefore, that in the circumstances the decision of the Judge below is right and the appeal must be dismissed with costs. The hearing fee is assessed at five gold *mohurs*.

The record will be sent down at once.

RAY, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 487 OF 1908.

July 26, 1909.

Present:—Mr. Justice Miller.

THE SALEM TOWN BANK LTD., BY SECRETARY, T. V. APPANNA AIYANGAR—PLAINTIFF—PETITIONER

versus

K. RAMASWAMY AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Liability of sons for debts of deceased father—Right of creditor to sue any or all sons—Decree, form of.

A creditor is not restricted to a suit against all the sons for the whole of the debt due by their deceased father, or if he sues one only, to a suit for a part of the debt proportionate to his share in the joint family property. In such a suit a decree should be for the whole amount payable out of the joint family property or the assets of the father in the hands of the son.

Civil revision petition against the revised decree of the Court of the Principal District Munsif of Salem, in Small Cause Suit No. 948 of 1907, dated the 14th November 1907.

Mr. *T. M. Krishnasami Aiyar*, for the Petitioner.

Messrs. *L. A. Govindaraghava Aiyar* and *K. Jaganadha Aiyar*, for the Respondents.

JUDGMENT.—In my opinion the decree should have been against the second defendant for the whole amount of the debt to the extent of his share of the joint family property and any other assets, being separate property of his father, which may be in his hands, but not against the shares of the 3rd, 4th and 5th defendants against whom the suit is barred. I have not been shown that these shares are held by the 2nd defendant on their behalf in any capacity which would warrant a decree against him and, in the absence of the owners, for the seizure of their shares by the creditor.

On the other hand I am unable to accept the argument that each one is liable only for a portion of the debt proportioned to his share in the joint family property. I have not been referred to any authority restricting the creditor to a suit against all the sons for the whole, or if he sues one only, to a suit for a portion of his debt. The authority seems to be the other way.

I modify the decree by directing the 2nd defendant to pay the plaintiff's claim so far as his share of the joint family property will go to satisfy it. It is not alleged that his father left any separate property.

The appellant succeeds in part, and is in part successfully resisted. No costs will be awarded in this Court, except that the plaintiff must pay the 3rd and 4th defendants' costs.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2320 AND 2428 OF 1913.

November 3, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

IN SECOND APPEAL NO. 2320 OF 1913.

SOMANCHI VENKATASUBBARAYUDU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SOMANCHI PULLAMMA AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN SECOND APPEAL NO. 2428 OF 1913.

DISIKA NARASAMMA—DEFENDANT NO. 2—APPELLANT

versus

SOMANCHI VENKATASUBBARAYUDU AND OTHERS—PLAINTIFFS AND DEFFENDANT NO. 1—RESPONDENT.

Will—Hindu Law—Portion of letter disposing of property after writer's death, whether Will.

A portion of a letter relating to dispositions of property after the writer's death operates as a Will, notwithstanding the fact that the remainder of the letter effects an immediate settlement and contemplates the execution of a more formal document.

Second appeals against the decree of the District Court of Godavery at Rajahmundry, in Appeal Suit No. 167 of 1911, preferred against that of the Temporary Subordinate Judge of Rajahmundry, in Original Suit No. 3 of 1911.

FACTS.—Plaintiffs are the reversioners to the estate of one Venkatasubbayudu. Defendant No. 1 is his mother and No. 2 is his sister. The said Venkatasubbayudu wrote a letter to his brother-in-law in which he recited that his sister should enjoy his *pitriam* after his death and his brother-in-law, the 2nd defendant's husband, should manage his estate on his behalf; and the letter ran as follows:

"To

"Brahma Sri Darigi Sitayya Bhavagaru, who is the incarnation of Vedas, Somandi Venkatarayudu makes many salutations.

"As I have been ill till now I have neither leased my lands on *cowle* nor recovered *kists* (rents) properly. I have settled that my entire ancestral property should after my death be enjoyed by my younger sister and your wife, Darigi Narasamma. I shall execute and get registered a necessary deed in writing. You should take possession of my ancestral lands 5-10 cents of *inam* land in Vemavaram village, which is my maternal grandfather's property and which devolved on me, and also the cocoanut garden standing thereon, the *jirayati* land in Madekarru and the house situate in Bhimavaram, and lease the said lands to new *ryots* and remit the *kists* realized in Vemavaram to my mother for charity expenses. She can spend that sum as she pleases. You should recover the rents due from the ancestral lands and pay the same to my younger sister. That sum should be spent towards family expenses and an account should be maintained for the sum thus spent. You should pay to me for my private expenses the *kist* realized from the *jirayati* land in Madekurru purchased from Chan Shaib and also the rent realized from the house in Bhimavaram. You should reside along with your children in the house situate in Narasapuram. The *ryots* who have been cultivating the lands till now, have not properly paid *kist* even for one year. You should remove these *ryots* and lease the lands to new *ryots* alone. If you should lease the lands for a lower *kist* than before, you should have to inform me of that matter and proceed according to my orders. I have given you this authority as I am not able to look after this work and so I request that you will manage the same for five years from this date. The *kadapas* executed by Mudekurru and Vemavaram *ryots* are delivered to you..... All acts should be done according to this letter. This is the deed of authority executed with my full will. I shall execute a proper deed in wrting in respect of this. There is no kind of objection whatever to your doing work from this date forward."

After the said Venkatasubbayudu's death, the reversioners to his estate brought a suit to declare that after 1st defendant's death they are entitled to the property and that the letter is not a Will and contains no dispositions in favour of 2nd defendant. The District Munsif held that the letter is a Will and dismissed the suit entirely. On appeal the District Judge held that the letter is a Will, but it does not take effect in regard to self-acquired property but affects only paternal property. He accordingly modified the decree, giving the reversioners a decree in so far as self-acquired property is concerned. The present appeal is against that decree. Both parties appealed, the

plaintiff in regard to the paternal property and the defendants so far as it related to ancestral estate.

Messrs. *V. Ramesam* and *J. Janakiramiah*, for the Appellants in Second Appeal No. 2320 of 1913 and for Respondents in Second Appeal No. 2428 of 1913.

Mr. *P. Narayanamoorthy* and Mr. *P. Somasundaram*, for the Respondents in Second Appeal No. 2320 of 1913 and for Appellant in Second Appeal No. 2428 of 1913.

JUDGMENT.—In Second Appeal No. 2428, the 2nd defendant contends, first, that the lower Appellate Court should have decided in favour of the oral Will set up. The question is purely one of fact, and we cannot disturb the learned District Judge's decision on it.

The other contention as to the merits is that put forward in Second Appeal No. 2320 that no portion of Exhibit I is a Will. Even tried by the principles laid down in *Rajammal* v. *Authiammal* (1), the portion of Exhibit I which relates to dispositions after the writer's death is, we think, a Will; and the facts that the remainder effects an immediate settlement and that the execution of a more formal document was contemplated, do not alter this. We agree with the learned District Judge on this question.

The remaining argument in Second Appeal No. 2428 relates to the form of the lower Appellate Court's decree. By consent plaintiffs will be given a declaration that items 1, 4 to 8, 10 to 14 of the plaint schedule are the absolute property of 2nd defendant and that as to items 2, 3, 9, 15 to 19 the 2nd defendant will have no right against the reversioners after the death of 1st defendant. Plaintiffs will pay costs of defendants in this Court in Second Appeal No. 2320 of 1913, and in Second Appeal No. 2428 of 1913 each party will bear his own costs in this Court. The lower Appellate Court's decree as to costs in the Courts below is confirmed.

Appeal dismissed.

(1) 7 Ind. Cas. 357; 33 M. 304; 8 M. L. T. 139; 20 M. L. J. 519.

MADRAS HIGH COURT.

SECOND APPEALS NOS. 1876 AND 1989 OF 1911.

August 27, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

K. RAGHAVA NAIDU—DEFENDANT—APPELLANT IN S. A. No. 1876 OF 1911 AND RESPONDENT IN S. A. No. 1989 OF 1911

versus

P. MUTHYALU NAIDU—PLAINTIFF—RESPONDENT IN S. A. No. 1876 OF 1911 AND APPELLANT IN S. A. No. 1989 OF 1911.

Madras Estates Land Act (I of 1908), s. 13, cl. (3)—Wells sunk by tenants at their own expense—Landlord, whether entitled to charge higher rates of rent.

Under the Estates Land Act a landlord is not entitled to charge higher rates of rent for the more valuable crops grown by the aid of the wells sunk by his tenant.

Second appeals against the decree of the District Court of North Arcot, in Appeal Suit No. 234 of 1910, preferred against that of the Revenue Divisional Officer, Ranipet, in Summary Suit No. 3609 of 1909.

In S. A. No. 1876 of 1911.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant.

Mr. *N. Chandrasekhara Aiyer*, for the Respondent

In S. A. No. 1989 of 1911.

Mr. *M. Chandrasekhara Aiyer*, for the Appellant.

Mr *A. Ramachandra Aiyer*, for the Respondent.

These second appeals coming on for hearing on the 26th September 1913, the Court delivered the following

JUDGMENT.—The lower Courts have decided that there is no evidence to show that the tenants have constructed the wells. On behalf of the appellant it is pointed out that the only witness examined on behalf of the plaintiff stated :—"All the defendants own wells on their dry lands. It costs 200 or 300 to sink a well," and it is said that after this statement they considered it unnecessary to examine their own witnesses in attendance to prove the fact. This evidence is not disbelieved by the lower Courts, and there is no explanation of it. We think it desirable in the circumstances that the question whether the wells were sunk by the landlord or tenants should be further investigated.

We direct the Judge to return a finding on the second issue after deciding the question aforesaid on further evidence.

The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of North Arcot submitted the following

FINDING.—I have been directed to return a finding on the 2nd issue in the suit, *i. e.*, whether the *patta* was a proper one and such as the defendants were bound to accept?

The issue as framed by the lower Court was :—

Whether the terms of the *patta* were proper and whether lands on which wells have been constructed should be charged *nanja* rates [issue 2 (*a*)]?

Issue 2 (*a*) is not, I think, happily worded. The question is, not whether lands on which wells have been constructed should be charged *nanja* (wet) rates, but what are the proper rates of rent for crops grown on dry lands with the aid of the tenants' wells.

I am of opinion that the landholder is not entitled to levy a higher rate than that charged for *cumbu*, *ragi*, which may be regarded as staple crops, *viz.*—

		Rs.	a.	p.
Class I	...	21	14	0
Class II	...	18	6	0
Class III	...	14	14	0

I would accordingly return a finding on the issue sent down, that the *patta* tendered was not a proper one and that the maximum rate which the landholder is entitled to levy for crops raised on dry lands by the aid of the tenants' wells is the *cumbu-ragi* rate.

These second appeals coming on for final hearing, after the return of the above finding, the Court delivered the following

JUDGMENT.—The finding is that the wells were sunk by the tenant at his own expense. The landlord is, therefore, not entitled to charge higher rates of rent for the more valuable crops grown by the aid of the wells sunk by his tenant. See section 13, clause (3), of Act I of 1908. The *patta* must, therefore, be modified by the insertion of the rates found by the District Judge for the crops which alone could be raised on the land without the aid of such water and which he calls staple crops. The class or the *taram* of the land referred to has reference to the condition of the land or crop without the aid of the tenant's improvement. Second Appeal No. 1876 of 1911 is allowed. Each party will bear his own costs throughout. Second Appeal No. 1989 of 1911 is dismissed with costs.

Appeal No. 1876 *allowed;*
Appeal No, 1989 *dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 998 OF 1912.
October 27, 1914.

Present:—Mr. Justice Kumaraswamy Sastri.

EDAYAGIRI GOPALARATNAM AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

A. L. A. R. CHOKALINGAM SETTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Principal and agent—Goods purchased on credit—Contract by agent to pay reasonable rate of interest—Principal, whether bound.

An agreement by an agent to pay a reasonable rate of interest for goods purchased on credit is binding on his principal.

Montaignac v. *Shitta*, (1890) 15 A. C. 357; *Heramba Chandra Pal Chowdhury* v. *Kasi Nath Sukul*, 1 C. L. J. 199, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Principal District Munsif of Masulipatam, in Small Cause Suit No. 740 of 1910.

Mr. *A. N. Sitarama Sastri*, for the Petitioners.

Mr. *K. N. Aiya*, for the Respondents.

JUDGMENT.—The District Munsif finds that the 3rd defendant was the agent of defendants Nos. 1 and 2 and that the fourth defendant is the person who actually dealt with the plaintiffs in connection with the transaction. It was not disputed that goods were purchased on credit. In the letter, Exhibit C, the third defendant requests the plaintiff to charge moderate interest thus showing that interest was chargeable by plaintiffs. The fourth defendant, who actually dealt with plaintiffs agreed to pay interest at 9 per cent. Where goods are purchased on credit and payment of interest was contemplated, it is difficult to see why an agreement to pay reasonable interest (in this case Rs. 9

per cent.) should not be binding on the principals. Under the circumstances the Court must presume authority to agree to pay interest so as to bind the principals: *Montaignac* v. *Shitta* (1); *Heramba Chandra Pal Chowdhury* v. *Kasi Nath Sukul* (2).

I modify the decree of the lower Court and pass a decree against defendants Nos. 1 and 2 for the amount claimed with costs in this and the lower Court. The suit against the third defendant will be dismissed.

Petition allowed: Decree modified.

(1) (1890) 15 App. Cas. 357.
(2) 1 C. L. J. 199.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 654 OF 1913.

October 27, 1914.

Present:—Mr. Justice Kumaraswamy Sastri.

SUBBIER—PLAINTIFF—PETITIONER

versus

CHINNAPPA ROWTHEN *alias* ISMAIL ROWTHEN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 5, 8—Review—Court, power of—Successor of Judge who decides case, whether competent to grant review—Decision erroneous—Court, discretion of.

Order XLVII, rule 8, of the Civil Procedure Code, empowers a Court to grant a review and to re-hear the case.

Where a Judge who heard a case issues notice on an application for review, his successor is not prohibited from disposing of it. Order XLVII, rule 5, applies to Courts composed of more than one Judge.

Where a decision is on its face erroneous owing to the attention of the Court not having been called to a decision of the High Court which it was bound to follow, the Court has a discretion in such cases to grant a review and if the Court exercises its discretion, it would require a very strong case for interference by a High Court under section 115 of the Civil Procedure Code.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree in Review Petition No. 41 of 1913, in Appeal Suit No. 287 of 1911 on the file of the District Court of Trichinopoly (in Original Suit No. 89 of 1912 on the file of the District Munsif's Court of Karur).

Mr. *K. B. Ranganadha Aiyar*, for the Appellant.

Mr. *T. R. Venkatarama Sastriar*, for the Respondent.

JUDGMENT.—A decree was passed by the District Munsif of Karur in Original Suit No. 89 of 1912 dismissing the plaintiff's suit. An appeal was filed and the District Judge of Trichinopoly reversed the decree and passed a decree in favour of the plaintiff for Rs. 275 with costs and further interest. The defendant applied to the District Court for review of judgment and the District Judge, who heard the appeal, passed the following order: "Admit and post for hearing after notice to the other side to 13th February 1913." The Judge went on leave and his successor heard the matter and restored the original decree dismissing the suit.

The Vakil for the plaintiff (who is the appellant) urges the following grounds: (1) that the whole procedure in respect of the petition for review was irregular as it was admitted without notice to the petitioner. (2) That no ground existed for granting the review.

There is nothing to show that the application for review was admitted without notice to the plaintiff. On the contrary the judgment of the District Judge shows that the question as to the admissibility of the review was argued. The Judge heard the objections to the granting of the review and at once proceeded to dispose of the appeal. There is nothing irregular in this procedure, as rule 8 of Order XLVII empowers the Court to grant the review and at once proceed to re-hear the case. There is nothing to show that the plaintiff wanted to argue the appeal or that he was prejudiced by the procedure of the Judge. It is argued that as the Judge who heard the review was only an acting incumbent and was not the Judge who decided the case, he ought to have left it to be disposed of by the permanent Judge.

Reference has been made to rule 5 of Order XLVII, but this rule only applies to Courts composed of more than one Judge. Where the Judge who heard the case issues notice on an application for review, I see nothing in rule 2 or any other provision of the Code prohibiting his successor from disposing of it.

The next objection is that no grounds such as are contemplated in rule 1 of Order XLVII exist and that the Judge had

no jurisdiction to entertain the review. I am not prepared to hold that, where a decision is on its face erroneous owing to the attention of the Court not having been called to a decision of the High Court which it was bound to follow, the Court has no power to grant a review even in cases where there is no appeal. In my opinion the Judge has a discretion in such cases and if he has exercised a discretion, it would require a very strong case for interference under section 115 of the Civil Procedure Code. So far as I can see, justice has not miscarried in the present case. The considered judgment of the District Munsif which was reversed on insufficient grounds has been restored.

The petition fails and is dismissed with costs.

Petition dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 285 OF 1911.
August 3, 1914.
Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Hannay.
AGNIHOTRAM VENKATA APPALA CHARLU—PLAINTIFF—APPELLANT
versus
KUMBUM PAKIRU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 9, 20—Jurisdiction of British Indian Courts - Right to trusteeship Temple in French territory—Parties French subjects.

The nationality of the parties has nothing to do with the jurisdiction of Civil Courts.

British Indian Courts have jurisdiction to determine the question whether a plaintiff is the sole trustee of a temple situate in French territory, even though the parties to the suit may happen to be French subjects, when the land in respect of which the suit is brought is within British India.

Appeal against the decree of the District Court of Kistna, in Original Suit No. 31 of 1910.

FACTS.—Suit for recovery of rent due by the defendants Nos. 1 to 5 under a rent-deed executed by them in favour of the plaintiff and his brothers, defendants Nos. 6 and 7. Plaintiff claimed to be the sole trustee of a temple situated in Frenchpet, Masulipatam, and alleged that defendants Nos. 6 and 7 had no right to the trusteeship. The temple had properties both in Frenchpet and in the British portion of Masulipatam. The parties were French subjects, but the rent-deed was executed in British territory and in respect of properties of the temple situated in British territory. Defendants Nos. 6 and 7 resisted the suit on the ground that they were joint trustees of the temple with the plaintiff, that they were willing to join as plaintiffs and that the suit was fraudulently instituted making them defendants. The District Judge, Kistna, dismissed the suit on the sole ground that the question having been raised whether the plaintiff was the sole trustee or was only a joint trustee with defendants Nos. 6 and 7 of a temple situated in French territory and the parties being French subjects, he had no jurisdiction to entertain the suit. From this decree plaintiff appealed to the High Court.

Messrs. *V. Ramadoss* and *N. S. Narasimhachari*, for the Appellant:—Nationality has nothing to do with the jurisdiction of Civil Courts. Dicey's Conflict of Laws, Rule 41, page 210. The suit is upon a rent-deed executed in British India in respect of properties situated in British India. British Indian Courts have jurisdiction to entertain the suit, notwithstandiug that the parties are French subjects and that the temple to which the property belonged is situated in French territory.

Mr. *T. Ramachandra Row*, for the Respondents:—As the parties are French subjects, the Court below had no jurisdiction. The jurisdiction of British Indian Courts depended on the nationality of the parties.

JUDGMENT.—This is a suit by the plaintiff, claiming to be trustee of a temple situated in French territory, to recover rent due by tenants under the temple of lands situated in British India. The District Judge has dismissed the suit on the ground that he had no jurisdiction to try the 4th issue, whether the plaintiff is the sole trustee of the temple and so solely entitled to sue, because the parties are French subjects and the temple is situated in French territory. No authority has been cited to show that these facts, if established deprive the Court of jurisdiction to try the issue.

There appears to be no ground for this position. We must allow the appeal, set aside the decree and remand the suit for

disposal according to law. Costs of this appeal will abide.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 39 OF 1913.

August 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

AKKAMMA—DEFENDANT No. 2—APPELLANT

versus

KOPPARAM RANGAPPA AND OTHERS—PLAINTIFFS AND DEFENDANT No. 1—RESPONDENTS.

Limitation Act (XV of 1877), s. 19—Acknowledgment of decree-debt, effect of—New Act, whether can revive barred right.

Under section 19 of the Limitation Act of 1877 acknowledgments of decree-debts had not the effect of initiating a new period of limitation.

Rama Rau v. *Venkatesa Bhandari*, 5 M. 171 (F. B.), referred to.

A right barred under an old Act cannot be revived by a new Act without express words.

Appeal against the appellate order of the Court of the District Judge of Bellary, in Appeal Suit No. 127 of 1911, preferred against that of the Court of the District Munsif of Penukonda, in Execution Petition No. 2122 of 1910, in Original Suit No. 455 of 1903.

Mr. *A. Krishnaswami Aiyar*, for the Appellants.

Mr. *V. Ramesam*, for Mr. *L. A. Govindaraghava Aiyar*, and Mr. *L. S. Veeraraghava Aiyar*, for the Respondents.

JUDGMENT.—The decision in *Rama Rau* v. *Venkatesa Bhandari* (1) lays down the law binding on this Court so far as interpretation of section 19 of the old Limitation Act is concerned. That decision treated acknowledgments of decree debts as not having the effect of initiating a new period for limitation. Notwithstanding, therefore, the acknowledgment relied on by the decree-holder in this case, his application for execution became barred in 1908 before the new Limitation Act came into force (on 1st January 1909), and the said Act cannot revive a barred right without express words. The appeal is allowed, the orders of the lower Courts are set aside and the execution petition will stand dismissed. The parties will bear their respective costs throughout.

Appeal allowed.

(1) 5 M. 171 (F. B.).

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1862 OF 1911.

May 26, 1914.

Present:—Mr. Justice Mallick.

ASIAT-ULLAH—DEFENDANT No. 1—APPELLANT

versus

SADAT-ULLAH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 31—Allegation of fraud or mutual mistake wanting—Suit, whether for rectification of contract—Dispossession, what amounts to—Limitation Act (IX of 1908), Sch I, Art. 120.

Where there is no allegation of fraud or mutual mistake of the parties nor any finding to that effect, the suit is not one for rectification of contract and cannot come under section 31 of the Specific Relief Act I of 1877.

If a proprietor who has been collecting rent from his tenants, is prevented from doing so because a rival proprietor has successfully invoked the assistance of a Court of Justice, the injured proprietor is dispossessed from his property just as effectually as if he had been driven out by physical force.

Article 120, Schedule I, of the Limitation Act has no application in such a case, which is governed by the 12 years' rule of limitation.

Appeal against the decree of the Sub-Judge, Sylhet, dated 18th April 1911, affirming that of the Munsif, fourth Court, Habiganj, dated 22nd June 1910.

Babu *Birendra Chandra Das*, for Babu *Ambica Charan Das*, for the Appellant.

Babu *Hemendra Kumar Das*, for the Respondents.

JUDGMENT.—The case of the plaintiff No. 1 is that he and defendants Nos. 1 and 8 jointly purchased some land, the conveyance in respect of which was executed by the proprietors on the 19th *Chaitra* 1303 B. S., that on that day and the date of registration the plaintiff paid his share of the purchase-money, that plaintiff's share in the land was partitioned subsequently by private arrangement, that he collected rent from some of the tenants, but in 1306 the tenants refused to pay him rent as defendant No. 1 had got decrees against them for rent. He dates his cause of action, *firstly*, from *Kartik* 1304 when he first discovered that through the fraud of defendant No. 1 his name had been omitted as one of the purchasers in the conveyance of the 19th *Chaitra* 1303 and, *secondly*, from the beginning of 1306 when the refusal of the tenants to pay him rent constituted a dispossession from the land. Plaintiff No. 2 is the brother of plaintiff No. 1. The suit was instituted

on the 1st *Chaitra* 1315 B. S. and the plaintiffs ask for a declaration of title and possession.

The Munsif finds that although there is not sufficient evidence of fraud on the part of defendants, the plaintiffs did in fact purchase the land in suit for consideration. He has accordingly decreed the suit. The Subordinate Judge agreeing with this view has dismissed the appeal. The present second appeal is preferred by defendant No. 1.

The first ground urged is that the only relief, which the plaintiff could have sought, was a rectification of the *kabala* of the 19th *Chaitra* 1303 B. S. under section 31 of the Specific Relief Act, a relief which is now barred by limitation. Now upon the findings this is not a case either of fraud or mutual mistake and, therefore, section 31 does not seem to me to apply. Next, it is urged that the facts disclosed do not establish that the plaintiffs have been dispossessed, and that a decree for rent obtained against a tenant is not an act dispossessing a rival proprietor. In my opinion both Courts have decided rightly in favour of the plaintiffs with regard to this part of the case. If a proprietor has been collecting rent from his tenants and is prevented from doing so because a rival proprietor has successfully invoked the assistance of a Court of justice, the injured proprietor is dispossessed from his property just as effectively as if he had been driven out by physical force. The case might be otherwise if the tenants inspite of the decrees obtained by a rival proprietor continue to pay to the original claimant, but that question does not arise here. The case is clearly one of dispossession and the suit is saved by the twelve years' rule of limitation. Article 120 of the Schedule to the Limitation Act, therefore, has no application. No other point has been argued before me and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 335 OF 1911.

October 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

GRACE ROSAMUND RHODES—DEFENDANT No. 2—APPELLANT

versus

PADMANABHA CHETTIAR—DEFENDANT No. 10—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 90—*Limitation Act(IX of* 1908), *s.* 18, *Sch. I, Arts.* 12 (*a*), 166—*Auction-sale—Fraud—Application to set aside sale—Plea of limitation, whether can be raised in second appeal—One administrator representing others—Decree passed against such administrator, validiy of—Auction-sale in such decree—Sale not set aside within* 30 *days—Suit to declare auction-sale not binding, whether maintainable—Succession Act* (*X of* 1865), *ss.* 268 *to* 273.

Where one administrator acts on behalf of the other administrators and fully represents the estate, a decree passed against him and against the estate represented by him is perfectly valid, though the administrator-in-charge might be liable to the legatees for the breaches of duty and for gross negligence resulting in loss to the estate. An auction-sale held in execution of such a decree is perfectly valid and binding on the estate until set aside.

Order XXI, rule 90, of the Code of Civil Procedure, unlike the old section 311 of the Code of Civil Procedure, 1882, includes applications to set aside sales on the ground of fraud.

A suit to declare an auction-purchase as not binding upon the estate fully represented by one of such administrators will not lie, but the sale might be set aside within 30 days from its date under Article 166 of Schedule I of the Limitation Act, IX of 1908.

Shivlal Bhagvan v. *Shambu Prasad*, 29 B. 435 at p. 448; 7 Bom. L. R. 585; *Bennett* v. *Hamill*, (1806) 2 Sch. & Lef. 566 at p. 577; *Bowen* v. *Evans*, (1844) 1 Jo. & Lat. 178 at p. 259; 6 Ir. Eq. R. 569; 68 R. R. 242; *Tommey* v. *White*, (1850) 3 H. L. C. 49 at p. 63; 10 E. R. 19; 88 R. R. 26; *Sheik Ismail Rowther* v. *Rajab Rowther*, 30 M. 295; 17 M. L. J. 165; 2 M. L. T. 186; *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan*, 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; *Faiyaz Husain Khan* v. *Prag Narain*, 29 A. 339; 10 O. C. 314; 11 C. W. N. 561; 2 M. L. T. 191; 4 A. L. J. 344; 5 C. L. J. 563; 17 M. L. J. 263; 9 Bom. L. R. 656 (P. C.); 34 I. A. 102; *Malkarjun* v. *Narahari*, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.); *Tookoomoni Dasi* v. *Dwarka Nath*, 17 Ind. Cas. 972; 17 C. W. N. 478; 16 C. L. J. 581, referred to.

A plea of limitation can be raised even in second appeal if it is patent on the face of the pleadings and requires no additional facts to decide the same.

Balaram v. *Mangta Das*, 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959; *Raghu Nath Singh Manku* v. *Pareshram Mahata*, 9 C. 635; 13 C. L. R. 89; *Venkata Narasimha Naidu* v. *Bashakarlu Naidu*, 25 M. 367 at pp. 370, 373; 6 C. W. N. 641; 29 I. A. 76 (P. C.); *Raja Har Narain Singh* v. *Chaudrain Bhagwant Kaur*, 13 A. 300 at p. 304; 18 I. A. 55; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283, followed.

GRACE ROSAMUND RHODES *v.* PADMANABHA CHETTIAR.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 267 of 1901, preferred against that of the Subordinate Judge of Trichinopoly, in Original Suit No. 31 of 1901.

Mr. *V. C. Seshachariar*, for the Appellant.

Messrs. *T. Rangachariar* and *K. Jagannada Aiyar*, for the Respondent.

This second appeal coming on for hearing on the 29th August 1912, the Court (Sundara Aiyar and Sadasiva Aiyar, JJ.) delivered the following

JUDGMENT.—We are unable to agree with the learned District Judge that under Exhibit A no valid trust was created with respect to the three suit houses or that the trust has been extinguished or has lapsed. The Vakil for the respondent admits that the estate given to the sons and daughters of the testator in the suit houses is an absolute estate. That being so, it is impossible to see how the trust was void. Such an estate would, of course, not infringe the rule against perpetuities. The administrators were bound to give the annual income of the houses to the sons and daughters of the testator until they put them in possession; and till they did so, the trust could not come to an end and the legatees would be entitled to institute a suit for administration with a view to get possession of their shares in the houses. The trust, therefore, neither failed nor was extinguished.

The 7th issue in the case is, "whether the sale and compromise in Original Suit No. 21 of 1889 was for the benefit of the administration and binding against plaintiff and others interested in the administration." That suit was instituted by the 1st defendant for setting aside the sale, which had taken place in execution of the decree in Original Suit No. 204 of 1880 which was passed against one of the daughters of the testator, namely, Mrs. Grace Rhodes. The suit was compromised. By the compromise the 1st defendant agreed to pay Rs. 600, the amount of the decree in Original Suit No. 204 of 1880, by a certain date and if he failed to do so, the properties were to be brought to sale. He did not pay the money and apparently the properties were sold and purchased by the 10th defendant, Padmanabha Chetti. Now, under the compromise the 1st defendant agreed to make the estate which belonged to all the sons and daughters of the testator liable for the debt of Mrs. Grace Rhodes. It does not appear that there was any contention in Original Suit No. 21 of 1889 that the debt contracted by Mrs. Rhodes should be enforced against the other legatees under the Will. The learned Judge does not find that there was any such question raised and that the 1st defendant acted prudently in settling a *res dubia* by agreeing to the compromise. He observes: "Then the proposed compromise may have appeared advantageous at the time, if he (1st defendant) was of an optimistic tendency, but the members of the family do not seem to have possessed much unanimity and thus he did not receive the support on which he probably reckoned. He failed to fulfil his contract under the compromise. Can he be blamed for having no funds to pay Rs. 600 on the due date or to bring a fresh suit when he was referred to one on his petition for adjournment being refused? I think not." This statement is full of conjectures as to what might have influenced the 1st defendant to enter into the compromise. It does not refer to any circumstances which would justify the 1st defendant in agreeing to it and in making the property of all the legatees liable. The learned District Judge says that the legatees took the estate absolutely but the shares were not defined. According to the Will which gave the houses to all the legatees, they obviously were all entitled to equal shares in them *and we see no reason justifying the 1st defendant in making the shares of all liable for the debt of one.* Apparently the learned District Judge proceeds on the view that the 1st defendant might have intended after paying the amount of Rs. 600 to Narayana Pillai to saddle Mrs. Rhodes' share with the whole of Rs. 600; but that was not the effect of the compromise and if that was what *he intended to do, he acted quite wrongly in agreeing to a compromise which made the shares of all liable for the debt of one.* The District Judge did not direct his attention to the question whether there were any doubtful matters at the time of the settlement, which would make the compromise binding on the sons

and daughters of the testator. We must, therefore, ask for a revised finding on the 7th issue.

The plaintiff alleged in the plaint that the sale in which Padmanabha Chetti purchased, was a fraudulent one and that he was the agent of the 1st defendant, the administrator. Apparently the suggestion was that the administrator by a fraud intended to benefit himself by the sale. It is not stated distinctly that Padmanabha Chetti was only a *benamidar* for the administrator. The District Judge observes that Padmanabha Chetti was a purchaser at an open sale by order of Court, that he was not a party to the previous litigation which Narayana Pillai started and that there was no reason to impute to him a knowledge that the Court sale was illegal, as disposing of property of persons not made liable under the decree. But the decree obviously was only against Mrs. Rhodes. The real question to be decided was whether Padmanabha Chetti made the purchase for the benefit of the 1st defendant, the administrator. Although the plaint is somewhat vague and the 5th issue is also vague, we consider it desirable that there should be a distinct finding on this question. The respondent complains that there is no finding on the 4th and 8th issues. We think that findings should have been recorded on them also.

We shall, therefore, ask the District Judge to record a fresh finding on the 7th issue and also to record findings on the 4th, 5th and 8th issues with reference to the observations we have made in connection with the 5th issue. The findings will be submitted within one month from the date of the receipt of this order, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following

FINDING.—The suit house formed part of the property of a certain Thomas Edmunds, who died in 1866 leaving seven sons and four daughters.

Two years before his death he executed a Will, which contained a clause directing that the suit house together with two other houses situated in the Trichinopoly Cantonment, two houses at Woriyur and one house at Pudnur be kept in trust and that the rents realised therefrom be divided equally among the whole of his children and their heirs respectively for their support and maintenance. No trustees were appointed and the testator's sons-in-law, who were appointed executors, appear to have taken no steps to carry out the terms of the Will. In 1877, the plaintiff in the present suit who is the 7th son of the testator, the 1st defendant, the testator's 6th son, and a married daughter of the testator applied for and obtained Letters of Administration with the Will annexed. One Narayana Pillai brought a suit, Original Suit No 204 of 1880, against another of the testator's married daughters, a certain Mrs. Grace Rhodes, who is 2nd defendant in this suit, to recover a sum of money she had borrowed from him and obtained a decree. The suit house together with the two other houses in the Cantonment were attached and sold in execution of this decree. The 1st defendant then lodged Original Suit No. 21 of 1889, before the sale was confirmed, to set it aside, and the suit was compromised, it being agreed that the sale should be set aside and that 1st defendant should pay a sum of Rs. 600 by a certain date, failing which the houses should again be sold. The money was not paid and the houses were sold, the suit house being purchased at Court auction by the 10th defendant in the present suit. This suit is brought for removing the 1st defendant from the trusteeship, for a declaration that the sale in Original Suit No. 21 of 1889 is not binding on the estate, and for possession of the plaint house and rent. The Subordinate Judge decreed the suit, but my predecessor, holding that no valid trust was created under the Will, Exhibit A, with respect to the suit house and the other houses bequeathed therein, found that the compromise entered into by the 1st defendant in Original Suit No. 21 of 1889 did not violate the terms of any trust and reversed the lower Court's decision and dismissed the suit. In second appeal their Lordships held that a valid trust was created under Exhibit A and that the trust neither failed nor was extinguished, and called for a fresh finding on the 7th issue and findings on issues 4, 5 and 8 with reference to the observations made in their order in connection with the 5th issue.

2. The 7th issue is whether the sale and compromise in Original Suit No. 21 of 1889 was for the benefit of the administration and binding against plaintiff and others interested in the administration. The Vakil for the 10th defendant asks for a finding in his favour on three grounds:—(1) that the debt contracted by Mrs. Grace Rhodes, to which Original Suit No. 204 of 1880 relates, was contracted for the benefit of the estate, (2) that the 1st defendant's action in compromising Original Suit No. 21 of 1889 was beneficial to the estate, whether or no the decree in Original Suit No. 204 of 1880 was binding on the estate, and (3) that if the 1st defendant acted *bona fide* the compromise and the subsequent sale to the 10th defendant, when it proved infructuous, are binding on the other beneficiaries under Exhibit A, whether or no the 1st defendant's action was beneficial to the estate. In view of their Lordships' observations in their judgment in second appeal I do not think it is open to me to consider the second ground, for their Lordships have laid down in unequivocal terms that unless there were any doubtful matters at the time of the settlement, which would make the compromise binding on the sons and daughters of the testator, the 1st defendant acted quite wrongly in agreeing to a compromise which made the shares of all liable for the debt of one. And unless the 10th defendant can show that the compromise was entered into by the 1st defendant owing to a reasonable doubt whether he could succeed in proving in Original Suit No. 21 of 1889 that Mrs. Grace Rhodes' debt was not contracted for the benefit of the estate, I cannot see how his action, even if it were proved to be *bona fide*, could bind the other beneficiaries. The real question on which as I understand their Lordships desire me to return a finding is whether the evidence establishes that there were any doubtful matters at the time of the settlement, which would make the compromise binding on the sons and daughters of the testator. The only persons examined on this point are the 1st defendant himself (P. W. No. 1) and D. W. No. 3, the individual who obtained the decree in Original Suit No. 204 of 1880. The latter, no doubt, says he lent the money, in respect of which he obtained his decree, to Mrs. Rhodes to execute repairs on one of the estate houses and to pay the Municipal tax due thereon, but I concur with the view of the Subordinate Judge for the reasons set out in paragraph 39 of his judgment that the evidence of this witness cannot be believed. The 1st defendant himself does not suggest that he entered into the compromise because he entertained any doubt as to succeeding in the plea contained in his plaint, that the debt to which Original Suit No. 204 of 1880 relates was Mrs. Rhodes' private debt. On the other hand, he explicitly states that he put in the compromise petition after getting permission from the Court to sell the property, intending to pay the amount fixed in the compromise from Mrs. Rhodes' share, and adds that, as permission to sell was cancelled on the following day, he took no further steps in the matter. My finding on the 7th issue on the evidence on record is that the sale and compromise in Original Suit No. 21 of 1889 was not for the benefit of the administration and is not binding against plaintiff and others interested in the administration.

3. Issues 4 and 8 deal with the question as to whether the plaintiff is estopped from making the present claim by reason of his previous conduct and of certain admissions made by him in previous suits. In the High Court the 10th defendant appears to have complained that my predecessor recorded no finding on these issues. But I may point out that so far as I can see, no objection was taken to the findings of the Subordinate Judge in the appeal memorandum presented to this Court against his decision. I concur in the finding of the Subordinate Judge on both these issues. So far from acquiescing in the sale the plaintiff has persistently contested it, and as the Subordinate Judge points out in paragraph 31 of his judgment, the plaintiff never admitted the validity of the sale or the propriety of the 1st defendant's administration in any of the suits mentioned in the 4th issue.

4. There appears to be a slight misconception in the penultimate paragraph of their

Lordships' judgment. The 5th issue relates, not to the sale in execution of the decree in Original Suit No. 21 of 1889 to the 10th defendant, but to the sale in execution of the decree in Original Suit No. 204 of 1880 to D. W. No. 3, which was set aside as a result of the compromise petition (Exhibit E). It is not apparent, therefore, why the 5th issue was framed, but so far as appears from the evidence on record, the decree in Original Suit No. 204 of 1880 is clearly not binding on the plaintiff. Their Lordships ask for a distinct finding on the question whether the purchase by the 10th defendant of the suit house in execution of the decree in Original Suit No. 21 of 1889 was made for the benefit of the 1st defendant. There seems no reason to think that it was. No doubt the 1st defendant had usufructuarily mortgaged the suit house and the two other houses in the cantonment to the 10th defendant under Exhibit C a few months before the sale, and it may be perhaps conceded that on this document the 10th defendant occupied a position as agent in respect of the three houses under the 1st defendant. But there is nothing to show that the 10th defendant did not purchase at the Court auction like any other bidder or that he gained any advantage at the auction by his position as a usufructuary mortgagee. It cannot, therefore, I think, be held in virtue of section 90 of Act II of 1882 that when the 10th defendant purchased the suit house he purchased for the benefit of the 1st defendant, and apart from the legal position which, it is urged for the plaintiff, the purchase by a mortgagee of mortgaged property creates, there is no evidence in support of the plaintiff's suggestion that the 10th defendant made the purchase for the benefit of the 1st defendant. My finding on this point is, therefore, against the plaintiff.

This second appeal coming on for final hearing on the 20th and 21st October 1914, after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The plaint in the suit out of which this second appeal has arisen was filed so long ago as the 18th July 1900 and hence it is now over 14 years since this suit was instituted. The suit was brought by one of the administrators of the estate of Thomas Edmonds for a declaration that the sale of the plaint house at the Court auction held in execution of the compromise decree in Original Suit No. 21 of 1889 passed against another administrator, was not valid and binding on the above estate. The plaint also prayed for the possession of the house (and for other subsidiary and alternative reliefs which need not be set out).

The 10th defendant is the contesting defendant and he was the purchaser at the Court auction. His sale seems to have been about the end of 1891 and one of the many surprises in this case is that even the sale certificate is not filed as evidence. The plaintiff attacks the validity of the Court auction-sale to the 10th defendant on the following grounds:—

(*a*) The compromise in the Suit No. 21 of 1889 brought by the 1st defendant, the other administrator, was not for the benefit of the trust nor was it within the 1st defendant's powers to enter into such a compromise. (See paragraph 17 of the plaint).

(*b*) The 10th defendant was the 1st defendant's agent. The 10th defendant has fraudulently purchased the property in Court auction and is in enjoyment of the same. (See paragraph 26 of the plaint).

This vague allegation in paragraph 26 of the plaint was afterwards expanded into the contentions:

(*b*1) that the 10th defendant was the *benamidar* of the 1st defendant, the administrator who acted fraudulently against the other administrator, the plaintiff, and against the other legatees under the Will;

(*b*2) that the 10th defendant took advantage of his position as the agent of the 1st defendant to bring the property to Court auction-sale and purchased the house for a low price.

I do not think it necessary to set out all the stages through which this complicated litigation has passed during the last 14 years and 4 months. The 2nd defendant who now holds the position of the plaintiff's legal representative is the appellant before us, while the 10th defendant is the only respondent before us.

The final findings of the District Court are:—

(1) That the 1st defendant in consenting to a decree being passed charging the plaint house in favour of Narayana Pillai in Original Suit No. 21 of 1889 acted foolishly and against

the interests of the estate, but that he (the 1st defendant) did not act fraudulently or collusively.

(2) That the 10th defendant who was a usufructuary mortgagee of the house under the 1st defendant and who was also the agent of the 1st defendant for certain purposes, did not purchase the house in the Court auction-sale as the 1st defendant's *benamidar*, that there was no fraud or collusion in the matter of the said purchase and that the 10th defendant must be deemed to be a *bona fide* purchaser in the Court auction-sale for valuable consideration, as he is not proved to have taken any advantage of his position as usufructuary mortgagee.

Sections 267, 268 and 269 of the Indian Succession Act, X of 1865, enact that the administrator has, generally speaking, got all the powers to sue which the deceased had when living and that he can dispose of the deceased's property at his absolute discretion.

Section 271 says that where there are several administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has taken out administration. As said in Halsbury's Laws of England, Vol. XIV, page 300: "The personal representative has very large powers to compromise claims. His powers extend as well to claims by legatees as to claims against the estate; the only question to be considered in the case of a compromise is whether he has acted in good faith or not." It seems to me that when the administrator represents the estate fully, a decree passed against him and against the estate represented by him is perfectly valid (until it is set aside), though the administrator might be liable to the legatees for breaches of duty and for gross negligence resulting in loss to the estate. (See William's Executors and Administators, Part IV, Book II, Chapter 2, section 2). The estate itself is bound by the decree. The Court auction-sale in pursuance of that decree vests in the purchaser the title to the property sold. A representative, no doubt, commits a *devastavit* if he applies the estate in payment of a claim which he has no right to satisfy or if he admits claims against the estate which he ought not to admit.

The 10th defendant in this case in his written statement does not clearly raise the contentions that as a *bona fide* purchaser at the Court auction-sale in execution of a decree passed against him, he got an unimpeachable title and that as that Court auction-sale was not set aside within one year from the date of the sale (1891) or even from the beginning of 1898 when, according to the plaint paragraph 39, the plaintiff came to know of the alleged fraudulent acts of the defendants Nos. 1 and 10, the suit is barred by limitation under Article 12(*a*) of the Limitation Act. (As I said before, the present suit was brought only in July 1900. Order XXI, rule 90, of the Code of Civil Procedure, unlike the old section 311, includes applications to set aside execution sales on the ground of fraud and thus the limitation period is now only 30 days under Article 166).

The first contention, however, may be spelt out by picking out and sorting of certain words found in paragraphs 8, 10 and 16 of the written statement. In *Shivlal Bhagvan* v. *Shambhu Prasad* (1), the following passages occur: "A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that it has on that investigation properly decreed a sale. He has no right to call upon the Court to protect him from a title not in issue in the cause and no way affected by the decree, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate the title, although the decree may be erroneous and, therefore, to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubt on sales under the authority of the Court which would be highly mischievous. This is how the law was expounded by Lord Redesdale in *Bennett* v. *Hamill* (2). In *Bowen* v. *Evans* (3) Lord St. Leonards remarks that it is of the greatest importance that sales made under the authority of the Court should not be lightly set aside, and he accordingly refused to disturb the purchaser. His decree was confirmed by the House of Lords *Bowen* v. *Evans* (4)."

(1) 29 B. 435 at p. 448; 7 Bom. L. R. 585.
(2) (1806) 2 Sch. & Lef. 566 at p. 577.
(3) (1844) 1 Jo. & Lat. 178 at p. 259; 6 Ir. Eq. R. 569; 68 R. R. 242.
(4) (1848) 2 H.L.C. 257; 9 E. R. 1090; 81 R.R. 136.

"The effect of the reversal of a decree on a sale held under it was considered by the House of Lords in *Tommey* v. *White* (5). Lord Brougham in delivering his o inion said :—' We cannot set aside the sale, for the sale was under the decree of the Court, to a *bona fide* purchaser, there being no fraud, and consequently the setting aside that sale is utterly and absolutely out of the question; the sale must stand.' " In *Sheik Ismail Rowther* v. *Rajab Rowther* (6) it was held that even where the decree-holder himself purchases the property in Court auction and had been guilty of fraudulent proceedings in obtaining the sale, the title of a third party who had no notice of any defect in the decree and who purchased it *bona fide* from the decree-holder purchaser, cannot be impeached. In *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (7) their Lordships of the Privy Council said that *bona fide* purchaser, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order for sale. Of course, if in this case the contention of the plaintiff that the 10th defendant was only the agent of the 1st defendant in making the Court auction-purchase and that he, the 1st defendant, and Narayana Pillai colluded in bringing about the decree and sale, had been established, the 10th defendant could not claim to be a *bona fide* third party purchaser. But on the finding of the District Court as it stands, I am of opinion that the 10th defendant's purchase cannot be set aside and his title is complete as against all persons who claim to be interested in the estate which was fully represented by the 1st defendant in the suit of 1889.

Mr. Seshachariar contended that as the 10th defendant was the mortgagee of the house from the 1st defendant under Exhibit C, dated the 6th June 1891 (*i. e.*, subsequent to the compromise decree, Exhibit E, dated the 8th December 1890), he was a sort of trustee for the 1st defendant and his purchase in the Court auction in execution of the decree, Exhibit E, made him a trustee of the equity of redemption of the house for the benefit of the 1st defendant. As I understood him, he seemed to contend that a mortgagee is a trustee for the mortgagor and by his purchase at a Court auction-sale he could not divest himself of his position as such trustee. Their Lordships of the Privy Council, however, in *Faiyaz Husain Khan* v. *Prag Narain* (8) held that a mortgagee decree-holder who purchases in a Court auction-sale is "in as good a position as any outside purchaser unconnected with the property would have been."

The other contention also on the side of the respondent, namely, that the plaintiff's suit is barred under Article 12 (*a*) of the Limitation Act has to be upheld. The estate in whose interests the plaintiff brought this suit was fully represented by the 1st defendant (the other administrator), and the Privy Council case in *Malkarjun* v. *Narhari* (9) is clear authority for the proposition that a sale held in execution of a decree, even in a suit where the proper representative was not impleaded in the record, ought to be set aside within one year of the sale. If the plaintiff was by fraud kept out of knowledge of the circumstances entitling him to have the sale set aside, he ought to come in within one year of the knowledge of the fraud, reading Article 12 (*a*) and section 18 of the Limitation Act together. [See *Tookoo Moni Dasi* v. *Dwarka Nath* (10)]. In this case, there was no fraud proved and assuming that there was fraud, the plaintiff admits that he knew of the fraud more than $2\frac{1}{2}$ years before the suit.

But it is argued that as limitation under Article 12 (*a*) was not set up till the arguments in this Court, we ought not to allow the plea to be argued before us and we ought not to consider it. In *Balaram* v. *Mangta Das* (11) a Full Bench of seven Judges by a majority of six held that the Court was bound even in second appeal

(5) (1850) 3 H. L. C. 49 at p. 63 ; 10 E. R. 19; 88 R. R. 26.

(6) 30 M. 295, 17 M. L. J. 165; 2M. L. T. 186.

(7) 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129.

(8) 29 A. 339; 10 O. C. 314; 11 C. W. N. 561; 2 M. L. T. 191; 4 A. L. J. 344; 5 C. L. J. 563; 17 M. L. J. 263; 9 B. L. R. 656 (P. C.); 34 I. A 102.

(9) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom L R. 927; 27 I. A. 216 (P. C.).

(10) 17 Ind. Cas. 972; 17 C. W. N. 478; 16 C. L J. 581.

(11) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959 .

o take note of the plea of limitation, if it appeared in the face of the plaint and on the facts found. Mookerjee, J., says at page 948:—"The provisions of section 542 of the Civil Procedure Code do not control and are not controlled by the provisions of section 4 of the Limitation Act. The two sets of provisions are independent of each other, though in the exercise of its judicial discretion under section 542 of the Civil Procedure Code, a Court may well have regard to the mandatory character of section 4 of the Limitation Act" (section 5 of the new Limitation Act of 1908). * * * * "If the determination of the question of limitation turns upon facts which were not investigated by reason of the omission of the defendant to take the plea of limitation in the Court of first instance, the Court of Appeal cannot be invited to entertain the point and remand the case for fresh investigation; if, however, the point arises *on the face of the pleadings or on the facts found, the question must be considered.*" * * * * * This view is identical with that taken by Mr. Justice Wilson in the case of *Raghu Nath Singh Manku* v. *Pareshram Mahata* (12) where that learned Judge observed as follows:—"The effect of section 4 of the Limitation Act, as I understand it, is simply this : whenever a case is properly before a Court, whether it is a Court of Appeal or a Court of first instance, it is bound to take notice of the question of limitation; but in order to enable the Appellate Court to do that, the case must be before it." This is also borne out by the observations of the Judicial Committee in *Venkata Narasimha Naidu* v. *Bashakarlu Naidu* (13) where their Lordships indicate the test to be, does the question of limitation arise upon the pleadings or upon the evidence? In *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (14) the Judicial Committee said, "The Statute is there and the Judges are bound to take judicial notice of it."

In this case, I think that on the plaint itself and on the facts found, namely, that the 10th defendant is not the *benamidar* of the 1st defendant in respect of the execution purchase, the question of limitation is patently raised and we are bound to take notice of it.

In the result, the second appeal fails and is dismissed. But seeing that the 10th defendant succeeds on a point which he ought to have raised and did not raise till the very last stage of this protracted litigation, I direct the parties to bear their respective costs throughout.

NAPIER, J.—I concur.

Appeal dismissed.

(12) 9 C. 635; 13 C. L. R. 89

(13) 25 M. 367 at pp 370, 373; 6 C. W N 641; 29 I. A. 76 (P C.)

(14) 13 A 300 at page 304; 18 I. A. 55; 6 Sar. P. C. J. 14; 15 Ind. Jur 283.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1713 OF 1912.

September 25, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

P. KANTHU (DIED) AND OTHERS—DEFENDANT AND HER LEGAL REPRESENTATIVES—APPELLANTS

versus

DASA UPADHYA—LEGAL REPRESENTATIVE OF THE PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by widow, suit by reversioner to set aside—Legal necessity—Burden of proof—Old alienation—Court, duty of, to regard alienee's evidence indulgently—Recital in deed, whether sufficient proof of legal necessity—Sale-deed by widow incorporating conditional sale-deed by husband, invalid—Alienee, right of, to fall back upon original deed—Mulgeni *lessee*—Darkhast *grant land; whether appurtenance of leased property.*

In a suit by a reversioner to set aside an old alienation made by a widow on the ground that there was no legal necessity for the alienation, though the burden of proof as to necessity is not shifted on to the reversioner, yet the Court should approach the evidence as to the necessity adduced in respect of such an alienation by the alienee with a much more indulgent mind than where the alienation attacked took place only a few years before suit.

Chowdhry Herasutoollah v. *Brojo Soondur Roy*, 18 W. R. 77; *Hunoomanpersaud Panday* v *Musammat Babooe Munraj Kunweree*, 6 M. I. A. 393; 18 W. R. 81 *note*; Sevestre 253 *n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147; *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu*, 25 C 103; *Maharaja of Bobbilli* v *Raja Kaminayani Bangaru*, 8 Ind. Cas. 860; 35 M. 108 at p. 112; 9 M. L. T. 155; 21 M. L. J. 593; (1911) 2 M.W.N. 101; *Gangisetti Ramaya* v. *Kallika Peraya*, 16 Ind. Cas. 411; (1912) M W. N. 559, followed.

Recitals in documents do not of themselves afford sufficient proof of legal necessity.

Brij Lal v. *Inda Kunwar*, 23 Ind Cas. 715; 36 A. 187; 26 M. L. J. 443; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L T. 395;

KANTHU *v.* DASA UPADHYA.

16 Bom. L. R. 352; 1 L. W. 794 (P. C.), followed.

If it is found that a widow was not justified in executing a sale-deed which purported to supersede and incorporate a previous conditional sale-deed executed by her husband, the alienee under the sale-deed and those who claim under him are entitled to fall back upon the rights created under the conditional sale-deed.

Richard Ross Skinner v. *Naunihal Singh*; 19 Ind. Cas. 267; 35 A. 211; 25 M. L. J. 111; (1913) M. W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853; 40 I. A. 105(P.C.); *Thumbuswamy Moodelly* v. *Hoosain Rowthen*, 1 M. 1; 2 I. A. 241 (P. C.); 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531, followed.

Land acquired on *Darkhast* grant from Government by a *Mulgeni* lessee is not an appurtenance of the properties held by him under the *Mulgeni* lease, as he is neither a trustee nor a mortgagee of the owner of the lands and his acquisition under Government grant is not an unfair gain or profit obtained by him in detriment to his lessor's interest or in a fiduciary capacity.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 237 of 1910, preferred against that of the District Munsif of Mangalore, in Original Suit No. 483 of 1908.

Messrs. *B. Sitarama Rao* and *K. P. Lakshmana Rao*, for the Appellants.

Mr. *K. Y. Adiga*, for the Respondents.

This second appeal and the memorandum of objections put in by the respondent coming on for hearing on the 29th August 1913, and also on the 9th September 1913, and having stood over for consideration till 15th September 1913, the Court delivered the following

JUDGMENT.—The defendant is the appellant before this Court. She purchased the plaint properties in 1901 from Ganapathi Rao, who had purchased them in 1899 from two persons, who in their turn claimed title under a sale-deed of 1869 executed by one Subbaraya Bhatta, who again had purchased the lands in 1857 from a Hindu widow, Subbammal. Exhibit VIII, dated the 3rd March 1857, is the registered sale-deed executed by the widow, Subbammal, to Subbaraya Bhatta. Under Exhibit VIII Subbaraya Bhatta purchased the plaint lands except land Survey No. 31/14 from Subbammal for Rs. 500. Subbammal's husband, who died in 1856, had shortly before his death *i. e.*, on 9th April 1856, executed the registered deed, Exhibit XXII, to the same Subbaraya Bhatta for Rs. 150. Exhibit XXII, however, does not relate to the entire lands conveyed by the later sale-deed, Exhibit VIII, but only to $\frac{1}{3}$rd share of the said land. This Exhibit XXII calls itself a sale-deed, but contains a condition that if the purchase-money, Rs. 150, is paid back in three years, Subbaraya Bhatta should allow the vendor to redeem the properties. If, however, the money (Rs. 150) is not paid within three years, the sale was to become absolute. Of the Rs. 500 purchase-money mentioned in Exhibit VIII, Rs. 150 is the purchase-money mentioned in the prior conditional sale-deed, Exhibit XXII, Rs. 100 is recited as required to pay two creditors who had lent the said money to Subbammal's husband and to Subbammal's husband's brother for a pilgrimage to Tirupati, Rs. 75 is recited as due to another creditor of Subbammal's husband's brother, Rs. 60 is recited as required to discharge the debt borrowed for Subbammal's husband's funeral expenses and Rs. 115 is recited as paid in cash to Subbammal. The plaintiff is the reversionary heir on the death of Subbammal (which took place in 1907 more than 50 years after the date of Exhibits XXII and VIII) and he brought this suit on the allegation that the sale under Exhibit VIII was not made by Subbammal for proper necessity and hence it was not binding on him (plaintiff), the reversioner. The learned District Munsif dismissed the suit, holding that the recitals in the deed are sufficient evidence of necessity and that the Rs. 115 paid in cash might have been required by Subbammal for her maintenance, that, though the price mentioned in Exhibit VIII, *viz.*, Rs. 500, might not have been an adequate price for the full ownership right in the lands, the circumstances showed that Subbammal intended to sell the lands subject to Subbaraya Bhatta satisfying the claims of a person who had satisfied the maintenance rights of two widows of Subbammal's husband's family and that the alienation under Exhibit VIII was, therefore, valid against the reversioner (plaintiff). The learned Subordinate Judge in appeal held that necessity for the alienation was not proved and he decreed the plaintiff's suit subject to the payment of compensation money for improvements effected by the defendant and by her predecessors-in-title from Subbaraya Bhatta downwards. Two material contentions in the second appeal before us might be formulated thus :—

(1) There having been no payment of

the purchase-money within three years of 1856, as stipulated in Exhibit XXII, the title of the vendee under Exhibit XXII became absolute according to the tenor of that document in 1859 and the plaintiff's claim for the recovery of the plaint lands is, therefore, inadmissible in law, the defendant as the assignee of the rights of the vendee under Exhibit XXII being entitled to fall back on Exhibit XXII and to plead the rights secured under that deed in bar of the plaintiff's suit, if the title of the defendant based on Exhibit VIII is found invalid for any reason.

(2) The lower Appellate Court in coming to a conclusion on the question of the necessity for the sale by Subbammal under Exhibit VIII has fallen into errors of law as regards the onus of proof, as regards the sufficiency of the proof of necessity in respect of such an old transaction as Exhibit VIII and as regards the admissibility of the recitals in Exhibit VIII as to necessity, and has fallen into other errors in reciting in its judgment some portions of the evidence in the case.

Taking the second contention first, we think it must be admitted that the learned Subordinate Judge was under the wrong impression that the Court should require as strict a proof in respect of an old transaction like Exhibit VIII as it was entitled to require in respect of an alienation which took place only a few years before suit. In one place, the learned Subordinate Judge says that "there must be positive and reliable proof that the alienation was for valid and binding purposes." In *Chowdhry Heerasutoollah* v. *Brojo Soondur Roy* (1) Kemp and Glover, JJ., have considered this question at length. That was also a case brought by the reversionary heir to recover property sold by the widow of the last male holder 50 years before the suit was brought. They allude to "the unreasonableness of expecting direct evidence" of legal necessity for an old alienation after the lapse of 50 years and hold that the recital of legal necessity in the document is evidence of such necessity and that due weight should be given to it. The observations of the Privy Council in the well-known case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (2) are also relied upon. Their Lordships of the Privy Council say: "It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence." Their Lordships also say that the representations of the alienor as part of the *res gestæ* and as contemporaneous declarations may be held to be evidence against the subsequent heir to the property. In *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu* (3) representations by an executor as found in the recitals in the deed executed by him were held to be evidence. In *Maharaja of Bobbilli* v. *Raja Kaminayani Bangaru* (4) and in the case of *Gangisetti Ramaya* v. *Kallika Peraya* (5) there are similar observations. We think that in this case the Subordinate Judge has, in considering the evidence, not taken sufficient account of the recitals in the deed and the length of time which has elapsed after Exhibit VIII was executed and has (so to say) misdirected himself to some extent as regards legal presumptions and the quantum of proof required in such cases. We do not go so far as to say that the burden of proof is shifted in the case of old alienations on to the reversioner, but we think that the Courts should approach the evidence as to necessity adduced in respect of such alienations by the alienee with a much more indulgent mind than when the alienations attacked took place a few years before suit. Coming to the first contention based on Exhibit XXII, this relates (as said before) to the title to only one-third of the plaint property. We think that the appellant should succeed on this second contention so far as the said one-third share is concerned if the sale under Exhibit VIII is found invalid as regards the whole of it or any fraction of it which includes that one-third share. It seems to us clear that if the limited owner (the widow, Subbammal) was not justified in executing the sale-deed, Exhibit VIII, which purported to supersede and

(1) 18 W. R. 77.

(2) 6 M. I. A. 393 at p. 420; 18 W. R 81 *note*; Sevestre 253 *n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(3) 25 C. 103.

(4) 8 Ind. Cas. 860; 35 M. 108 at p. 112; 9 M. L. T. 155; 21 M. L. J. 593; (1911) 2 M. W. N. 101.

(5) 16 Ind. Cas. 411; (1912) M. W. N. 559.

incorporate the previous conditional sale-deed, Exhibit XXII, executed by her husband, the alienee under Exhibit VIII and those who claim under him are entitled to fall back upon the rights created under the conditional sale-deed, Exhibit XXII. It is unnecessary to dilate upon this clear principle of equity, as this principle has been in a very striking manner acted upon by their Lordships of the Privy Council in the very recent case of *Richard Ross Skinner* v. *Naunihal Singh* (6). The defendant being thus entitled to fall back upon the rights created by Exhibit XXII in favour of her predecessor-in-title (Subbaraya Bhatta) and that conditional sale-deed having become an absolute sale-deed by reason of the lapse of the period fixed in it *viz.*, three years, for the redemption of the property by payment of the purchase money, the title possessed by Subbammal's husband to a one-third share in plaint property and which was inherited by Subbammal, became irredeemably extinguished in 1859. If the sale-deed, Exhibit XXII, had been executed after 1858, it might be argued that it was executed with reference to the erroneous course of decisions alluded to by the Privy Council in *Thumbuswamy Moodelly* v. *Hossain Rowthen* (7), but as this document, Exhibit XXII, was executed before 1858, the Privy Council decision in *Pattabhiramier* v. *Venkatarow Naicken* (8) clearly applied and the provisions of the document ought to be given effect to, especially as the document is not merely a mortgage which was to effectuate as a sale but is itself a sale-deed which might be treated as a redeemable mortgage, if certain conditions were strictly fulfilled by the vendor. The respondent's learned Vakil, Mr. Yegnanarayana Adiga, tried to take away the transaction under Exhibit XXII out of the class of transactions to which the ruling in *Pattabhiramier's* case (8) applied, by an ingenious comment on two sentences which occur in the later case in *Thumbuswamy Moodelly* v. *Hossain Rowthen*(7). Those two sentences in the judgment are:—"On a stale claim to redeem a mortgage and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course." (That is the course of treating the sale as having been absolute.) "In the case of a security, executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted." It was argued that the first sentence favours only those deeds under which the alienees had acquired absolute titles before 1858 and not a deed like the present, under which the absolute title was acquired only in 1859, though the deed itself was executed before 1858. Having regard to the observations in *Pattabhiramier's* case (8) and the whole tenor of the observations in *Thumbuswamy Moodelly* v. *Hossain Rowthen*(7) (including the second sentence quoted above), we have no doubt that their Lordships of the Privy Council favoured the natural construction of all documents *executed before* 1858, whether the title had become absolute before 1858 or became absolute only after 1858, provided the suit to redeem was brought after the title had become absolute. In the result, the suit would have to be dismissed anyhow as regards one-third share in the plaint property. As regards the other questions raised in the appeal, one of them relates to the amount of compensation payable to the defendant in case the plaintiff is entitled to succeed. The amount of compensation is a question of fact and we see no sufficient reason to differ from the concurrent findings of the lower Courts on this question. The rate of interest allowed on mesne profits to the plaintiff by the lower Appellate Court is the same rate as is allowed by it on the compensation money due to the defendant and hence is not at all inequitable. The memorandum of objections (relating to the land No. 31/14) put in by the plaintiff must be dismissed with costs, as that land was acquired on *Darkhast* grant from Government and cannot, in law, be deemed to be an appurtenance of the properties alienated under Exhibit VIII,

(6) 19 Ind. Cas 267; 35 A. 211 (P. C.); 25 M. L. J. 111; (1913) M. W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853; 40 I. A. 105.

(7) 1 M. 1; 2 I. A. 241 (P. C.); 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531.

(8) 13 M. I. A. 560; 7 B. L. R. 136; 15 W. R. (P.C) 35; 2 Suth. P.C.J. 410; 2 Sar. P. C.J. 623; 20 E. R. 660.

the defendant, who represents the original *mulgeni* lessee of the said properties, not being a trustee or mortgagee of the owner of the lands and his acquisition of No. 31/14 under Government grant not being an unfair gain or profit obtained by him in detriment to his lessor's interest or in a fiduciary capacity.

Before finally disposing of this second appeal, we have to obtain a finding on the following issue from the lower Court which should, in arriving at this fresh finding, have regard to the observations made in the first part of this judgment on the subject of the quantum of proof to be reasonably required, in cases like the present, of the value of recitals in old deeds, etc.

The issue remitted is:—

1. Was the sale by Subbammal of the plaint lands for Rs. 500, of which Rs. 115 was paid in cash, made for proper necessity binding on the plaintiff-reversioner? If the sale-deed is not valid as an outright conveyance, is it valid as a charge binding on the estate or any share in the estate in the hands of the reversioner to any extent and if so, to what extent? (See ground No. 26 of the second appeal memorandum). The time allowed is six weeks, from the receipt of this order. Ten days will be allowed for objections. No fresh evidence is to be adduced.

In compliance with the order contained in the above judgment, the Subordinate Judge of South Canara submitted the following

FINDING — * * * *

Taking all the circumstances into account and paying due regard to the long lapse of time and the fact that the property had changed hands several times till it came into the possession of the defendant I hold that the sale was for a purpose binding upon the plaintiff-reversioner. I, therefore, find that the sale under Exhibit VIII was made for proper necessity binding upon the plaintiff-reversioner.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—Having regard to the decision of the Privy Council in *Brij Lal* v. *Inda Kunwar* (9) and the statement in paragraph 8 of the lower Appellate Court's finding that "the defendant has no evidence beyond the recitals in Exhibit VIII," we are unable to accept its conclusion that the sale under Exhibit VIII is binding upon the plaintiff-reversioner.

For the reasons given in the judgment pronounced by us on the 15th September 1913, we modify the lower Appellate Court's decree by awarding to plaintiff possession of only those portions of the plaint property which are not covered by Exhibit XXII and also excluding No. 31/14. Plaintiff will get proportionate mesne profits on the portion decreed to him and will pay proportionate compensation for improvements on that portion. The parties will bear their respective costs in all Courts.

Appeal allowed in part; Decree modified.

(9) 23 Ind. Cas. 715; 36 A. 187 (P. C.); 26 M. L. J. 443; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 9 OF 1913.

May 29, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BANDI ALI FAKIR AND OTHERS—PLAINTIFFS

versus

AMUD SARKAR AND OTHERRS—DEFENDANTS.

Bengal Tenancy Act (VIII of 1885), ss. 144 (1), 193—Money payable in respect of forest rights, suit for recovery of—Jurisdiction of Civil Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8.

The provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent apply, as far as may be, to a suit for the recovery of money payable in respect of forest rights.

What is payable in respect of forest right is in the nature of rent for the purposes of determining the jurisdiction of the Court, and, therefore, a suit for recovery thereof is entertainable by an ordinary Civil Court and not by a Small Cause Court.

Civil reference by the District Judge of Dacca, dated the 29th July 1913.

JUDGMENT.—This is a reference by the District Judge of Dacca under rule

BANDI ALI FAKIR *v.* AMUD SARKAR.

7 of Order XLVI of the Civil Procedure Code, 1908. The petitioners instituted a suit in the Court of the Munsif at Dacca for recovery of a sum of Rs. 326-4-10 from the defendants on the basis of what is called a *sadar patta*, that is, a lease under a sub-lease. The Munsif held that the suit was cognizable by a Court of Small Causes, and on the 1st July 1913 returned the plaint for presentation in the proper Court. The plaint was then presented in the Small Cause Court at Dacca; but the Judge there returned the plaint on the 8th July 1913, because the suit, in his opinion, was not maintainable in the Small Cause Court. The District Judge has accordingly, upon the application of the plaintiffs, referred the question to this Court, whether the suit is maintainable in the ordinary Civil Court or in the Small Cause Court; he has expressed the opinion that the view of the Small Cause Court Judge as to the nature of the suit is erroneous.

On the 23rd March 1911, the defendants executed a *kabuliat* in favour of the plaintiffs in respect of forest rights in a tract of land described by boundaries at the foot of the document. The *kabuliat* states that for a period of one year, four months and twenty-one days, from the 23rd March 1911 to the 15th August 1912, the executants would have the right to cut and take out of the forest all the *gajari* trees and all wild trees (with the exception of mango, jack fruit, *tal*, *bel*, tamarind and *simul* trees) in close proximity thereto, of a circumference of more than 18 inches and one cubit above the ground, on the tract with the boundaries mentioned. The consideration for this sub-lease was specified to be Rs. 450, out of which Rs. 150 was paid in cash, and the balance was made payable in two equal instalments on the 17th September and 16th November 1911. The plaintiffs allege that the defendants have exercised acts of possession under the sub-lease and have felled and sold the forest-trees, but have withheld payment of the rent, except a sum of Rs. 97 paid in two instalments. The plaintiffs seek to recover the balance with interest and costs. The question arises, whether the suit is in essence one for damages for breach of contract maintainable in a Court of Small Causes, or whether it is a suit for rent entertainable only by the ordinary Civil Court.

Section 193 of the Bengal Tenancy Act provides that the provisions of the Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like. It is plain that the view most favourable to the defendants is that the document executed by them and called a *kabuliat* does not create in their favour any interest in the land on which the forest stands. But it cannot be disputed that it creates in their favour forest rights within the meaning of section 193. The transaction cannot rightly be regarded as a sale of timber; the trees were not and could not be specified, as the grantees were clearly entitled to fell timber which might attain the prescribed size at any time within the period during which the rights conferred on them were to be in force. It is further clear that what the plaintiffs now seek to recover was payable in respect of the forest rights conferred by them on the defendants. This view is supported by the decision of this Court in *Abdullah* v. *Ashraf Ali* (1). It follows consequently that the provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent apply, as far as may be, to the present suit for the recovery of money payable in respect of forest rights. Consequently under section 144, sub-section 1, the cause of action must be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the trees. This view, it may be conceded, is open to the criticism that the language of section 144 is possibly unduly strained to enable us to reach the conclusion. But it is supported by the judgment of Banerjee, J., in *Shibu Haldar* v. *Gupi Sundari Dasya* (2) where section 144 was held to apply to a case of fishery right, and this was followed, though not without some hesitation, in *Abdullah* v. *Ashraf Ali*(1) [see also *Shib Prasad* v. *Vakai Pali* (3)].

The question finally arises whether the suit

(1) 7 C. L. J. 152.
(2) 24 C. 449; 2 C. W. N. 169.
(3) 33 C. 601.

is one for the recovery of rent other than house-rent within the meaning of clause (8) of the second Schedule to the Provincial Small Cause Courts Act; because, unless excepted from the cognizance of a Court of Small Causes, the suit must be tried by such Court under sub-section 2 of section 15. Now, the term 'rent' is not defined in the Small Cause Courts Act, nor is any definition given in the General Clauses Act. The definition given in section 105 of the Transfer of Property Act or in section 3, clause 5, of the Bengal Tenancy Act is of no assistance, because each of such definitions was framed for the purposes of a special Statute. When we turn to law lexicons, we find a variety of definitions given. Sweet refers to Co. Litt. (142*a*) and defines rent as a periodical payment due by a tenant of land or other corporeal hereditament, which is usually payable in money but may also be resumed in fowls, wheat, spurs or the like. Wharton defines it as a certain profit issuing yearly out of lands and tenements corporeal, and adds that it must issue out of the thing granted and not be part of the land or the thing itself. Bouvier defines rent as a certain profit in money, provisions, chattels or labour issuing out of lands and tenements in retribution for the use, and is thus distinguishable from purchase-money: *Barrs* v. *Lea* (4). Anderson defines rent as a compensation or return in the nature of an acknowledgment given for the possession of some corporeal inheritance. In Bacon's Abridgment, Tit. Rent, reference is made to Co. Litt. (47*a*, 142*a*) and it is laid down as a general rule that no rent can issue out of any incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress. To this is added the illustration that a lease of the vesture or herbage of land reserving rent is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon. It is not necessary, however, to treat distress as an inseparable concomitant of rent, and in *Brown* v. *Peto* (5) it was pointed out that in the Conveyancing Act, 1881, the term 'rent' is used to include recurring payments not issuing out of the thing demised and for which accordingly there can be no distress. It is further pointed out in the Laws of England edited by Halsbury, Volume 24, paragraph 1032, that the term 'rent' is sometimes used in a very comprehensive sense and includes periodical sums of money charged upon or paid out of land and all corporeal hereditaments: *Skene* v. *Cook* (6). It has also sometimes been observed that rent may issue, not only from lands and tenements corporeal, but also from the personal property necessary for their proper enjoyment; for instance, where a furnished house or a stocked farm is leased, in such cases the personal property is really a part of the consideration of the rent, so that when the view is sought to be maintained that the rent issues out of the land alone, *Selby* v. *Greaves* (7) and *Farewell* v *Dickenson* (8), there is an attempt at a fictitious accommodation of the case to the defective definition. To return to the Provincial Small Cause Courts Act, it is plain that the term 'rent' in clause (8) of the second Schedule is used in a wide sense, otherwise the Legislature would not have found it necessary to exclude explicitly house-rent from its scope. We are consequently of opinion that what is payable by the defendants to the plaintiffs in respect of forest rights granted to them, is in the nature of rent for the purposes of determining the jurisdiction of the Court, as it has been already held to be for the purposes of determining the question of limitation applicable to a suit for its recovery. *Abdullah* v. *Ashraf Ali* (1). In this view, the plaint must be returned to the Munsif, so that he may entertain the suit and try it on the merits. The suit will be deemed for purposes of limitation to have been instituted in his Court on the date on which the plaint was originally presented.

Plaint returned.

(4) (1864) 12 W. R. 525; 33 L. J. Ch. 437; 10 L. T. 567; 3 N. R. 635.

(5) (1900) 2 Q. B. 653; 69 L. J. Q. B. 869; 83 L. T. 303; 49 W. R. 324; 16 T. L. R. 561.

(6) (1902) 1 K. B. 682; 71 L. J. K. B. 446; 86 L. T. 319; 50 W. R. 506; 18 T. L. R. 431.

(7) (1868) 3 C. P. 594; 37 L. J. C. P. 251; 19 L. T. 186; 16 W. R. 1127.

(8) (1827) 6 B. & C. 251; 9 D. & R. 345; 5 L. J. (o. s.) K. B. 154; 108 E. R. 446.

MADRAS HIGH COURT.
CIVIL APPEAL No. 109 OF 1912.
November 2, 1914.
Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.
NACHIYAPPA CHETTY AND ANOTHER—DEFENDANTS—APPELLANTS
versus
M. R. M. K. R. RAMASAMI CHETTY—PLAINTIFF—RESPONDENT.

Hindu Law—Sale by managing member—Deed unregistered—Adverse possession against members of joint family, commencement of.

Where there is no registered sale-deed to evidence a sale by the managing member of a joint Hindu family, limitation as against the members of the family commences from the date on which the purchaser takes possession of the property sold to him.

Doraisami Sirumadan v *Nondisami Sulevan*, 21 Ind. Cas. 410; 25 M L. J 405; 14 M. L. T. 401; *Harihar Pershad* v. *Bholi Pershad*, 6 C, L J. 383, followed.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 156 of 1910.

Messrs. *K. Srinivasa Aiyangar* and *C. A. Seshagiri Sastri*, for the Appellants.

Mr. *A. Krishnasami Aiyar*, for the Respondent.

JUDGMENT.—We agree with the decision of the Subordinate Judge. It is first objected that the first defendant's vendor, Sellappa Chetty, got no registered transfer in his favour in 1895 from his vendor, Kannappa Chetty, and that at the date of suit, two of Kannappa Chetty's sons were still minors and so entitled to question Challappa Chetty's title. We think that the objection is not sustainable. In these circumstances, time began to run against the joint family of which Kannappa Chetty was the managing member from the date of Chellappa Chetty's taking possession in 1895. [See *Doraisami Sirumadan* v. *Nondisami Sulevan* (1) and *Harihar Pershad* v. *Bholi Pershad*(2).] As regards the alleged mortgage on the property by Chellappa Chetty's widow, we agree with the Subordinate Judge that it was a mere nominal transaction and that the defendant was informed of it before entering into the agreement to purchase, and that the indemnity clause in the agreement was intended to refer to this

(1) 21 Ind. Cas. 410; 25 M. L. J. 405; 14 M. L. T. 401.
(2) 6 C. L. J. 383.

mortgage. We also agree with the Subordinate Judge that when the plaintiff by Exhibit B undertook to sell to the defendant the house in Kanarai street, Devakotta, which he had purchased in Court sale, he did not impliedly covenant that he had acquired the *melvaram* as well as the *kudivaram* rights in the house site. We also agree with the Subordinate Judge that there was no oral covenant as to this. The appeal fails and is dismissed with costs. The memorandum of objections is also dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 189 OF 1913.
October 6, 1914.
Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.
VISWANATHIER—PLAINTIFF—APPELLANT
versus
AIYAVIER—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151—Amendment of plaint—Plaint framed on wrong view of law—Subsequent alteration of law—Adjournment of case, application for, grant of.

An application to amend a plaint on the ground that the plaint was based on the wrong view of the law and that the correct view has subsequently been laid down by the High Court, should be allowed inspite of the fact that the suit is barred by limitation on the date of the application.

Mulla Veetil v. *Atchuthan Nair*, 9 Ind. Cas. 513; 21 M. L. J. 213; 9 M. L. T. 431; (1911) 2 M. W. N. 165, followed

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 460 of 1911, preferred against that of the District Munsif of Kulitalai, in Original Suit No. 515 of 1910.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondent.

JUDGMENT.—The only question argued is whether the District Munsif should have adjourned the case, as he was asked to do, in order that a formal application for leave to amend the plaint might be made.

It was clear with reference to *Mulla Veetil*

v. *Atchuthan Nair* (1) that plaintiff's suit as filed was not sustainable; and that decision had not been reported till after the suit was filed. In the circumstances we think it possible to take the course taken by the learned Judges who eventually disposed of that case in accordance with the opinion of the Full Bench, and enable the present plaintiff to amend his plaint by adding a prayer for the recovery of the amount of his mortgage by sale. That course was taken by the learned Judges, as it will have to be here, inspite of the fact that plaintiff's suit would have been barred by limitation on the date of his application for an adjournment in order that he might amend. It is no doubt defendant is interested only in part of the property and will be liable at most for the portion of the mortgage amount which may be imposed on it. But that will not necessarily entail the impleading of the other person interested in the property, since the amount due for defendant's portion can be ascertained as between him and plaintiff alone.

In the circumstances we set aside the lower Courts' decisions and remand the suit to the District Munsif's Court for re-admission. The District Munsif must give plaintiff a reasonable opportunity of amending his plaint by the insertion of a prayer for recovery of the amount of his mortgage by sale of the property in defendant's hands. If no amendment is made within the time granted, the suit can again be dismissed. If an amendment is made, the suit must be disposed of on the amended plaint according to law. Plaintiff will bear his own costs in the lower Appellate Court and here. His other costs and defendant's costs will be costs in the cause.

Appeal allowed.

(1) 9 Ind. Cas. 513; 21 M. L. J. 213; 9 M. L. T. 131; (1911) 2 M. W. N. 165.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 72 OF 1913.

October 15, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

S. KRISHNA REDDI—DEFENDANT No. 7—APPELLANT

versus

SUNDARA REDDI AND OTHERS—PLAINTIFFS AND SUPPLEMENTAL RESPONDENT—RESPONDENTS.

Evidence Act (I of 1872), s. 33—Evidence given in one suit, when treated as evidence in another suit—Practice.

Evidence given in one suit can, by consent of the parties to another suit, be treated as evidence in that suit although the former suit was not between the same parties.

Sri Raja Inugunti Prakasa Raganingaru v. *Venkata Rao*, 21 Ind. Cas. 319; 25 M. L. J. 360; (1913) M. W. N. 800, followed.

A. B. Miller v. *Babu Madho Das*, 19 A. 76 at p. 92; 23 I. A. 106; 7 Sar. P. C. J. 73 and *Ex parte Bottomley*, (1909) 2 K. B. 14; 78 L. J. K. B. 547; 100 L. T. 782; 73 J. P. 246; 25 T. L. R. 371, referred to.

Appeal under section 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Miller, in Second Appeal No. 1568 of 1912, preferred against that of the District Court of Chingleput, in Appeal Suit No. 284 of 1910, presented against that of the District Munsif of Chingleput, in Original Suit No. 75 of 1909.

Messrs. *S. Srinivasa Aiyangar* and *N. Rajagopalachariar*, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The appeal is argued, first, on the ground that the plaintiffs, who proved only that the two tenants for life either were or should be presumed dead, were bound also to prove which died last and under which the reversioners claim immediatlely. The latter point is, in my opinion, immaterial since there is no question of limitation. It is only important that the succession has opened and that the plaintiffs established their character as reversioners.

Next, the evidence relied on as to the death of Ammoyee Ammal, one tenant for life, was that recorded in another case. It was regarded as evidence in this by agreement under a memorandum dated 4th December 1909. It is argued that, as such depositions could not be admitted in evidence under section 33 of the Indian Evi-

dence Act or any other provision of law, they could not be rendered admissible by consent of parties, inasmuch as the consent of parties cannot authorize the Court to treat as evidence what could not in any circumstances be legally admitted as such. *Sri Raja Inugunti Prakasa Raganingaru* v. *Venkata Rao* (1), in my opinion, negatives this objection. The attempt to distinguish that decision from the present case, on the ground that here the parties to the two trials are different, must fail, because that fact had no influence on the reasoning by which the conclusion was reached. I, therefore, hold that the lower Courts were right in acting on this evidence.

The Letters Patent Appeal, therefore, fails and is dismissed with costs.

TYABJI, J.—This appeal depends upon the decision of two questions.

The first question may be shortly dealt with. It is, whether it is necessary that a reversioner, in a suit to recover the estate, should prove, not only that those who had prior interests in the estate have died, but also when or in what succession they died. The latter fact seems to me to be entirely immaterial to the reversioner's title. This question must, therefore, be answered against the appellant.

The second question seems to me to involve far-reaching principles. It is this. The death of a certain person was a fact in issue. It is alleged that the lower Courts' decisions on this issue are based on matters which were irrelevant, under the Indian Evidence Act, to the fact in issue, matters irrelevant to a fact in issue, by finding their way on the record or by otherwise coming to the cognizance of the Court either by the consent of the parties or through failure on their part to take objection, do not acquire thereby any probative force. If, therefore, the facts are as alleged, I have no doubt that the argument must prevail. I need only refer to *A. B. Miller* v. *Babu Madho Das* (2).

As I understand the law contained in the Indian Evidence Act, especially in the light of the decision cited, the Act lays down in sections 6 to 55 certain rules of logic. These sections (and I believe some other sections, *e. g.*, 60, 61 and 158, come very near them in effect) are directions to the Court as to the cases in which the Court is to consider as a matter of logic that one fact has any relevance (or logical bearing) on another. In other words, where the Court has to consider the question whether or not a fact exists, certain sections of the Evidence Act are directions to the effect that facts A, B and C are facts from which the existence or non-existence of the fact X may be deduced. And by reason of section 5, unless the Court has the warrant of the Act for inferring as a matter of logic the existence or non-existence of fact X from the existence of facts A, B and C, the Court may not lawfully make any such inference.

Section 5, no doubt, refers primarily to the giving in evidence of facts. But the greater includes the less. Not only is the Court not to infer the existence of the fact X from A, B and C unless the facts A, B and C are declared by the Act to have a logical bearing on the fact X, but the facts A, B and C are not to be brought to the cognizance of the Court unless their logical bearing to X is so declared.

These rules of logic are to be distinguished from the rules laying down how the materials on which the Court is empowered to base its conclusions (the legal *media concluendi* as the Privy Council have called them in one case), are to be brought to the cognizance of the Court, *i. e.*, the method of proving relevant facts. This latter class of rules have reference to the mode in which the Court has to collect the materials for the hypothesis. The former class of rules refers to the use to be made of the materials—the inference to be drawn from the hypothesis. In regard to the method of proving relevant facts, the parties have unrestricted power to make admissions: (section 58). But in regard to the logical conclusions to be deduced from the existence of the facts proved or admitted, the parties have no power to alter the directions given to the Courts to act in a manner declared by the Legislature to be illogical.

Thus, the parties may admit that the facts, A, B and C exist, in which case the

(1) 21 Ind. Cas. 319; 25 M. L. J. 360; (1913) M. W. N. 800.

(2) 23 I.A. 106; 19 A. 76 at p. 92; 7 Sar. P. C. J. 73.

Court will be able to deduce the existence of the fact X only if the Indian Evidence Act lays down that A, B and C are relevant to X, but not otherwise. The parties are equally at liberty to admit the existence of X itself. In that case it would no more be a fact in issue. But by the parties admitting the existence of A, B and C, the rules of logic are not abrogated, and if the Indian Evidence Act lays down that A, B and C are not relevant to X, then no deduction can be drawn relating to X from A, B and C.

I have thought it necessary to set out these somewhat elementary considerations in order to test the question which has been strenuously argued before us, that in the present case the parties purported to waive a rule of logic, a rule about the relevancy of facts, and that, therefore, the Court could not act in accordance with the course to which the parties consented.

What the parties did in the present case is stated in writing signed by the Vakils of both sides to the following effect:—

"The parties agree that the evidence let in in Original Suit No. 577 of 1908 on the issue as to whether Ammoyee Ammal is alive or dead, may be regarded as the evidence on that issue in the above case, *viz.*, in Original Suit No. 75 of 1909."

It seems clear to me that the parties did not purport to abrogate any rule of logic contained in the Indian Evidence Act; but agreed that certain oral testimony which was given in another suit should be regarded as having been given in this suit. This does not affect any question as to relevancy. All that was waived was the method of proof. What was done did not contravene section 33. The defendant did not consent to give to evidence in another judicial proceeding probative force not given to it by section 33. The parties merely consented to let the Court take cognizance of the evidence in the prior suit in the same way as if it had been the testimony of witnesses examined before the Judge in the course of the trial of the latter suit.

The question, therefore, is whether a party is bound by his consent that the examination of the witnesses before the Judge should be dispensed with, and another method substituted for the Judge's taking cognizance of oral testimony. The law relating to this matter is partly referred to in the Indian Evidence Act and partly regulated by the law and practice relating to Civil and Criminal Procedure and, in the absence of any such law, by the discretion of the Court: *cf.* sections 135, 118, 119, 137 and 138 of the Indian Evidence Act. Order XVIII, rule 4, Code of Civil Procedure, contains the mode in which the evidence of the witnesses in attendance shall be taken. It seems to me clear that what was disregarded by the consent of the parties was no law relating to the relevancy of evidence but Order XVIII, rule 4.

Can the parties by consent empower the Court to act in contravention of Order XVIII, rule 4? It is beyond dispute that the parties may waive such rules of procedure as are intended to protect their personal interests and are not based on public policy. The rule that evidence shall be given in open Court, is no doubt a rule of public policy, *Scott* v. *Scott* (3). What has been waived, however, in the present case is not the giving of the evidence in open Court but its being given once again in the Court in specific reference to the trial of this suit. The Judge in Original Suit No. 75 of 1909 was the same as the one who had recently heard the evidence in the prior case, Original Suit No. 577 of 1908. What the parties did by consent was to bring about a variation of Order XVIII, rule 15, so that the same Judge could deal with the evidence recorded by him in another suit as if he had recorded it in the one he was hearing.

It seems to me that this was a course of proceeding which, though not specifically provided for in any enactment, was one nearly resembling recognised modes of procedure and varying from them in matters which do not affect any rule of public policy. The considerations referred to in *Sri Raja Inugunti Prakasa Rajaningaru* v. *Venkata Rao* (1) seem to me to be applicable. There oral testimony given before one Court was held to have been

(3) (1913) App. Cas. 417; 82 L. J. P. 74; 109 L. T. 1; 57 S. J. 498; 29 T. L. R. 520.

rightly taken cognisance of by another Court without a fresh examination of the witnesses on the latter occasion, the parties having consented to this course. The decision is sought to be distinguished on the ground that there the parties to the prior and later proceedings were the same, so that section 33 would not have been violated by the depositions in the earlier proceedings being given in evidence in the latter; whereas in the case which is now under decision the parties to the two suits, Original Suit No 577 of 1908 and Original Suit No. 75 of 1909, were not the same: so that under section 33 the evidence given by witnesses in Original Suit No. 577 of 1908 was not relevant to any issue in Original Suit No. 75 of 1909. But the fact that the provisions of section 33 were satisfied in *Sri Raja Inugentis* case (1) does not affect the question, if my opinion is correct that section 33 has no application either to the present case or to the grounds on which the decision cited proceeded. To the considerations referred to in *Sri Raja Inugenti Prakasa Rajaningaru's* (1) case, I may add (1) that evidence may, by consent of parties, be taken on commission and Order XXVI, rule 8, of the Code of Civil Procedure implies that by consent of parties evidence of persons not coming within clause (*a*) thereto may be taken on commission and used at the trial; (2) that if a party refers for information to another, that person's statement, though not given under Order XVIII, rule (4), becomes evidence under the Indian Evidence Act, section 20.

Before concluding my judgment, however, I must add that I should not be satisfied with the correctness of my reasoning if its effect would be to nullify section 33. But I do not think any such result follows.

Section 33 in principle is an enabling section. In the circumstances mentioned in the section, matters other than the best evidence are permitted to be brought before the Court. The person relying upon section 33 says: "I am not able to adduce the best evidece—which would be the oral testimony of the witness under section 60 of the Indian Evidence Act (because the witness is dead or for some similar reason); but in its place I tender a statement of the witness on a previous occasion." If the occasion and circumstances of the statement tendered satisfy the provisions of section 33, then the substitution of the previous statement for oral testimony is permissible, because the Indian Evidence Act has laid down, as rules of logic, that inferences may be drawn not only from oral testimony but from such substitution for oral testimony.

Section 33 would, therefore, be violated if the party said, "I am not able to bring the witness in Court, take this document in substitution"—and it was found that the document offered and accepted in substitution did not satisfy the requirements of section 33.

But I have been at pains to justify my opinion that this was not what the parties intended to do. They said in effect: "We are satisfied that these witnesses, if they were called (as can be done), will depose to the same effect as they have recently deposed. We want the Court to consider that they have so deposed before it, without our being put to the trouble and expense of calling them." The fact that one of the parties agreeing to this course was not a party to the previous suit does not affect the procedure, inasmuch as it merely meant that though he had no opportunity for cross-examining in the previous suit he was content to waive that right. Had that party not consented to this course, it would still have been possible for the Court to avail itself of the procedure laid down in *Ex parte Bottomley* (4), *viz.*, to re-call the witnesses, to have them re-sworn, and to put to them their previous depositions in the form of leading questions and ask the party objecting to cross-examine them further; and in a case such as the present, where the same Judge had very recently heard the witnesses give evidence I am not prepared to say that (if any objection had been raised to the course actually proposed and followed) the best way of exercising the discretion vested in the Court under sections 142 and 154 of the Indian Evidence Act

(4) (1909) 2 K. B. 14; 78 L. J. K. B. 547; 100 L. T. 782; 73 J. P. 246; 25 T. L. R. 371.

would not have been to follow the procedure in *Ex parte Bottomley* (4).

I am, therefore, of opinion that the Court was competent to act in the manner suggested; that it exercised its discretion rightly in acceding to the suggestion, and that the result was that the witnesses were by the consent of parties taken to have given oral testimony in the suit under appeal to the same effect as in the other suit, though the testimony was not given in the exact mode provided for by the Civil Procedure Code.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 914 OF 1911.

October 29, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge and Mr. Justice Rattigan.

MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUZAFFAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. VI—Res judicata.

S sued his brothers, *F* and *J*, in 1856, for his ⅓rd share in the ancestral estate. The suit was referred to arbitration, and *S* accepted a certain area of the *shamilat* in full satisfaction of his claim. After his death, his son again sued *F* and *J* for the alleged share of *S*, but the suit was dismissed in January 1860 on the ground that in the previous proceedings *S* had given up all right to his share. Owing to some mistake which was repeated from time to time till 1908, *S* and his descendants were entered in the Revenue Records as full proprietors of the land in their possession and as having a right to claim a share, according to their holding, in the village *shamilat*. On a suit by the descendants of *F* to have the entry rectified:

Held, that the decision of 1860 operated as *res judicata* and that consequently the plaintiffs' suit ought to be decreed.

First appeal from the decree of the District Judge, Shahpur, dated the 29th June 1911, passing a declaratory decree in respect of ¼th share in the *shamilat*.

Lala *Ganga Ram*, for the Appellants.

Mr. *Badr-ud-din Kureshi*, for the Respondents

JUDGMENT.—The family tree given in the judgment of the District Judge is admittedly correct and sets forth the relationship of the parties.

Aulia, the common ancestor, was one of four persons who owned the village Dehr in the Khushab Tahsil of the Shahpur District, all four proprietors being owners of an equal one-fourth share therein. It would appear that Aulia died about 1815, leaving his property to three sons, Fatta, Jahana and Sultan, and that at that time the land was more or less waste (*uftada*). Fatta and Jahana alone seem to have taken an interest in the property, and Sultan made no attempt to claim his ⅓rd share until 1856, when he brought a suit in the Court of Pandit Moti Lal for recovery of that share. By agreement of parties, this dispute was referred for determination to the two *lambardars* of the village who, on the 16th July 1856, gave an award which is printed *in extenso* at pages 3 and 4 of the paper-book. The arbitrators were satisfied that Fatta and Jahana had expended Rs. 780 upon the land and that Sultan was bound to recoup them to the extent of ⅓rd of that amount before he could claim his share in the property. Sultan appears to have admitted this liability, but he pleaded poverty and inability to pay anything to his brothers and prayed the arbitrators to award him some land for his maintenance. The arbitrators accordingly put it to Fatta and Jahana that Sultan was their own brother and that they should give him some land, whereupon the two former replied that they would abide by any award the arbitrators thought proper to make. As a result, the arbitrators decided that Fatta and Jahana should, out of their ¼th share in the *shamilat*, give Sultan a plot of 118 *kanals* 19 *marlas* (=29 *bighas* 2 *kanals*) of land, and they added that this portion of land would have to be taken into account in the defendants' share when partition of the *shamilat* was effected. Fatta, Jahana and Sultan accepted the award and the Court granted a decree in accordance with its terms. Before proceeding, we may here observe that the present defendants Nos. 1, 2 and 3 (the son and grandsons of Sultan) in ground No. 1 of their memorandum of appeal to this Court have attempted to place a false construction upon the words

of the award to the effect that at the time of partition the area allotted to Sultan was to be taken "into account in defendants' share." According to them, the area allotted to Sultan was, by the terms of the award, to be deducted from the share in the *shamilat* to which otherwise Sultan would have been entitled when that *shamilat* was partitioned. Such was obviously not the meaning of the arbitrators. The area given to Sultan was given in charity and it was taken from the *shamilat* land, and what the arbitrators meant, and what the parties knew to be their meaning, was that when the *shamilat* land was eventually partitioned, Fatta and Jahana would, as against the other three proprietors of the village, have to be debited with the 29 *bighas* 2 *kanals* of *shamilat* land which they had given to their brother for his maintenance. That such was clearly the intention of the arbitrators and of the parties is apparent, not only from the terms of the award itself, but also from the statement made by Fatta and Jahana when asked by the Court whether they accepted the award. They replied that they did and added, "at the time of partition, we shall credit to the village proprietors the portion of *shamilat* now allowed to the plaintiff" (*i.e.*, to Sultan). There is thus absolutely no force in grounds Nos. 1 and 2 of the grounds of appeal filed in this Court, and the District Judge was right in construing the proceedings of 1856 as amounting to a dismissal of Sultan's claim for his share in the ancestral estate. Of that estate, so far as the proprietary holding was concerned, he received nothing, but his brothers as an act of charity gave him of their own free will a plot of land in the *shamilat* and accepted the position that they would, at partition of the *shamilat*, have to credit the other three proprietors in the village with the amount of land thus received by *them* in anticipation.

Sultan died shortly after the above proceedings had concluded and in 1860 his son, Muhammad, again sued Fatta and Jahana for his alleged one-third share in the ancestral estate which had devolved from his grandfather, Aulia. This suit also came before Pandit Moti Lal who, on the 13th January 1860, dismissed it on the ground that Sultan, Muhammad's father, had in the previous proceedings given up all right to his share and had finally accepted the area allotted to him (*viz.*, 29 *bighas* 2 *kanals*) in full satisfaction of all his claims. By some curious mistake, however, Sultan and his descendants were entered in the Revenue Records as full proprietors of the land in their possession and as having a right to claim a share, according to their holding, in the village *shamilat*, and this entry appears to have been repeated from time to time until 1908, when the *patwari* reported to the Tahsildar that Sultan and his heirs were mere *malikan qabza* and as such not entitled to claim any part of the *shamilat*. He accordingly proposed that the entry should be altered so as to bring it into accord with the real facts, but defendants objected and as a result, the Revenue Authorities declined to alter the entry and referred the descendants of Fatta (Jahana having died sonless some time ago) to the Civil Courts to establish their right to have the entry rectified. Hence the present suit, which has been decreed by the District Judge on the ground that the whole question was finally concluded by the decree based on the award in 1856. Defendants Nos. 1 to 3 have appealed to this Court and we have heard all that Mr. Ganga Ram had to urge on their behalf. In our opinion there can be no possible doubt of the correctness of the District Court's decision. Sultan in 1856 practically threw himself upon the mercy of his brothers and gladly accepted from them, in lieu of the third share in the ancestral holding which he claimed, a specified plot of land carved out of the village *shamilat* and agreed, according to the judgment of Pandit Moti Lal in Muhammad's suit of 1860, to accept that plot in full satisfaction of any rights he might possess as a shareholder in the village. The plot which was given to him was, as we have said, taken out of the *shamilat* and could not, therefore, in any event carry as appurtenant to it a proportionate right in the rest of the *shamilat*. But this objection apart, the decision given in 1860 clearly operates as *res judicata* so far as the present plea urged by defendants Nos. 1 to 3 is concerned (see section 11, Explanation VI, of the Civil Procedure Code) Mr. Ganga Ram laid stress before us upon

a statement in a certified copy of a so-called *ikrarnama*, which we were informed was attached to the Settlement Record of 1866. Probably this *ikrarnama* is part of the *Wajib-ul-arz* of that Settlement, but it is not necessary for us to deal with it at length. Defendants in the Court below did not so much as even refer to it, and the certified copy before us was actually filed in that Court not by them but by plaintiffs. As a matter of fact it does not in any wise strengthen defendants' case, as it is admitted that the entries in the Revenue Records have all along been in their favour, and the very object of the present suit is to show that these entries are erroneous. The *ikrarnama*, moreover, purports to have been executed in 1860 and that it erroneously represents the true facts is obvious when we remember that it was in that same year that Fatta and Jahana had succeeded in getting Muhammad's claim dismissed. It is impossible to believe that after their success they agreed to accept a contention which they had strenuously opposed in Court.

We have no hesitation in holding that plaintiffs have succeeded in establishing their case and we accordingly dismiss this appeal with costs. We have only to add in conclusion that there is no force in the contention that the omission of defendants Nos. 4, 5 and 6 to join the suit is a strong piece of evidence in favour of the justice of the contesting defendants' claims. Defendants Nos. 4, 5 and 6 are, no doubt, equally interested with plaintiffs, but while they have not actively assisted plaintiffs, they have in no way admitted the rights of defendants Nos. 1 to 3 and we see no reason to doubt the allegation that plaintiffs are suing as much on their behalf as on their own. Pleader's fee in this Court to be Rs. 32.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 299 OF 1911.

April 1, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

MUNSHI RAM—PLAINTIFF—APPELLANT

versus

GAINDA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition, evidence of—History of family—Money transactions.

The mere fact that no formal partition ever took place between the members of a Hindu family is not in itself conclusive against separation having occurred; the matter has to be decided upon an examination of the history of the family, of its mutual dealings, of its dealings with outsiders and upon admissions, if any, made by the members.

Apporier v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. (P. C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30, followed.

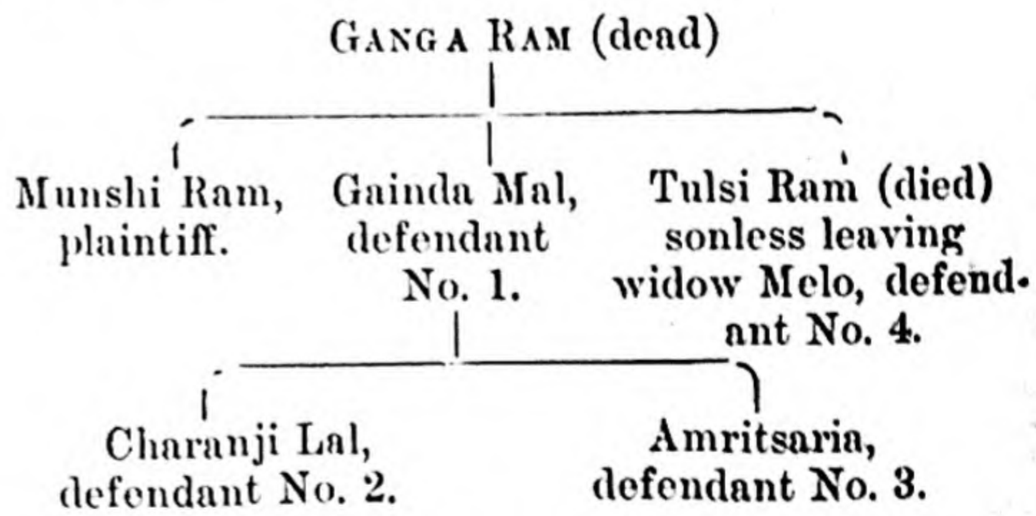
Money transactions between the members of a Hindu family, the one lending and the other borrowing and showing corresponding debts and credits in their books, go very far to prove disruption.

First appeal from the decree of the Honorary Subordinate Judge, first Class Jullundur, dated the 28th November 1910, decreeing the claim in part.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Mr. *C. H. Oertel* and Lala *Ram Rattan*, for the Respondents.

JUDGMENT.—It is convenient to reproduce here the pedigree-table with which the judgment of the learned Subordinate Judge opens:—



Gainda Mal also had a third son Dev Raj, who is alive but has not been impleaded and apparently is treated as having no interest in this litigation. The lower Court has set out the pleadings and issues and it is unnecessary to repeat them. Plaintiff claims ⅓rd share in the family property which he details under 11 heads, allowing a similar share to *Musammat* Melo and to Gainda (and his sons) respectively; but adds that, if the Court is of opinion that the widow is not

entitled to a share, than he (plaintiff) should have half and not only ⅓rd.

The points for decision were whether the family was a joint Hindu family, as plaintiff contends, or whether it had ceased to be so during Ganga Ram's life-time—he died in 1907—and in either case in what property plaintiff is by law entitled to a share. The lower Court found that some 22 years before suit Ganga Ram had separated off his sons; that on his death, out of all the property in suit, plaintiff became entitled only to his share in such property as Ganga Ram himself left, having kept it for himself at the disruption; that this share is one-half, *Musammat* Melo being entitled to no share, and that the property so left by Ganga Ram consisted of houses shown in list *Dal* attached to defendant's *jawab-i-dawa*, bonds and decrees shown in list *Jim* similarly attached, and a parcel of salt, value Rs. 250. Decree was passed accordingly, but no costs were allowed against either side.

Plaintiff appeals, and the sole question argued and requiring decision—there being apparently no dispute as to details of property—is whether the family really remained joint or not. After giving our best attention to the somewhat voluminous evidence and to the able arguments of Messrs. Sheo Narain and Oertel, we are unhesitatingly of opinion that disruption of the family is established and that the appeal must fail.

The lower Court was of opinion that both the oral and the documentary evidence showed that disruption took place long before the death of Ganga Ram. No formal partition ever took place, but according to the authorities, *e. g.*, such rulings as *Appovier* v. *Rama Subba Aiyan* (1) this in itself is not conclusive against separation having occurred, the matter has to be decided upon an examination of the history of the family, of its mutual dealings, of its dealings with outsiders; and upon admissions, if any, made by the members. The lower Court in its discussion of issue 1, page 194, line 30, paper-book, perhaps makes too much of plaintiff's admissions for—see page 100—plaintiff really only admitted separating in the matter of residence 1½ years before his father's death and stoutly denied any other separation; but for the most part the rest of the lower Court's discussion of the record is correct enough. Perusal of the oral evidence for the plaintiff produced before the Court shows that it is largely partisan in character; but even as it stands it does not much help him. A large proportion of the witnesses state no facts bearing upon the essential problem before us, and those who do state such facts by no means agree in their testimony. Some even make statements distinctly contrary to the theory of the jointness of the family; and some give themselves away by wild assertions that the family is still in practice joint, even in residence, which is oppposed alike to the allegations of the defendants and to the admissions of the plaintiff himself, and that the shop in which Ganga Ram used to work with Gainda Mal up to the former's decease is still carried on jointly "by the parties." One very useful indication of the partisan character of this evidence may be given as a sample. Ghulam Mustafa, Octroi *Muharrir*, page 128, says: "Goods received in the name of Munshi Ram or any of his co-partners were taken delivery of sometimes by Gainda Mal, sometimes by Munshi and sometimes by Amritsaria." This sounds decidedly in favour of plaintiff; but presently the witness is compelled to admit that "no goods were received in the name of Munshi Ram;" and he does not show by any record that Munshi Ram ever took over goods consigned in the name of Gainda Mal. The lower Court was right in holding that such evidence as this is of little value.

We need not examine minutely, or lay much stress upon defendants' oral evidence, as documentary evidence in such cases as the present is usually the only reliable evidence. That oral evidence is partly in favour of plaintiff and partly of defendants, and the general impression one gets from the whole of the oral evidence is that the family long since ceased to be a joint Hindu family in the proper sense of the term, that the members of it remained on good terms until recently and that, therefore, now and again, though seldom, transactions occurred in which both plaintiff and Gainda Mal were mixed up. The oral evidence before the Local Commissioner is decidedly more favourable to defendants than that given in Court,

(1) 11 M. I. A. 75; 8 W. R. (P.C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R 30.

e. g., plaintiff's witnesses Allah Dad Khan and Nabi Bakhsh, pages 168, 169; and it must not be lost sight of that where we find plaintiff and Gainda Mal, for instance, jointly selling grain after Ganga Ram's death, this does not go to show jointness as of a family between them, the explanation being that both of them were interested in grain, etc., *left by Ganga Ram* and so would until they fell out, naturally co-operate in dealing with it.

The Local Commissioner who is a Munsif made a long and elaborate report, arriving at the conclusion that the family was still undivided. The lower Court in coming to a contrary opinion does not specifically discuss that report, which is a pity; but it gives from the documents on the record sufficient ground for its findings, dividing the indications into nine heads. The first two heads are concerned with the income-tax objections of 1905, 1906 and 1907. In the first, which was filed by Ganga Ram alone, it is plainly stated that separation has taken place. Apparently it was rejected; and in the other two petitions stress is laid by the petitioners not so much on their separation but on the smallness of their total income, though the fact that plaintiff and Gainda Mal ran separate shops was urged. Most of the other heads amount to cumulative evidence of separation, that is to say, hardly any one head by itself would be anything like conclusive, *e.g.*, No. 3, as to nature of entries in Octroi Register; No. 5, showing that plaintiff more than once sued in his own name and got decrees and apparently never accounted to Gainda Mal or adjusted matters with him; No. 6, as to rent of shops taken by plaintiff for his own business; No. 7, showing that *Arhtis* kept up separate accounts in the names of plaintiff and Gainda Mal respectively; No. 8, as to separate bonds, mortgages and decrees in favour of plaintiff and Gainda Mal and Ganga Ram respectively. All of these individually no doubt are capable of the familiar explanation that adult members of joint families do for convenience' sake frequently carry on, each in his own name, business and litigation in connection with affairs made over specially to their charge; but the combined effect is by no means negligible, when it is borne in mind that there is no indication in the last 20 years or so of what might be called a general stock-taking in the family and when attention is drawn to the remarkable dearth of *joint transactions* in which both plaintiff and Gainda Mal, who were until lately quite good friends, took part.

Lastly, heads Nos. 4 and 9 afford, in our opinion, very strong proof of separation though here too Mr. Sheo Narain has been able to suggest something in the nature of explanation. According to the authorities, money transactions *between* members of a Hindu family, the one lending and the other borrowing and showing corresponding debits and credits in their books, go very far to prove disruption. The entries referred to in head No. 4 are of this type, and we do not think the suggestion that the entries were merely made to keep accounts straight is sufficient to rob them of their significance. Then as to head No. 9, though Mr. Sheo Narain has been able to show that ultimately in 1899 plaintiff himself sued on the mortgage-deed which in 1892 he had sold to Gainda Mal, we hardly think this sufficiently explains the execution of such a sale-deed *containing as it does a covenant for title.* The mortgage document, no doubt, must have been re-transferred to plaintiff before 1899; but we think this does not show that the sale of 1892 was merely a colourable transaction to enable Gainda Mal to sue on it. This idea seems to us to be sufficiently negatived by the fact that there was obviously no urgency about suing.

A few lines may be devoted to the more important special points taken by Mr. Sheo Narain in his addresses on behalf of the plaintiff-appellant and not already discussed. He relies to some extent on the evidence of the witness, Dasaundhi, brother of the late Ganga Ram; but like much of the oral evidence in the case it contradicts itself. Thus while saying that Ganga Ram effected no partition, he has to admit that plaintiff was separated from him, that a certain distribution in the family of bonds, etc., was made by Ganga Ram and that *tambol*, etc., was taken and given by plaintiff separately from his brothers. We do not think much of the next point taken, namely, that there is no partition-deed or *farighkhatti* forthcoming; but it is certainly a point against defendants-respondents that so many books and other documents one would expect to

be in plaintiff's possession, were produced from defendants' custody. This is noticed by the Local Commissioner, page 188, line 38; but it must not be supposed that *all* plaintiff's papers were in defendants' custody. Then, such documents as the mortgage on page 12 do not help, being 23 years old and so probably earlier than the disruption, or at least before the disruption was complete. Further, the deed makes no mention of plaintiff at all. Similarly, the document on page 16 is easily explained as some petty adjustment between plaintiff and Gainda Mal. The receipt on page 18 proves absolutely nothing in connection with plaintiff, and a similar remark applies to all the documents up to page 22. It is useless to burden this judgment with any more examples of the way in which we look at the evidence on the record. Suffice it to say that we see no reason to differ from the lower Court in its opinion that the parties separated long before the death of Ganga Ram. Where money due to one member of the family is found paid or credited to another member, we see in the special circumstances of each and every such instance no reason to attribute the phenomenon to jointness of the family, thinking it more reasonable to explain it by genuine transfer or adjustments between separated persons. There is also important evidence of separation noticed by the Local Commissioner at page 188, paragraph marked 1, which is supported by the evidence of Parmeshria Mal and Mathra *Munim*—pages 167 and 179—but not taken advantage of by the lower Court. In our opinion Mr. Sheo Narain is unsuccessful in his attempts to explain away or minimise that evidence.

The parties have quoted rulings in connection with problems of jointness and separation of Hindu families; but we need not discuss them, as the law is clear.

We may note that the property mentioned in paragraph 3 of the plaint has been excluded from the suit by order of the lower Court, dated 8th December 1909, page 119.

The net result is that we agree with the lower Court in its conclusions and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL SUIT No. 190 OF 1912.

September 29, 1914.

Present:—Mr. Justice Kumaraswamy Sastri.

V. VENKATARAMIAH PANTULU AND OTHERS—PLAINTIFFS

versus

P. V. SUBRAMANIAM PILLAI AND OTHERS—DEFENDANTS.

Hindu Law—Joint family—Bequest of self-acquired property by father to his sons—Presumption—Property taken by sons, whether joint property—Bequest invalid—Intestacy—Management of property by eldest member who was also executor in accordance with Will—Debts contracted for family purpose by eldest member, how far binding on family—Renewal of debt — Apportionment of security — Apportionment invalid—Security not extinguished—Power of Receiver in partition suit to acknowledge debt—Acknowledgment, effect of—Joint family trade—Promissory note executed on behalf of firm by one member, if other members can be sued.

One *P V* died in 1887 leaving a Will, in and by which he directed that the residue of his property after payment of certain legacies should be divided at his death among his sons and grandsons, who were living with him as members of one family, into five equal shares as soon as his grandsons attained majority, that his eldest son shall be the executor to his Will and conduct the shop and business which he was carrying on in his name, and generally administer his estate. In pursuance of the directions of the Will the 1st defendant continued to manage the estate and incurred debts and executed mortgages for family and business purposes and no objection was taken as to his management by the other members of the family. In 1905 a suit was filed for a partition of the estate of *P V* by some of the members of the family and for an account of the properties left by him, on the ground that the estate became divisible under his Will, and during the pendency of the suit Receivers were appointed to pay interest and arrears of interest accrued due and payable on mortgages executed by the 1st defendant of the immoveable properties belonging to the estate. In the said suit it was decided that on a proper construction of the Will the bequest of the Will was invalid and that there was an intestacy in regard thereto. The plaintiff in whose favour promissory notes were executed and title-deeds were deposited as collateral security therefor, sued to recover the moneys due to him from the 1st defendant and the other members of the family. The defendants, among other pleas, pleaded that the equitable mortgage was not binding on them and that the 1st defendant as executor had no power to make any such alienation and that the payment made by the Receivers towards the said debt did not save limitation:

Held, that the residue of the properties must be deemed to have been taken by the members as joint family property and that the debts contracted and the mortgages made by the 1st defendant

were in the capacity of a managing member and, therefore, binding on the family.

Where a family is joint and continues joint after the death of a testator, his properties, which they get by his Will, would be joint properties, unless there is something in the Will which raises a presumption to the contrary.

Nagalingam Pillai v. *Rimachandra Tevar*, 24 M. 429; 11 M. L. J 210, referred to.

Where a person borrowed money and executed promissory notes and deposited title-deeds of immoveable property creating a valid equitable mortgage thereon and was taking subsequent advances on the strength of the same security, and some time after looked into the accounts, executed two promissory notes for the total sum due and also two documents with a view to apportion the title-deeds of the immoveable property, which were already deposited, to each of the said promissory notes and it was found that the said documents were invalid:

Held that the equitable mortgage originally created was not extinguished and that the mortgagee was entitled to enforce it.

The renewal of a debt does not *ipso facto* put an end to the security which a person has, unless such a renewal is accompanied by a fresh contract giving fresh security, and an attempt made to apportion the security which was invalid would not deprive the person of the security which he already has.

Ganpat Pandurang v. *Adarje Dadabhai*, 3 B. 312, referred to.

Where a joint family trades under a firm name, the members thereof can be sued on a note properly executed by one member in the firm's name.

A payment by a Receiver, who is appointed in a suit for partition or administration and who is authorised by the order of appointment to pay interest on debts, is sufficient to keep the debts alive against all the parties who are bound by the debts. *Chinnery* v. *Evans*, (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 29; 145 R. R. 79; 11 E. R. 1275; *Annapaguda* v. *Sangadigyapa*, 26 B. 221 (F. B); 3 Bom. L. R. 817; *Wilkinson* v. *Gangadhar*, 6 B. L. R. 486, *In re Hale*; *Lilley* v. *Foad*, (1899) 2 Ch. 107; 80 L. T. 827; 47 W. R. 579; 68 L. J. Ch. 517; 15 T. L. R. 389, referred to.

Mr. *T. Ethiraja Mudaliar*, for the Plaintiffs.

Messrs. *K. Ramachandran*, *Short Bewes and Co.*, *S. Duraisawmi Iyer*, *V. Viswanatha Sastri*, *G. Krishnaswami Iyer*, *Branson & Branson* and *P. Subramaniam*, for the Defendants.

JUDGMENT.—The plaintiffs sue to recover Rs. 78,696-4-10 alleged to be due on an equitable mortgage created by the 1st defendant by the execution of two promissory notes dated the 1st October 1904 for Rs. 15,000 and Rs. 14,500 respectively, carrying interest at 18 per cent. per annum, and by the deposit of title-deeds of the properties specified in the plaint.

The case of the plaintiffs is that one P. Venkatachelam who was carrying on business in Madras, died leaving five sons of whom 1st and 9th defendants are now living, that the 1st defendant, his brothers and their children were members of an undivided family of which the 1st defendant was the manager, that for the purpose of joint family trade he (1st defendant) borrowed sums of money from the plaintiffs from time to time and deposited title-deeds, that the 1st defendant and the Receivers appointed in Original Suit No. 238 of 1905 paid the plaintiffs several sums of money amounting to Rs. 20,307 towards the said promissory notes and that the suit is not barred by limitation owing to such payments.

The 2nd, 3rd and 4th defendants are the sons of the 1st defendant. The 5th and 6th defendants are the sons of one Singaravelu Pillai, the deceased brother of the 1st defendant. The 7th defendant is the son of Kadirivelu Pillai, another deceased brother. The 8th defendant is the son of Subbaraya Pillai who was also a brother of the 1st defendant. The 9th defendant is the brother of the 1st defendant. Defendants Nos. 10 and 11 are made parties as the 7th defendant is alleged to have executed a deed of trust in their favour transferring his interest in the properties. The 12th, 13th and 14th defendants are made parties as being puisne mortgagees of the 7th defendant.

The 1st defendant did not file any written statement. Defendants Nos. 2, 3 and 4 filed a written statement pleading that the 1st defendant carried on business as executor under the Will of his father Venkatachelam and not as manager of an undivided joint family, that the plaintiffs with knowledge of this fact dealt with the 1st defendant as executor and not as manager, that under the Will the 1st defendant had no power to borrow and any alienations or mortgages made by him would not bind them, that they are not personally liable in respect of the debts borrowed by the 1st defendant on promissory notes, that the 1st defendant agreed to pay exorbitant rates of interest,

which are not binding, that the suit is barred by limitation and the plaintiffs are entitled to no relief against them. The 5th defendant filed a written statement putting the plaintiffs to proof of the 1st defendant having borrowed moneys as manager of an undivided family or that the moneys were borrowed either for family purposes or for the purpose of trade, and pleading that there was no necessity for the same. He denies the equitable mortgage and states that, even if true, the mortgage is inoperative as against him. The 8th defendant filed a written statement pleading that the 1st defendant as executor had no power to mortgage the properties or contract loans, that the acts of the 1st defendant, as set out in the plaint, do not bind him or the other defendants, that no payments were made by the 1st defendant, and that the statement of accounts annexed to the plaint contains several items which are not chargeable against the other defendants. The 9th defendant filed a written statement admitting the allegations in the plaint, as to defendants Nos. 1 to 9 being members of a joint family and the 1st defendant being the manager of the family who has been carrying on a family business, but stating that the business was carried on by him not as manager but as executor with Probate of the Will of Venkatachelam, that there was no necessity for any loans to be contracted and that the plaintiffs, having dealt with the 1st defendant as executor, have no right to proceed against the other defendants. He puts the plaintiffs to proof of the deposit of title-deeds and states that the equitable mortgage is not valid and binding on him and that as the payments made by the Receivers were only made on behalf of the 1st defendant, they would not save the suit being barred as against the others. He pleads in the alternative that, if the mortgage is binding, the same should be set aside as an unconscionable transaction under sections 16 and 16A of the IndianContract Act, as the contract sued on was obtained by undue influence under circumstances set out in the written statement. The 12th defendant filed a written statement denying that the 1st defendant was the manager of the family and stating that he was only an executor with Probate, that he had no power to mortgage, that the mortgage was for his own private purposes and that it does not bind the other defendants. The 13th defendant filed a written statement putting the plaintiffs to proof of the allegations and denying that the amounts were borrowed for family purposes or were applied for the purpose of the business. The 14th defendant filed a written statement pleading in addition that he obtained a mortgage decree in Civil Suit No. 70 of 1910 for Rs. 9,952-15-0 for principal and interest and that he is entitled to priority over all the other mortgagees in so far as the 7th defendant's interest is concerned.

The following issues were settled:—

1. Was the money borrowed by the 1st defendant for joint family purposes?

2. Did the 1st defendant deposit the title-deeds as alleged?

3. And, if so, is the mortgage binding on the joint family?

4. Is the suit barred against any of the defendants?

5. Did the 1st defendant enter into the agreement pleaded in paragraph 6 of the plaint? If so, was such agreement obtained by undue influence and are the defendants entitled to be relieved therefrom?

6. Were defendants Nos. 1 to 9 members of a joint family, was 1st defendant manager thereof and did he borrow as such?

7. To what relief are the parties entitled?

Before dealing with the issues it is necessary to refer to the Will of P. Venkatachelam, who was admittedly the common ancestor of defendants Nos. 1 to 9, and to certain proceedings in the High Court in relation to his estate.

P. Venkatachelam, the father of defendants Nos. 1 to 9 and the grandfather of defendants Nos. 2 to 8, died on the 9th May 1887 leaving four sons, namely, Subramania Pillai (1st defendant), Singaravelu Pillai, Kadirivelu Pillai and Murugesa Pillai, and Sundaramurthi Pillai (8th defendant), the son of Subbaraya Pillai, his predeceased son. He left a Will dated 30th January 1887, Probate of which was granted to the 1st defendant on the 30th August 1889. The Will provides "that Subramania Pillai (the 1st defendant) shall conduct the shop, etc., business and other matters in the name of Pa. Venkatachelam and take the

necessary steps as regards the shop". It also provides "that he shall in company with his brothers conduct the business and shall maintain and support his mother and other female members of the family." After giving certain legacies to certain persons it provides "that Subramania Pillai shall as the chief person to the Will and testament preserve and administer the landed properties and all other properties mentioned in the Will." Though in the body of the Will Subramania Pillai is not given any powers of alienation, the Will winds up with the following directions:—"Though it is mentioned that my eldest son Subramania Pillai should not sell and that no person should buy my aforesaid landed properties, still should the expenses increase by any act of King or God or by Government or by the people residing adjacent to my landed properties or by rain or by wind, or should the income of rents decrease owing to any other cause and should the expenses increase, the aforesaid Subramania may after consideration sell the landed properties, convert them into money and add the same to the ready money already in the Bank and make it yield income. He shall purchase such buildings, lands and gardens, if any, as may in his opinion yield income, and add the same to the above properties." The power to purchase properties out of the savings was already given by paragraph 9 of the Will, which empowers the 1st defendant "to purchase houses and grounds from the balance remaining in the Bank." So that the power given again is, in my opinion, a general power to make purchases of such properties which, in his opinion, may form profitable investments, in addition to the powers given to purchase properties out of the income. Mr. Subramania Pillai admittedly went on looking after the shop affairs, and, so far as the evidence goes, no notice was given to him by any of the defendants claiming partition nor was any objection taken to his administration of the properties until 1905 when 9th defendant and some other members of the family filed Original Suit No. 238 of 1905, praying that an account be taken of the properties, assets and effects of Venkatachelam in the hands of the 1st defendant as executor, for a partition and for each party being put in possession of his share. The case of the plaintiffs was that under the Will of Venkatachelam the estate became divisible into five shares as soon as the eldest grandson living at the death of the testator attained majority. They also alleged that the 1st defendant borrowed moneys without any justification whatever. On the 20th December 1905 Messrs. Parry & Co. were appointed Receivers and power was given to them "to pay interest and arrears of interest accrued due and payable on the mortgages executed by the 1st defendant of the immoveable properties belonging to the estate." The suit was dismissed by Mr. Justice Boddam, on the ground that all the grandsons were not of age and that the 1st defendant had the option to divide the properties when they became of age and that the Will did not vest the property in any one until the option was exercised. He also held that the parties were members of an undivided family and that there was no right to sue for administration. The matter went up in appeal and in Original Side Appeal No. 79 of 1906 this judgment was reversed and the case was sent back to the original side, "to be dealt with in accordance with law on the footing of an intestacy as regards the estate referred to in paragraph 11 of the Will." Their Lordships held "that the disposition referred to in paragraph 11 of the Will cannot in law be given effect to and that with regard to the residuary estate there is an intestacy. The property, therefore, devolves upon his heirs-at-law." This decision was confirmed by the Privy Council. The case was eventually disposed of and a *rajinama* decree was passed on the 9th October 1913. All the parties to the present suit and those who claim under them were represented in that suit and as regards the debts of the 1st defendant the decree provides as follows:—"That the debts of the 1st defendant binding on him incurred prior to the institution of this suit and disclosed to the Receivers, are binding on the parties and shall be paid by the Receivers from and out of the income accruing to the estates in their hands." It is proved by Exhibit Q-1 and it has not been disputed by any of the defendants that a list of debts was given to the Receivers and that the present debt is one of them. It is also not disputed that the Receivers did pay interest to the 1st plaintiff from time to time after

they were appointed Receivers. These payments are endorsed upon the promissory notes (Exhibits A and B) and there can be little doubt that when the parties consented to the *rajinama* decree in Civil Suit No. 238 of 1905, they all agreed that the mortgage now sued on was to be paid by the Receivers out of the income, thus showing that they all treated the mortgage as binding on them. The decree expressly states that such debts are binding. No attempt was made to explain why the parties did not exclude the present debt from the scope of the decree, even though this suit was pending when the decree was passed and all parties knew of the plaintiffs' claim. It is argued that the plaintiffs cannot take advantage of any agreement between the parties themselves as they were not parties to the *rajinama* decree; but there can be little doubt the plaintiffs can use the decree as an admission by all the parties of the validity of their debt. Whether Civil Suit No. 238 of 1905 is treated as a suit filed for the administration of the estate or as one for partition, it is pretty clear that an inquiry as to the debts and their binding nature was essential to the passing of a final decree and it cannot be said that the clause about the payment of debts referred to above was immaterial or was beyond the scope of the proceedings. Whether we treat the 1st defendant as the managing member of the undivided family or as executor whose powers are limited by the Will, it seems to me that the compromise decree would be cojent evidence as to the validity of the plaintiff's claim. The parties to the partition decree have agreed to divide the properties purchased by the first defendant subsequent to his father's death. They have also got a share in the business conducted by him subsequently. Their case now is that he had no right to purchase properties but they having agreed to divide the properties which he purchased, this argument comes with very bad grace from them. The proper and honest course would have been for them to have repudiated all the purchases made subsequent to his father's death, if they wanted to contend that the mortgages created for the purpose of purchasing properties were not binding on them. That would have left the mortgagees to proceed against the properties on the footing that they belonged to the mortgagor. Having divided all the properties in Civil Suit No. 238 of 1905 and having agreed that all the debts of the 1st defendant which were in the list given to the Receivers were binding on them, they now want to get an advantage to themselves at the expense of the 1st defendant and the plaintiffs by contending that the mortgage is invalid and *ultra vires*. A great deal of ingenuity has been spent by some of the defendants in the pursuit of this object, but it appears to me from the evidence and the documents filed that the plaintiffs' mortgage cannot be said to be invalid, or created for purposes not binding on them. There is certainly nothing in th evidence to show that the mortgage was for 1st defendant's own private purposes or that the 1st defendant did not contract the debts *bona fide* and for the purpose of the business which he conducted and to the purchase of immoveable properties, which have been considerable.

Issues 1 *and* 6.—It is not disputed before me that during the life-time of Venkatachelam he, his sons and their children lived together as members of one family. There is no allegation that any partition was effected except by the decree in Original Suit No. 238 of 1905. The 9th defendant who is the brother of the 1st defendant, although he raises every other possible defence to the suit, admits the allegations in paragraph 3 of the plaint to the effect that defendants Nos. 1 to 9 are members of a joint Hindu family and that the 1st defendant has been the manager of the joint family. The evidence of the 1st defendant is to the effect that after his father's death he, his brothers and nephews continued to be members of an undivided family and that the moneys borrowed from the plaintiffs were moneys borrowed for purposes of the business of Venkatachelam and for purchasing immoveable properties. He also states that his brothers and nephews were living together till 1905 and that he was the managing member. The 9th defendant states that he did not attend to the business subsequent to a year after his father's death; but this would not affect the rights of the 1st defendant as managing member of the family and as the person who was admittedly carrying on the family business. As regards the Will of Venkatachelam, it is clear from the decree of the Appellate Court which was confirmed by the Privy Council that there was an intestacy; so that with the exception of the small legacies and

maintenance payable as directed by the Will, the whole property devolved on his heirs not under the Will but by reason of an intestacy. It, therefore, appears to me to be clear that the fact, the Will was executed appointing the 1st defendant as executor, would not take the properties out of the ordinary rules of Hindu Law relating to succession to the properties of an intestate. The position would be just the same as if Venkatachelam died leaving no Will. Even assuming that there was no intestacy the mere fact that a Will was left would not make the properties bequeathed by a father, who was living jointly with his sons, the self-acquired properties of his sons. The general rule is that where a family is joint and continues joint after the death of a testator, the properties which they get by a Will would be joint properties unless there is something in the Will which raises a presumption to the contrary, [see Mayne's Hindu Law, paragraph 353 and *Nagalingam Pillai* v. *Ramachandra Tevar* (1).] The terms of this Will do not indicate that the sons should treat the property as their separate property. On the contrary it indicates that the sons had very little power over the properties and that if the terms of the Will were strictly enforced, their rights would be much less than those of the members of an undivided family inheriting property by survivorship. There is absolutely no evidence that the moneys borrowed by the 1st defendant from the plaintiffs were borrowed for his own purposes or for purposes unconnected with the business carried on by him as the manager. As I have already pointed out, all the parties interested agreed to treat the debts of the 1st defendant, which were contained in the list given to the Receivers, of which the present debt is one as binding on all of them and this, in my opinion, is the strongest possible evidence of the fact that these debts could not have been debts incurred by the 1st defendant for his own private purposes. It is not disputed that the 1st defendant purchased a large number of properties nor is it disputed that the properties purchased by the 1st defendant have been agreed to be divided between the members of the family. Under these circumstances and in the absence of any evidence to the contrary let in by the defendants, I find that the moneys borrowed by the 1st defendant from the plaintiffs were for joint family purposes.

(1) 24 M. 429; 11 M. L. J. 210.

Second Issue.—The title-deeds of the properties mentioned in the plaint are produced by the plaintiffs, and the 1st defendant in his evidence did not dispute the deposit of title-deeds. It is clear from the evidence of the 1st plaintiff and the 1st defendant that there were dealings between them from the year 1899 and that moneys were lent to the 1st defendant from time to time on promissory notes and the deposit of title-deeds. The 1st plaintiff states that all the moneys he advanced were on the security of title-deeds and that 1st defendant represented to him that he wanted the loans in order to discharge a prior debt due to the Madras Bank and for the purpose of the shop. It is clear from the evidence that prior to the execution of the two promissory notes sued on (Exhibits A and B), there was a sum of Rs. 29,500 due for principal and interest in respect of the sums advanced to the 1st defendant and that the whole of this amount was secured by the deposit of title-deeds. First defendant began by depositing title-deeds and borrowing moneys, and the subsequent loans up to 1904 were on the security of the deeds with the plaintiffs. It is difficult to accept the contention of the defendants that the plaintiffs who had title-deeds in their possession, would have made subsequent advances without any security whatever. I see no reason to disbelieve the evidence of the 1st plaintiff and the 1st defendant. On the 1st October 1904 accounts were looked into and Rs. 29,500 was found to be due and in respect of this sum, the 1st defendant executed two promissory notes one for Rs. 15,000 and the other for Rs. 14,500 (Exhibits A and B). At that time an attempt was made to apportion the title-deeds to each of these two promissory notes, and the 1st defendant executed two letters (Exhibits H and J) bearing the same date 1st October 1904. In one of the letters (Exhibit J) he states that the title-deeds of four houses should be security for the promissory note for Rs. 14,500, and in the other letter (Exhibit H) he states that the title-deeds of three properties (comprised in one title-deed) should be security for the loan of Rs. 15,000.

Objection was taken that these letters

are inadmissible for want of registration. I am of opinion that these letters do require registration, because not only do they recite that certain properties should be security for the debts but they go on to state that compound interest will be paid at 18 per cent. per annum (compounding every month). They, therefore, create an additional burden to secure which the title-deeds would be security. As the title-deeds were already in the possession of the plaintiffs and as no money was advanced on the date of the promissory notes (Exhibits A and B) but the whole amount was secured before an attempt to apportion the security, I am of opinion that the mere fact that there was an infructuous attempt to apportion the securities between the two promissory notes, Exhibits A and B, would not deprive the plaintiffs of the security they already had or deprive them of the right to fall back upon the deeds as security for both Exhibits A and B in case the apportionment was inoperative in law. There can be little doubt that the apportionment was for the benefit of the mortgagor and if the mortgagor chose to plead that the apportionment was invalid for want of registration, it would be perfectly open to the mortgagee upon the security which he never relinquished to insist upon his original title. It is always presumed that the mortgagee intends to take the mortgage alive when it is for his benefit to do so. It has been held in *Ganpat Pandurang* v. *Adarji Dadhabhai* (2) that a mere endorsement is sufficient to pass the securities created by the execution of a promissory note and the deposit of title-deeds, and that no deed of transfer is required. If endorsement of the promissory-notes executed prior to the notes Exhibits A and B would have passed the security to the endorsee, it is difficult to see how a renewal of the prior notes would extinguish the security unless there was a fresh deposit. I am unable, therefore, to find either any authority for holding that the renewal extinguished the security simply because Exhibits H and J require registration. It is argued that the mere execution of a promissory note in renewal of obligations already incurred amounts to a discharge of the previous obligations and that the previous obligations having been discharged, the security went with it, unless there was a fresh contract to give security. I am unable to find any authority for the proposition that the renewal of a debt *ipso facto* puts an end to the security which a person has unless such renewal is accompanied by a fresh contract giving fresh security, or that an attempt made to apportion the security which is invalid would deprive the person of the security which he already has. I am of opinion that the only effect of Exhibits H and J not being registered will be to put the plaintiffs in the same position as they were before the letters were executed, and it would only deprive the 1st defendant of his right to insist on an apportionment. I find this issue in favour of the plaintiffs.

Third Issue.—I have already in dealing with the 1st issue found that the 1st defendant was the managing member of the family and that the moneys were borrowed for purposes of the business carried on by the family and for the purpose of purchasing properties. There can be little doubt that the 1st defendant was carrying on the business of the family ever since his father's death. He would have been entitled to do so, even if there was no Will: but in the present case the Will expressly authorised him to carry on the business. No objection was taken to the 1st defendant's carrying on the business and to his purchasing the properties and, so far as I can see, all parties to the suit of 1905 allowed him to be in management of the family concerns. In 1899 the 1st defendant borrowed moneys for the purpose of discharging the equitable mortgage with the Madras Bank, for Rs. 12,500, of certain properties. The 1st defendant states that the Madras Bank pressed him for payment, that he had to borrow moneys for that purpose and that the plaintiffs lent moneys and got the title-deeds which were with the Madras Bank. There is nothing to show that the plaintiffs had any notice that the 1st defendant was either mismanaging the properties or was borrowing money for his private purposes. From the evidence for the 1st plaintiff

(2) 3 B, 312.

and the 1st defendant and from the fact that the debt due to the plaintiffs was agreed to be treated as family debt in the decree in Original Suit No. 238 of 1905, I am of opinion that the mortgage is binding on the joint family as the debts were incurred for purposes necessary and beneficial to the family. It is argued that as the loans were evidenced by the promissory notes, Exhibits A and B, a suit against persons not the makers would not lie. The present suit is not a suit on promissory note but on a mortgage. There is no difference in the remedies between regular and equitable mortgages and there is no authority for holding that Order XXXIV, rule 1, of the General Rules of Hindu Law as to suits on mortgages created by a manager does not apply when the mortgage is created by execution of a promissory note and the deposit of title-deeds. There is no authority for holding that where a joint family trades under a firm name, the members cannot be sued on a note properly executed by one member in the firm name.

Fourth Issue.—The promissory notes were executed on the 1st October 1904 and payments on account of interest have been endorsed on the promissory notes and signed by the Receivers, and these payments are dated 27th September 1907, 22nd September 1909, 5th November 1909, 1st March 1910, 4th April 1910 and 2nd May 1910. These endorsements are not disputed, but it is contended that the payments by the Receivers would not save limitation. The order appointing the Receivers dated the 20th December 1905 expressly authorised them to pay interest and arrears of interest accrued due and payable on the mortgage created by the 1st defendant on the immoveable properties belonging to the estate. Although the suit was dismissed on the original side, the order appointing the Receivers was continued by the order of the Appellate Court (Exhibit G) dated 23rd January 1907. Messrs. Parry & Co. were continued as Receivers on the same terms and under the same powers as were contained in the order of Mr. Justice Boddam dated 20th December 1905. I am of opinion that a payment by a Receiver who is appointed in a suit for partition or administration and who is authorised by the order of appointment to pay interest on debts is sufficient to keep the debts, alive against all the parties who are bound by the debts. *Chinnery* v. *Evans* (3); *Annapagauda* v. *Sangadigyapa* (4); *Wilkinson* v. *Gangadhar* (5); *In re Hale, Lilley* v. *Foad* (6). I find that this suit is not barred by limitation.

Fifth Issue.—The promissory notes, Exhibits A and B, carry interest at 18 per cent. per annum, but by the letters Exhibits H and J the first defendant agreed to pay the interest monthly and in default to pay compound interest at the same rate with monthly rests. It is clear that this clause will not affect the immoveable property, as Exhibits H and J are not registered. The 1st defendant would, however, be personally liable on the covenant unless it can be shown that the transaction was one which is voidable. I am clearly of opinion that the agreement to pay compound interest at Rs. 18 per cent. with monthly rests ought not to be enforced. The amount due to the plaintiffs on the 1st October 1904 was Rs. 29,500, this sum itself being the principal and interest due on the loans of 1899 and subsequently. Although the amount paid, as admitted by the plaintiffs in paragraph 8 of the plaint, is Rs. 20,307, the amount still due is Rs. 78,696-4-10. The transaction, in my opinion, is *prima facie* exorbitant and unconscionable and the evidence of the 1st defendant shows that undue advantage was taken of his position in 1904. It is not disputed that at the time of Exhibits H and J the plaintiffs had obtained a decree in the High Court in Original Suit No. 152 of 1903. The 1st defendant states that the 1st plaintiff was threatening to arrest him under a warrant and that he actually took out a warrant of arrest. I have little doubt that the 1st plaintiff, whether he actually took out a warrant of arrest or not, was in a position to do so at any moment and that he threatened the 1st defendant with arrest unless he complied with the 1st plaintiff's

(3) (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 145 R. R. 79; 11 E. R. 1275.

(4) 26 B. 221 (F. B.); 3 Bom. L. R. 817.

(5) 6 B. L. R. 486.

(6) (1899) 2 Ch. 107; 80 L. T. 827; 47 W. R. 579; 68 L. J. Ch. 517; 15 T. L. R. 389.

demand. Under these circumstances I do not think that the 1st defendant can be said to have freely entered into the manifestly onerous condition of paying compound interest at 18 per cent. per annum with monthly rests. The 1st plaintiff admits that the security was ample and, therefore, this is not a case where the plaintiffs had taken any risk. It is argued by the plaintiffs' Vakil that there were similar agreements as regards prior transactions, but those agreements were not carried into effect when the total of the Rs. 29,500 was ascertained. It also appears to me from the evidence that this agreement to pay compound interest was never seriously intended to be enforced by the plaintiffs. Plaintiff No. 1's letters to the Receivers show that he was prepared to accept 12 or 15 per cent. per annum if he was paid and it also appears from the endorsement on Exhibit II*d*, the promissory note dated 29th July 1902 for Rs. 13,000, that though the promissory note carries interest at 24 per cent. per annum, the 1st plaintiff agreed to receive interest at 12 per cent. if the money was paid in three months. I am of opinion that the plaintiffs are only entitled to simple interest at 18 per cent. per annum and not to compound interest. It is argued that the 1st plaintiff agreed to receive 15 per cent. from the Receivers, but the letters put in show that it was only conditional on prompt payments being made and that it does not amount to a binding contract between the parties irrespective of the payments being made within the period stipulated.

Seventh Issue.—Though not covered by any issue, it was argued by Mr. Doraisamy Iyer that inasmuch as the amounts due on the promissory notes of 1st October 1904 included the sum of Rs. 4,000 due under the decree of the High Court in Original Suit No. 152 of 1903 and the promissory notes bore higher rates of interest, the whole transaction was void under section 258 of the old Civil Procedure Code. There is no issue on this point and I do not think it is open to the parties to raise this contention, as the determination of this question involves numerous questions of law and fact and the plaintiffs have no opportunity to meet them. It is also argued that the 1st defendant being the executor under the Will had no power to borrow because the Will cut down his powers. As I have already said, the High Court has held that there has been a complete intestacy as regards the residue of the property of the testator and I do not see how, if there was intestacy, the 1st defendant, who apart from the Will, was the eldest and the *de facto* managing member of the family, would still be subject to the limitations as to conducting the business and dividing the property between the grandsons of the testator. The rights of the 1st defendant should, in my opinion, be governed by Hindu Law because of the intestacy. However this may be, even assuming that the 1st defendant has exceeded his powers and committed a breach of trust in borrowing moneys for carrying on the business and for purchasing the properties and adding the same to the estate, it is clear that all the persons who were entitled to the residue by reason of the intestacy and who were majors and competent to contract, agreed by the *rajinamah* decree with the executor, who is alleged to have committed the breach of trust, to treat the transaction binding on all the parties.

There will be a decree for the plaintiffs for Rs. 29,500 with proportionate costs and interest at 18 per cent. per annum from 1st October 1904, giving credit for Rs. 20,307 paid on account of interest. The decree will be the usual mortgage decree against the properties. The mortgage decree of the 14th defendant will be subject to plaintiff's rights. Except the 1st defendant the other defendants will not be personally liable for any deficiency that may arise.

As regards the costs of the suit, I direct that the plaintiffs do get proportionate costs from the 1st defendant and that the taxed costs of defendants Nos. 2, 3 and 4 who are minors be paid by the Receivers out of the estate. The other defendants will bear their own costs as they have failed in their attempt to repudiate the mortgage. They agreed to treat the mortgage as binding by the *rajinamah* decree in Original Suit No. 238 of 1905 and after getting the benefit of the purchases made by the 1st defendant, they attempt in this suit to get rid of the liability incurred for purchasing the properties and for carrying on the business, the profits of

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which they have got in the partition suit. Under these circumstances I do not think they are entitled to costs.

Suit decreed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS PETITION No. 296 OF 1914.

November 23, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Rossignol.

BHAGAT SINGH—DEFENDANT—PETITIONER

versus

JAI RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110, O. XLV, r. 2—Leave to appeal to King in Council—Decree of affirmance—Substantial question of law.

Where the Chief Court affirms in part the decree of a District Judge, a petition for leave to appeal to the King in Council cannot be granted, as in substance the decree of the Chief Court is a decree of affirmance within the meaning and for the purposes of section 110, Civil Procedure Code.

A Court has a discretionary power under section 34 of the Civil Procedure Code to allow interest *post litem motam* at such rate as it deems reasonable and if it allows 9 per cent. per annum it is not such an arbitrary and unwarrantable exercise of discretion as to involve such a substantial question of law as is contemplated by section 110 of the Code.

Petition, under Order XLV, rule 2, Civil Procedure Code, for permission to appeal to His Majesty in Council against the judgment and decree of the Chief Court, dated the 9th May 1914, passed in Civil Appeal No. 83 of 1913.

Mr. *Manohar Lal*, for the Petitioner.

Mr. *Clarence Kirkpatrick*, for the Respondents.

ORDER.—Plaintiff, mortgagee, sued to recover Rs. 81,200, principal and interest, from defendant No. 1, Bhagat Singh. The District Judge granted him a decree for (1) Rs. 44,552-10-6, together with interest as in the mortgage-deed from date of institution of suit until realization, as a first charge upon the mortgaged property; (2) Rs. 37,945-3-3 with interest as in the mortgage-deed from date of institution of suit until realization, as second charge upon the said property, to rank *pari passu* with the charge (if any) which defendant No. 2 might still have over the mortgaged property; and (3) Rs. 2,490 as costs of suit. The District Judge further held that defendant No. 1 was liable personally and as regards his other property for the discharge of the amount decreed. Defendant No. 1 appealed to this Court, and a Division Bench by its judgment, dated 9th May 1914, agreed with the District Judge as regards all findings of facts, but held, in favour of appellant, that he was not liable to pay compound interest after the date on which the last instalment was, according to the mortgage-deed, to be paid—in other words, that after the 19th October 1901 (the date when the first three years had elapsed without payment or without full payment) the mortgagor was liable to pay simple interest only on the accumulated debt until realization. This Court, therefore, while agreeing with the findings of the District Judge upon the merits, so far accepted the appeal as to reduce the amount of Rs. 44,552-10-6 to Rs. 40,567-8 and the amount of Rs. 37,945-3-3 to Rs. 34,557-8. In all other respects the appeal was rejected and defendant No. 1 (appellant) was ordered to pay $\frac{3}{4}$ths of respondents' costs. It is clear, therefore, that the alteration made in the decree was made entirely in appellant's favour. He has now, through his Counsel, applied under Order XLV, rule 2, of the Civil Procedure Code for a certificate that as regards amount or value and nature the case fulfils the requirements of section 110 of the Code and is a fit and proper one for appeal to His Majesty in Council.

Notice was directed to issue to respondents to show cause why the certificate should not be granted, and we have heard arguments on both sides.

Appellant's Counsel in support of the present application contends—

(*a*) that the amount decreed against the petitioner and in dispute on appeal to His Majesty in Council is over Rs. 10,000;

(*b*) that the decree of this Court did not affirm the decision of the District Judge and that consequently an appeal to His Majesty in Council lies as of right; and in any event,

(*c*) that there are substantial questions of law involved.

Point (*a*) is obviously correct and is not disputed by respondents.

Point (*b*).—On behalf of petitioner (appellant in the case before this case) it is contended that the decree of this Court cannot be said to have affirmed the decision of the District Judge, inasmuch as it reduced

the amount payable by petitioner to the respondents, and it is argued that the mere fact that this alteration in the decree of the District Judge was made in petitioner's favour cannot affect the question. We are unable to accept this contention. As observed by the High Court of Calcutta (Maclean, C. J., Hill and Stevens, JJ.) in the case of *Raja Sree Nath Roy* v. *Secretary of State for India in Council* (1), "We must look to the substance of the case. What is the decree from which the present applicant now desires to appeal to the Privy Council ? He desires to appeal only against the decision of this Court so far as it affirmed the decision of the Court below: nothing else. This seems to be, in substance, as far as the subject-matter of appeal goes, a decree of affirmance. If the decree of this Court had been properly drawn, it would have dismissed the appeal, except to the extent that the additional sum was given" to the applicant.

In the present case also the petitioner clearly does not desire to appeal from that part of the decision of this Court which reduced the amount payable by him, and the object of his appeal is to attack such part of the decree of this Court which affirmed the decision of the Court below. We cannot believe that it was the intention of the Legislature that in cases such as this a petitioner (who would have had no right of appeal had the decree of the Appellate Court been wholly against him) should nevertheless have such right because in one particular the Appellate Court decided in his favour.

We hold, therefore, that the present petition does not fall within the purview of the last paragragh of section 110 of the Code.

There remains the question whether the appeal involves "some substantial question of law."

According to the petition before us, the substantial questions of law involved in the appeal are as follows :—

"(1) that the rate of interest *post litem motam* should not be allowed at more than 6 per cent. per annum ;

"(2) that wrong presumptions have been made in regard to the question of profits made by plaintiffs by their enjoyment of the possession and working of the defendant's factories, etc., between 1903 and 1907 ;

"(3) that the burden lay strictly on the plaintiffs to prove accounts of their working the factories, etc, item by item ;

"(4) that the nine per cent. rate of interest allowed is excessive."

In our opinion there are no substantial questions of law involved in the appeal. As regards No. 1 of the grounds above set forth, we need say no more than that section 34 of the Code of Civil Procedure gives the Court a discretionary power to allow interest *post litem motam* at such rate as it deems reasonable, and we cannot agree that the fixing of such rate at Rs. 9 per cent. per annum is such an arbitrary and unwarrantable exercise of this discretion as to involve a substantial question of law.

Ground No. 4 is equally untenable. The mortgagor in his deed had agreed to pay interest at the rate of Rs. 9 per cent. per annum and because the District Judge and this Court held that he must abide by his contract and that the rate was not excessive, it cannot be said that the appeal involves such a substantial question of law as is contemplated by section 110 of the Code.

As regards grounds Nos. 2 and 3 it is obvious that neither the District Judge nor this Court decided the question of profits upon mere presumptions. The whole of the evidence and all the facts on the record were discussed and considered, and it was held by both Courts that the plaintiffs' accounts and the statements of Jamna Das, plaintiff, and his manager (*Munim*), Sant Singh, were true and credible, while defendant and his witnesses had failed to show that the factories, etc., must have been worked at a handsome profit.

For the reasons given we hold (1) that the decree of this Court affirmed the decision of the District Judge within the meaning and for the purposes of section 110 of the Code and (2) that there are no substantial questions of law involved in the appeal, and we accordingly reject this petition with costs.

Petition rejected.

(1) 8 C. W. N. 294.

HIRA v. MUHAMADI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 131 OF 1911.

November 11, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

HIRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMADI *alias* WALAITI AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 59, 111, 112—Succession to occupancy rights—Right of collaterals—Claim based on agreement—Entry in Settlement Record, effect of—Agreement, how proved.

In the absence of an express intention to the contrary, agreements recorded in a Settlement Record are not intended to take effect after the expiry of the period of the Settlement.

Where an occupancy tenant died without leaving any male lineal descendants or a widow, and his collaterals sued to succeed to the occupancy rights as against the landlords:

Held, (1) that there being no evidence to prove that the common ancestor of the last occupancy tenant and his collaterals ever occupied the land, the plaintiffs had no right of inheritance under section 59 of the Punjab Tenancy Act;

(2) that the plaintiffs' claim could not be allowed as they failed to establish an agreement referred to in section 111 of the Act.

A collateral of a deceased occupancy tenant who bases his claim to succeed to his tenancy upon an agreement, must prove it in one of the three following ways:

(1) He may produce a document which contains the terms agreed upon between the parties;

(2) he may put forward an entry made before the 18th November 1871 and attested by the proper officer in the record of a Regular Settlement sanctioned by the Local Government; or

(3) he may rely on an entry in a Record of Rights made after the above-mentioned date or on an entry in an annual record prepared under the provisions of the Punjab Land Revenue Act, 1887.

An entry which comes under (2) is by law deemed to be an agreement and nothing beyond its mere production is required, while the entry coming under (3) does not *proprio vigore* amount to an agreement and the party relying upon it has to prove that it embodies the terms of an agreement arrived at between the parties

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 15th November 1910, reversing that of the Munsif, first Class, Hoshiarpur, dated the 10th December 1909, dismissing the suit.

Rai Bahadur Pandit *Sheo Narain*, Lala *Madan Gopal* and Lala *Balwant Rai* (for Rai Bahadur Lala *Sukh Dial*), for the Appellants,

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—Narain, the last occupancy tenant of the land in suit, died in April 1903, without leaving any male lineal descendants or a widow, and the point for decision in this appeal is whether the plaintiffs, who are admittedly his collaterals, are entitled to succeed to the occupancy rights as against the landlords. We may clear the ground by stating at the outset that there is absolutely no evidence on the record to prove the allegation that the common ancestor of the plaintiffs and Narain ever occupied the land, and that the plaintiffs have, therefore, no right of inheritance under section 59 of the Punjab Tenancy Act. The statutory rules of succession which are enumerated in that section do not, therefore, help the plaintiffs. But the law allows landlords and tenants to contract themselves out of the statute by an agreement, and if a valid agreement containing rules with respect to succession is established, the Court is bound to give effect to it.

The question then arises whether the plaintiffs have succeeded in proving an agreement by which collaterals of an occupancy tenant are entitled to succeed to his tenancy, even though the common ancester did not occupy the land. In this connection, we have considered the provisions of sections 111 and 112 of the Tenancy Act, and are of opinion that a person basing his claim upon an agreement must prove it in one of the following three ways :—

(1) He may produce a document (other than an entry in a Record of Rights or in an annual record) which contains the terms agreed upon between the parties. It is clear that there is no such document in the present case;

(2) he may put forward in support of his contention an entry made before the 18th November 1871 and attested by the proper officer in the record of a Regular Settlement sanctioned by the Local Government; or

(3) he may rely on an entry in a Record of Rights made after the above-mentioned date or on an entry in an annual record prepared under the provisions of the Punjab Land Revenue Act, 1887.

There is, however, this difference between (2) and (3), that an entry which comes under (2) is, by law, deemed to be an agreement and nothing beyond its mere production is required. On the other hand, the entry coming under (3) does not *proprio vigore* amount to an agreement, but the party rely-

ing upon it has to prove that it embodies the terms of an agreement arrived at between the parties. In one case the consent of the parties is presumed; in the other it is to be proved by the party relying on the entry.

With these propositions of law before us, we now proceed to consider whether the plaintiffs have complied with the requirements of (2) or (3). As regards (2), reliance has has been placed upon an entry in the *Wajib-ul-arz* of the Settlement of 1852. But the obvious answer to it is that the agreement contained therein was clearly intended to remain in force during the term of that Settlement and that it exhausted itself upon the expiration of that term. The internal evidence afforded by the document itself conclusively proves this point. The learned Divisional Judge has quoted extracts from the statements of the landlords and tenants recorded in the *Wajib-ul-arz*, and a perusal thereof leaves not the slightest doubt in our minds that the agreement was expressly restricted to the term of the Settlement and ceased to be operative when the Settlement of 1884 came into force, and that it cannot now be invoked by the plaintiffs in the present case. Moreover, it appears that in the absence of an express intention to the contrary, agreements recorded in a Settlement record are not intended to take effect after the expiry of the period of the Settlement, vide *Fateh Bakhsh* v. *Lehna* (1) and *Musammat Narain Devi* v. *Hira* (2). The plaintiffs' contention must, therefore, fail so far as the entry of 1852 is concerned.

Coming now to the proof required by rule (3) stated above, we find that there is an entry in the *Wajib-ul-arz* of 1884 relating to succession to occupancy rights, and the first question for determination in this connection is, whether the plaintiffs have proved that the entry gives expression to an agreement actually entered into by the landlords and the tenants. If the entry were a mere repetition of the previous entry and the persons concerned were not questioned as to whether they consented to accept it as a binding agreement, it could not obviously satisfy the requirements of section 111 of the Tenancy Act. Now, there is no evidence on the record that the landlords ever agreed to it beyond the mere fact that the *Wajib-ul-arz* is signed at the end by both the landlords and the tenants. But the mere signature at the end of a document containing many clauses with respect to various matters relating to rural economy cannot *per se* be regarded as sufficient evidence to prove the fact that the attention of the parties was directed to the rules of succession, at variance with the statutory rules, contained with other matters in one of its clauses, and that those rules were the result of their mutual consent. This observation applies with greater force when we find that the document itself states that, at the time of the Settlement, *koi tankih huquq muzarian nahin kiya gaya.* It is important to remember in this connection the procedure which was followed in the preparation of the *Wajib-ul-arz* of 1884. That procedure was prescribed in the old revenue rule 35 (*vide* pages 208 and 209, Spitta's Manual of Law, third Edition), and the Superintendent of Settlement has certified at the end of the *Wajib-ul-arz* under consideration that he acted in conformity with that rule. The judgment of the Financial Commissioner in *Mamraj* v. *Rampat* (3) throws a flood of light on the manner in which the rule was worked in a Settlement which is roughly contemporaneous with that of Hoshiarpur, and he held therein that a new entry which was merely a repetition of the entry in the old Settlement Record did not constitute an agreement under section 111 of the Act. We also observe that in *Labhu* v. *Ganda Singh* (4) an entry in the *Wajib-ul-arz* of 1884 relating to another village in this very District, which was in *totidem verbis* as the entry in question, came for consideration before a Division Bench of this Court and it was decided that the entry did not constitute an agreement within the purview of section 111. The view taken in that case coincides with the result at which we have arrived after an independent examination of the entire material before us and we entertain no doubt as to the correctness of the law laid down therein.

In the view of the case which we take, we consider it unnecessary to determine the further question as to whether, even under

(1) 4 Ind. Cas. 851; 97 P. R. 1909; 166 P.W.R 1909; 10 P. L. R. 910.

(2) 21 Ind. Cas. 843; 22 P. R. 1914; 212 P. W. R. 1913; 339 P. L. R. 1913; 12 P. L. R. 1914.

(3) 3 P. R. 1889 Rev.

(4) 20 Ind. Cas. 528; 185 P. W. R. 1913; 2 P. L. R. 1914.

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the terms of the *Wajib-ul-arz*, the agnates can succeed without proving that the common ancestor occupied the land.

For the reasons stated above, we are of opinion that the plaintiffs have failed to establish a rule of succession at variance with the provisions of section 59 and that the judgment and decree appealed against are correct. We, therefore, maintain the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 124 OF 1912.

May 28, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

RAMJAN ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHARAM ALI KHONDKAR AND OTHERS—PLAINTIFF AND REMAINING DFEENDANTS—RESPONDENTS.

Regulation XI of 1825, *s* 4, *cls.* 1, 4—*Small and shallow river-beds, right in—Accreted land, lease of, whether recognized - Lease, whether in good faith*

Under section 4, clause (4), of Regulation XI of 1825, the beds of small and shallow rivers are recognised as the private property of *zemindars* within whose estate they lie, subject when dried up, to the proviso stated in the first clause of the section as regards the assessment of revenue.

When, therefore, such a river dries up or recedes leaving behind dried up land, the neighbouring subordinate *Talukdar* cannot claim it either as appertaining to his *taluk* or as an accretion to it within the first clause of the section, but it remains the *khas patit* of the *zemindar* to whose estate the river belonged.

Where a lease of such river-bed is granted by a subordinate *Talukdar* when it is still under water, the lessee cannot claim to hold it as a *raiyat* as against the proprietor when the bed dries up.

The land which is the *khas patit* of the *zemindar* cannot be *raiyati* land, and the lessee cannot acquire any *raiyati* right in it by demise from a Subordinate *Talukdar* and he cannot be said to be a lessee in good faith of the land so demised to him.

Appeal against the decree of Sub-Judge, Second Court, Tipperah, dated 16th September 1911, affirming that of the Munsif, Third Court, at Comilla, dated 16th July 1910.

Babu *Upendra Kumar Roy*, for the Appellants.

Babus *Dwarkanath Chakravarti* and *Gopal Chandra Chakravarti*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for recovery of *khas* possession of 5 *kanis* and ¼ *gandas* of land on proof of the plaintiff's title thereto and for *wasilat*. The plaintiff had taken a settlement from the Maharaja of Tipperah and got his lease in October 1907. The lands are found to be the *khas patit* of the Maharaja. The defendant No. 1 is the person who took a lease from defendants Nos. 9 and 10, *dar-talukdars*, in the year 1885 when the land in question was under water. The water that covered it was a small and shallow river known as Gomti, which does not fall within the Regulation relating to alluvion and diluvion but was the private property of the Maharaja. When this little river receded or dried up, the *dar-talukdar* appears to have regarded the land so left exposed as an accretion to the *taluk*; and the defendant No. 1's case is that he also so regarded it.

Four points were taken in appeal in the Court below, *firstly*, whether the suit was barred by limitation; *secondly*, whether the lands in suit were comprised in the *taluk* and *dar-taluk*; *thirdly* whether the disputed land is an accretion to the *taluk* and *dar-taluk*. And the *fourth* point was that the defendant No. 1 had acquired the status of a *raiyat* in respect of the disputed land by having in good faith obtained a lease of it for the purpose of cultivation from the *dar-talukdar* of the adjoining land.

The learned Judge in the Court below has in a very long, careful and well-reasoned judgment found that there is no limitation, and in doing so he has practically decided that the land is the *khas patit* of the *zemindar* and that the Maharaja was in possession all along and that defendant No. 1 could have no adverse possession against him. This is not impugned in this appeal. The second point that the disputed land is not comprised in the *taluk* of Karimunessa and *dur-taluk* of Kalagazi,

which also is not and cannot be disputed in second appeal, seems also to conclude the appellant; for if the land is not and could not be in the *dar-taluk* his lease could not be operative.

As regards the two points which are argued here, the point that the land is an accretion obviously is concluded by the finding that we have referred to above, *firstly*, that there can be no accretion of the private land of the *zemindar* which forms the bed of a small and shallow river ; and *secondly*, it is sought to be argued that clause (4), section 4, of Regulation XI of 1825 is governed by clause (1) in all respects, which would mean that the law of accretion in small and shallow rivers is exactly the same as it is in great and navigable rivers. But it is perfectly clear what clause 4 says is that the provision or provisos of clause (1) also apply to clause (4), and those provisions are merely with regard to the payment of revenue. We, therefore, think there is nothing in the first contention raised by the appellant.

As to the second, the point of good faith, it is found that the defendant could not have had that good faith which would entitle him to hold possession from a trespasser in land in which he could acquire a non-occupancy right. The learned Judge found, not that he had bad faith, but that he could easily have known if he made the slightest inquiry that his lessor was neither the *de facto* nor the *de jure* landlord at the time the lease was granted, and he certainly did know that the land being under water the lessor had not inducted him into possession. But there is a much stronger ground why the defendant cannot succeed in his claim as *raiyat*, and that is that the land being the *khas patit* of the *zemindar* is not *raiyati* land and the defendant No. 1 can never have acquired a non-occupancy right in it by demise from the *dar-talukdar* holding land under the *zemindar*, even if the *dar-talukdar* had possession.

The grounds given by the learned Subordinate Judge for his decision appear to us to be correct. His findings of fact conclude the matter and with his view of the law we entirely agree. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1631 OF 1913.

October 12, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

JODI BIBI *alias* MYTHEN BIBI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

VAJIAR KHAN SAHEB AND ANOTHER—PLAINTIFF AND DEFENDANT No. 3—RESPONDENTS.

Evidence Act (*I of* 1872), *ss.* 79, 106, 114—*Minor—Plea of minority—Burden of proof.*

In the case of a contract if a plea of infancy is set up, it is for the party who sets it up to prove it.

Krishnama Chariar v. *Veeravelli Krishnama Chariar*, 19 Ind. Cas. 452; 24 M. L. J. 517 at p. 521; 13 M. L. T. 385; (1913) M. W. N. 355; *Virupakshappa* v. *Siddappa Basappa*, 26 B. 109 at p. 113; 3 Bom. L. R. 565; *Nilmonee Chowdhry* v. *Musammat Zuheerunnissa Khanum*, 8 W. R. 371, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in Appeal Suit No. 43 of 1912, (transfered from the file of the District Court of Coimbatore), preferred against that of the District Munsif of Udamalpet, in Original Suit No. 589 of 1910.

Mr. *L. A. Govindaraghava Aiyer*, for the Appellants.

Mr. *T. M. Krishnaswami Aiyer*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The only question argued is whether the burden of proof regarding the 1st defendant's minority was rightly imposed on the defendants by the lower Appellate Court. The answer may be given shortly in the words of theChief Justice in *Krishnama Chariar* v. *Veeravelli Krishnama Chariar*(1): "in the case of contract if the plea of infancy is set up, it is for the party who sets up the plea to prove it," that is, in this case, for the defendants. *Virupakshappa* v. *Sidappa Basappa* (2) and *Nilmonee Choudhry* v. *Musammat Zuheerunnissa Khanum* (3) are also in point. The second appeal, therefore, fails and is dismissed with costs.

TYABJI, J.—In this case, in my opinion, no question arises which can be considered in second appeal. All we are really asked

(1) 19 Ind. Cas. 452; 24 M. L. J. 517 at p. 521; 13 M. L. T. 385; (1913) M. W. N. 355.
(2) 26 B. 109 at p. 113; 3 Bom. L. R. 565.
(3) 8 W. R. 371.

to decide is, whether the learned Subordinate Judge considered an issue of fact in the correct manner. That question must, in my opinion, depend upon whether the Subordinate Judge acted in accordance with the Indian Evidence Act or in contravention of it. The argument before us is that the present appeal is dependent on the question whether the burden of proof as to the first issue lay upon the defendants which, in my opinion, without any warrant is assumed to be always a question of law. The first issue is, "was 1st defendant a major at the time of the sale relied on by the plaintiff ?"

Unless this issue is answered in the affirmative, the plaintiff must fail, because it was the plaintiff who was relying on the sale executed by the first defendant and it was necessary for him to prove the validity of the sale in order to prove his title. The Subordinate Judge did answer it in the affirmative. For doing so, he presumed that the first defendant was of age at the date of Exhibit A and threw the burden of proof on the defendants as regards the issue. It may be that this course was necessitated by section 106 of the Indian Evidence Act; it was, in my opinion, certainly within his powers under section 114, especially in consideration of the fact that he held Exhibit B (to which I shall refer later) to be genuine. But the learned Subordinate Judge did not refer to either section. Nor was his decision expressed to be based on the grounds I have mentioned.

If the lower Courts were to refer to the sections of the Indian Evidence Act or at least to follow the terminology of that Act (which ought to be taken as the first guide in the decision of facts), a great number of second appeals would not be filed at all and a great number of others would not withstand fruitless efforts on the part of the appellant to formulate grounds of appeal. On the other hand a discussion of facts in language not corresponding to that which is adopted in the Indian Evidence Act, and without anything to indicate that the attention of the Court has been directed to its powers and duties as laid down in the Indian Evidence Act make the task of Courts sitting in second appeal unnecessarily laborious. In this particular case, I may point out that the Subordinate Judge has considered the whole evidence carefully and has come to the conclusion that the oral evidence is quite unreliable, and that only one document, Exhibit B, is proved to have any bearing on the age of the 1st defendant—that document is evidence as an admission that the first defendant was of age. If on these materials the learned Subordinate Judge had given a decision with reference to the Indian Evidence Act, sections 106 and 114, it would have been wholly satisfactory. It would then have been quite appropriate to cite as he did *Virupakshappa* v. *Sidappa Basappa* (2) for the purpose of showing that a Court of superior jurisdiction adjudicating upon similar facts had based its decision by presuming in favour of majority. It would have then also been proper to refer to the *obiter dictum* of the Chief Justice in *Krishnama Chariar* v. *Veeravelli Krishnama Chariar* (1) and to the case in *Nilmonee Chowdhry* v. *Musammat Zuheerunnissa Khanum* (3), which was decided five years and twelve days prior to the date when the Indian Evidence Act came into operation.

When presumptions and the incidence of the burden of proof are the subject of discussion it seems to me to be unsafe and unsatisfactory to ignore the appropriate sections, of the Indian Evidence Act and in particular sections 4, 79, 90 and 101—114. Their effect is summarized in the following terms by Messrs. Ameer Ali and Woodroffe in their commentary just preceding section 101 :—

"In conclusion, the general principle with regard to burden of proof may be stated to be that a party, who desires to move the Court, must prove all facts necessary for that purpose (sections 101—105). This general rule is, however, subject to two exceptions: (*a*) he will not be required to prove such facts as are especially within the knowledge of the other party (section 106), nor (*b*) so much of his allegations in respect of which there is any presumption of law (sections 107—113), or, in some cases, of fact (section 114) in his favour."

To the sections mentioned by the learned authors in paranthesis, might be added sections 79—90 of the Indian Evidence Act and the other provisions of the law such as sections 118, 122 or 137 of the Negotiable Instruments Act, 1881. The expression "presumption of law" is taken from the system

prevailing in England and as I understand the matter, it refers to those presumptions which the Judge is required to point out to the jury. The Indian Evidence Act does not follow that phraseology, but lays down that certain matters *shall* be presumed and others *may* be presumed (Indian Evidence Act, section 4, Taylor on Evidence, paragraphs 25, 70, 72 *et seq* and 111. The introduction of the Indian Evidence Act by its draftsman, Sir James Stephen, re-printed in Ameer Ali and Woodroffe's Edition of the Act at page 79 shows the relation between the English Law and the Indian Evidence Act on this subject). I desire also to refer in this connection to my remarks in *Pingale Viswanatha Row* v. *Chinnakolandai Nainar* (4) which were explicitly concurred in by my learned colleague.

When decisions referring to presumptions are relied upon, it is necessary to bear in mind whether the presumption raised (or rejected) in the decisions is one of fact or of law,—something which the Court *may* presume or *shall* presume (See Indian Evidence Act, section 4). For this purpose it is advisable to see whether the decision cited is or is not of a Court adjudicating upon facts.

In my opinion, the learned Subordinate Judge was, for the reasons I have stated, entitled (especially in view of section 106 of the Indian Evidence Act and of his decision that the only piece of reliable evidence in the case was in favour of the plaintiff) to draw the presumption that the 1st defendant was of age and to throw the burden of proving his minority on the defendants, and his decision on that issue cannot be questioned in second appeal.

I would, therefore, dismiss the second appeal with costs.

Appeal dismissed.

(4) 22 Ind. Cas. 369; 1 L. W. 197.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 542 OF 1913.

September 23, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

AYYASAMI IYENGAR—DEFENDANT—APPELLANT

versus

KYLASAM PILLAI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 58—Writer of document signing below attestor, whether attesting witness.

The writer of a document, who signs after an admitted attestor, signs as an attestor, though he merely describes himself as the writer.

Veerappuddayan v. *Muthu Karuppa Thevan*, 19 Ind. Cas. 589; 24 M. L. J. 534; (1913) M. W. N. 400; 13 M. L. T. 463, *Shamu Pattar* v. *Abdul Kadir Rowthen*, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220 (P. C.), followed.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 188 of 1912, preferred against that of the Court of the District Munsif of Chidambaram, in Original Suit No. 779 of 1911.

Messrs. *V. S. Govindachariar* and *V. S. Kallabiram Aiyangar*, for the Appellant.

Mr. *M. Patanjali Sastri*, for the Respondent.

JUDGMENT.—Following *Veerappuddayan* v. *Muthu Karuppa Thevan* (1) which was decided after the Privy Council decision in *Shamu Pattar* v. *Abdul Kadir Rowthen* (2), we hold that the writer of the document in question in this case, who signed after an admitted attestor, did sign as attestor, though he merely describes himself as the writer of the document, and hence there is nothing in the contention of the appellant that the document is not attested by two witnesses as required by law.

The second appeal is dismissed with costs

Appeal dismissed.

(1) 19 Ind. Cas. 589; 24 M. L. J. 534; (1913) M. W. N. 400; 13 M. L. T. 463.

(2) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220 (P. C.).

RAI CHARAN MANDAL *v.* BISWANATH MANDAL.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3511 OF 1911.
May 13, 1914.

Present:—Justice Sir Asutosh Mookerjee Kt., and Mr. Justice Beachcroft.

RAI CHARAN MANDAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BISWANATH MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10, procedure under, not resorted to—Suit to be tried on original cause of action in all its stages—Devolution of plaintiff's interest pendente lite, *if a change in cause of action—Competency of plaintiff to continue suit.*

A suit must be tried in all its stages on the cause of action as it existed at the date of its commencement.

Radhay Koer v. *Ajodhya Das*, 7 C. L. J. 262, followed.

Anundomoyee v. *Sheeb Chunder*, 9 M. I. A. 287 at p. 301; 2 W. R. (P. C.) 19; Marsh 455; 1 Suth. P. C. J. 485; 1 Sar. P. C. J. 854; 19 E. R. 750, referred to.

Though there are well-recognised exceptions to the above rule, which show that a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis thereof, yet a devolution of the plaintiff's interest in the subject-matter of the suit *pendente lite* is not such an exceptional event and does not make the plaintiff incompetent to maintain the suit, there being no change in the cause of action on which the suit was originally brought.

In the event of such devolution of interest, the successor-in-interest of the plaintiff may, if he chooses, come on the record with leave of the Court under Order XXII, rule 10, but if he does not, the plaintiff is entitled to continue the suit and his successor will be bound by the result of the litigation

Appeal against the decree of the Additional Sub-Judge, Khulna, dated 2nd September 1911, reversing that of the Munsif, 3rd Court, at Bagerhat, dated 28th July 1910.

Dr. *Sarat Chandra Basak* and Babu *Bipin Chandra Bose*, for the Appellants.

Babus *Nilmadhab Bose* and *Jadunath Kanji Lal*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of possession of land with mesne profits, on declaration of title thereto. The Court of first instance found against the plaintiffs and dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision and decreed the suit. In the present appeal, the only substantial question of law which has been argued on behalf of the defendants is that as the interest of the plaintiffs in the property claimed was sold *pendente lite* in execution of a decree for arrears of rent and was purchased by the landlords, decree-holders, on the 19th November 1909, the suit should have been dismissed. The contention in substance is that a decree for recovery of possession cannot properly be made in favour of persons who, at the time the decree is made, are found to have lost all interest in the property claimed by them. In our opinion there is no foundation for this position.

The rule was recognized in *Radhay Koer* v. *Ajodhya Das* (1) that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement. This is in accord with the observation of Lord Kingsdown in *Anundomoyee* v. *Sheeb Chunder* (2) that in appeal the question is, whether the decision of the primary Court is correct on the facts as they stood when the judgment was rendered and that no subsequent event or devolution of interest can affect that question, because to give effect to them, should justice require it, would be the office, not of an appeal, but of some supplementary proceeding. As illustrations of the general rule, reference may be made to the cases of *Govinda* v. *Perumdevi* (3); *Ramanadan Chetti* v. *Pulikutti Servai* (4); *Wamanrao* v. *Rustomji* (5); *Raja of Venkatagiri* v. *Mokku Narasaya* (6). But to this ordinary rule, exceptions have been recognized on grounds fully explained in the case of *Ram Ratan Sahu* v. *Mohant Sahu* (7). The decisions in *Sakharam* v. *Hari Krishna* (8); *Sangili* v. *Mookan* (9); *Ahmadjee* v. *Mahamadjee* (10); *Rustumji* v. *Purushotamdas* (11); *Balkishan* v. *Kishan Lal* (12); *Hazari Mull* v. *Janaki Prosad* (13); *Ramyad Sahu* v. *Bindeswari Kumar Upadhya* (14); *Udit Chobey* v. *Rashika Prasad Upadhya* (15); *Hedlot Khasia* v. *Ka Ran*

(1) 7 C. L. J. 262.
(2) 9 M. I. A. 287 at p. 301; 2 W. R. (P. C.) 19; Marsh. 455; 1 Suth. P. C. J. 485; 1 Sar. P. C. J. 854; 19 E. R. 750.
(3) 12 M. 136.
(4) 21 M. 288; 8 M. L. J. 121.
(5) 21 B. 701.
(6) 7 Ind. Cas. 202; 37 M. 1; (1910) M. W. N. 369; 8 M. L. T. 258.
(7) 6 C. L. J. 74; 11 C. W. N. 732.
(8) 6 B. 113.
(9) 16 M. 350; 3 M. L. J. 137.
(10) 1 Bom. L. R. 218.
(11) 25 B. 606; 3 Bom. L. R. 227.
(12) 11 A. 148; A.W.N. (1889) 42; 13 Ind. Jur. 309
(13) 6 C. L. J. 92.
(14) 6 C. L. J. 102.
(15) 6 C. L. J. 662; 3 M. L. T. 41.

Khasiani (16) and *Banwari Lal* v. *Sheo Sankar Misser* (17) show that a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. This doctrine is of an exceptional character and is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. A similar view has been taken in England in *Quilter* v. *Mapleson* (18) and *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* (19), where the principle was recognized that on appeal such a judgment may be given as ought to be given if the case came at that time before the Court of first instance (*Cf.* Order XLI, rule 33, of the Code of Civil Procedure, 1908.) The case before us obviously does not fall within the exception. The plaintiffs claim to be owners of the disputed property and the allegation is that the defendants have dispossessed them wrongfully. This has been investigated and found to be substantially true by the Subordinate Judge. But the defendants contend that as during the pendency of the litigation in the Court of first instance, there has been a devolution of interest, the plaintiffs are no longer competent to maintain the suit. It cannot be disputed that in respect of mesne profits from the date of dispossession, the claim of the plaintiffs has not been affected by the sale of their interest in the land. That portion of the claim, at any rate, must be investigated, and before a decree for mesne profits can be made in favour of the plaintiffs, the question of their title to the land also must be determined. The defendants are consequently restricted to the contention that although the title of the plaintiffs to the land at the date of the suit may be established, relief should not be granted to them by way of recovery of possession, and that such relief can legitimately be awarded only to persons who have succeeded to the interest of the plaintiffs. For this proposition no authority has been cited. On the other hand the argument, tested from the point of view of principle as well as convenience, seems obviously unreasonable. Under rule 10 of Order XXII of the Code of Civil Procedure, 1908, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons to or upon whom such interest has come or devolved. This entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest *pendente lite*, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon him to do so. If he does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in *Moti Lal* v. *Karab-ul-Din* (20), he will be bound by the result of the litigation even though he is not represented at the hearing. But the Legislature has not further provided that in the event of devolution of interest during the pendency of suit, if the person who has acquired title does not obtain leave of the Court to carry on the suit, the suit would stand dismissed. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for as Lord Kingsdown said in *Prannath* v. *Rookea Begum* (21) a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings: *Rajaram Bhagwat* v. *Jibai* (22); *In the matter of the petition of Sarat Chandra Singh* (23). If this view were not maintained, what would be the result? The suit commenced, by the plaintiff stands dismissed. The person who has acquired the right, title and interest

(16) 13 Ind. Cas. 377; 15 C. L. J. 241.
(17) 1 Ind. Cas. 670; 13 C. W. N. 815.
(18) 9 Q. B. D. 672; 52 L. J. Q. B. 44; 47 L. T. 562; 31 W. R. 75.
(19) (1912) A. C. 788; 82 L. J. Ch. 45; 107 L. T. 353; 76 J. P. 481.
(20) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639.
(21) 7 M. I. A. 323 at p. 353; 4 W. R. (P. C.) 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331.
(22) 9 B. 151.
(23) 18 A. 285; A. W. N. (1896) 45.

of the plaintiff commences a fresh suit. His cause of action is the original cause of action upon which the first plaintiff commenced his suit. It may consequently happen that while the plea of limitation would have been of no avail in answer to the claim of the original plaintiff, it may be very effective as an answer to the subsequent suit. It may also be asked, if the contention of the appellants were to prevail, what would happen in the event of a devolution of the interest of the defendants. Would the suit be heard *ex parte*, because the interest of the defendants had passed to a stranger to the litigation, or would the suit stand dismissed because it was at that stage a suit against a person who had no interest in the litigation? If the contention of the appellant were upheld, there would obviously be endless litigation and the substantial rights of litigants might be completely defeated. It is also worthy of note that at the stage when the objection is taken, neither the Court nor the parties may be in a position to decide that there has been a final and operative devolution of interest. For instance if the devolution of interest is due to an execution sale of the right, title and interest of the plaintiff, the validity of that sale may be challenged and the proceedings consequent thereon may be protracted. Would the original suit be dismissed on the assumption that the sale was valid and operative? If this course were pursued, what would happen if it ultimately transpired that the sale was inoperative and that there had been no effective devolution of interest? No doubt cases are conceivable, where the Court may have to stay the trial of the suit by reason of a devolution of the interest of one of the parties in favour of his opponent. For instance, if the interest claimed by the plaintiffs have been purchased by the defendants, the latter may fairly ask, that the suit be stayed till the question of the validity of the sale in their favour has been finally determined. But except in cases of this peculiar character, it is plain that the trial of the suit should not be arrested merely by reason of the devolution of the interest of the plaintiffs. The successor-in-interest may, if he chooses, obtain leave of the Court under Order XXII, rule 10, but if he does not do so, the original plaintiffs are entitled to continue the suit and their successor will be bound by the result of the litigation. The consequence will be that the plaintiffs, if successful, will obtain a decree which will enure to the benefit of their successor.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1119 OF 1913.

December 16, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Srimati SHAJAN BIBI AND OTHERS—DEFENDANTS—PETITIONERS

versus

Moulvi SAFFIRUDDIN—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), *O. IX, r.* 13—Ex parte *decree, application to set aside - Appeal subsequently preferred—Jurisdiction to deal with application.*

A Court, which passed an *ex parte* decree, is not deprived of its jurisdiction to deal with an application to set aside the *ex parte* decree on the merits, merely because an appeal against the *ex parte* decree has been subsequently preferred.

Sankara v. *Subrayar*, 30 M. 535; 17 M. L. J. 436, *Sarat Chandra* v. *Damodar*, 12 C. W. N. 885, *Damodar* v. *Sarat Chandra*, 3 Ind. Cas. 468; 13 C. W. N. 846, and *Kumud Nath* v. *Jatindra Nath*, 9 Ind. Cas. 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399, followed.

Application in the matter of Miscellaneous Application No. 264 of 1912 of the District Judge's Court of Tipperah, in Miscellaneous Case No. 140 of 1912 of the Court of the Munsif 5th Court, Comilla.

Babu *Upendra Kumar Roy*, for the Petitioners.

Babu *Jotindra Mohan Ghosh*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to discharge an order by which the Court of first instance refused an application to set aside an *ex parte* decree. The *ex parte* decree was made on the 29th June 1912. On the 30th July 1912, the petitioners applied under rule 13 of Order IX of the Code of 1908 to set aside the *ex parte* decree. On the next day they preferred an appeal to the District Judge against the *ex parte* decree, as they were entitled to do under sub-section 2 of section 96 of the Code. On the 14th December 1912 the application to set aside the *ex parte* decree was taken up for disposal. The Court dismissed the application on the

ground that as an appeal had been preferred against the *ex parte* decree, the power of the Court, which had made the *ex parte* decree, to set it aside had terminated. The petitioner appealed to the District Judge against this order under clause *(d)*, rule 1, of Order XLIII. The District Judge dismissed the appeal on the ground that if the petitioner had any grievance, he would have his remedy in the appeal against the *ex parte* decree and it was consequently superfluous to take evidence to determine whether there were good grounds to set aside the *ex parte* decree. We are now invited to hold that the primary Court refused to exercise a jurisdiction vested in it by law when it refused to entertain the application to set aside the *ex parte* decree. We are of opinion that this contention is well-founded.

It cannot be disputed that the Court had jurisdiction to entertain the application when it was made on the 30th July 1912. On what principle can it be held that such jurisdiction was destroyed as soon as an appeal was preferred to the District Judge against the *ex parte* decree? The proceeding to set aside the *ex parte* decree and the appeal to the superior tribunal are entirely distinct in their scope and purpose. If the application to set aside the *ex parte* decree is successful, the suit will stand revived and the defendant will have an opportunity to establish his defence on the merits. In the appeal, he is restricted to the materials already on the record brought in by the plaintiff behind his back and without his knowledge. He can at least show that the materials on the record do not justify the decree made in favour of the plaintiff. There is thus no reason apparent why the defendant should not have a two-fold remedy. We are not prepared to adopt the view taken in *Sankara* v. *Subrayar* (1) that as soon as an appeal has been preferred, the Appellate Court has seizin of the suit and the jurisdiction of the primary Court is destroyed, with the result that the Appellate Court thereafter becomes competent to deal with an application to set aside the *ex parte* decree under section 107 read with Order IX, rule 13. The argument is obviously fallacious, because although the Appellate Court acquires jurisdiction to confirm, reverse or modify the decree, still the decree continues to be the decree of the primary Court till it has been confirmed, reversed or modified by the decree of the Appellate Court. Order IX, rule 13, authorises the Court to set aside an *ex parte* decree made by itself. Section 107, sub-section 2, read with Order IX, rule 13, may be taken to authorise an Appellate Court to set aside an *ex parte* decree made in the exercise of its appellate jurisdiction (as expressly laid down in Order XLI, rule 21), but it does not authorise an Appellate Court to entertain an application to set aside an *ex parte* decree made by a Subordinate Court. We are of opinion that the original Court was not deprived of its jurisdiction to deal with the application to set aside the *ex parte* decree on the merits, merely because an appeal against the *ex parte* decree was subsequently preferred to the District Judge. The view we take is supported by the cases of *Sarat Chandra* v. *Damodar* (2), *Damodar* v. *Sarat Chandra* (3) and *Kumud Nath* v. *Jatindra Nath* (4).

The result is that this Rule is made absolute and the orders of the Courts below are discharged. The application under Order IX, rule 13, presented on the 30th July 1912 will be restored and heard on the merits in the presence of both parties. The petitioner is entitled to his costs throughout these proceedings. We assess the hearing fee in this Court at two gold *mohurs*.

Rule made absolute.

(1) 30 M. 535; 17 M. L. J. 436.

(2) 12 C. W. N. 885.

(3) 3 Ind. Cas. 468; 13 C. W. N. 846.

(4) 9 Ind. Cas. 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 322 OF 1913.

September 23, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

VADIVELU PILLAI AND OTHERS—RESPONDENTS NOS. 2 TO 5—APPELLANTS

versus

MARUDA PILLAI *alias* SOMASUNDARAM PILLAI—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48—Court

VADIVELU PILLAI *v.* MARUDA PILLAI.

passing decree, whether has jurisdiction to execute it after transfer of jurisdiction—Step-in-aid of execution—Application returned for correction not re-presented—Correction not essential to validity of application.

A Court, which passes a decree for the sale of certain properties, cannot, after transfer of jurisdiction, entertain an application for sale of those properties.

Panduranga Mudaliar v. *Vythilinga Reddi*, 30 M. 537; 2 M. L. T. 466; 17 M. L. J. 417 and *Gomatham Alamelu* v. *Komandur Krishnamacharlu*, 27 M. 118, distinguished.

Allagappa Mudaliyar v. *Thiyagaraja Mudaliyar*, 7 Ind. Cas. 864; (1910) M. W. N. 477; 8 M. L. T. 299 and *Subbiah Naicker* v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 26 M. L. J. 189; (1914) M.W.N. 205; 1 L W. 251; 37 M. 462, followed.

The validity of the original presentation of an application for execution of a decree is not affected by a subsequent order of return for correction of defects unless the defects to be corrected are such as to prejudice the judgment-debtor substantially.

Therefore, an application for execution returned for correction of defects, not essential to the validity of the application, although not re-presented after correction, is a step-in-aid of execution and is valid for the purpose of section 48, Civil Procedure Code.

Raghunatha Thatha Chariar v. *Venkatesa Tawker*, 26 M. 101; 12 M. L. J. 435; *Gopal Sah* v. *Janki Koer*, 23 C. 217; *Ramanadan Chetti* v. *Periatambai*, 6 M 250 and *Ramayyan* v. *Kadir Bacha Sahib*, 31 M. 68; 3 M. L. T. 254; 17 M. L. J. 596, followed.

Appeal against the order of the Court of the Subordinate Judge of Kumbakonam, in Execution Petition No. 49 of 1913, in Original Suit No. 15 of 1899.

Mr. *B. Somayya*, for Mr. *S. Dorasawmy Aiyar*, for the Appellants.

Mr. *K. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The first question argued is whether the application of 27th June 1910 was a step-in-aid of execution. Appellant (2nd defendant) contends that it was not, because it was presented to the Mayavaram Court to which jurisdiction over the suit property had lately been transferred, not to the Kumbakonam Court which passed the decree. Appellant relies on *Panduranga Mudaliar* v. *Vythilinga Reddi*(1) and *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (2). The latter case turned on acquiescence in the Court's jurisdiction and is not in point. The correctness of the former has been doubted in *Allagappa Mudaliyar* v. *Thiyagaraja Mudaliyar* (3) and it was not followed in *Sabbiah Naicker* v. *Ramanathan Chettiar* (4). In the last-mentioned case the whole question was considered fully, though the Court was not obliged to act on its conclusion, since it could deal with the matter by means of a transfer. That conclusion which we adopt is that the Court which passed a decree for sale cannot, after a transfer of jurisdiction, even entertain an application for the sale of the suit properties. We have not been shown that for the present purpose any distinction can be drawn between execution of a decree of that nature and the decree before us, one for possession. We, therefore, hold that the application of 27th June 1910 was not made to the wrong Court.

It is next urged that the applications of 27th April 1907 and 27th June 1910 were not steps-in-aid of execution, because they were not properly presented. They were in fact filed in Court, but were returned for correction of defects and eventually were not re-presented corrected. No doubt in *Raghunatha Thatha Chariar* v. *Venkatesa Tawker* (5) and *Gopal Sah* v. *Janki Koer* (6) it was held that an application returned for correction must be treated as having been presented, when the Court has accepted it corrected. But in the former case the defect was fundamental and the application should have been rejected in the first instance: and the latter decision expressly dissented from a series of Madras cases beginning with *Ramanadan Chetti* v. *Periatambai*(7), in which it was held that the validity of the original presentation was not affected by a subsequent order of return, unless the defects to be corrected were such as to prejudice the judgment-debtor substantially. See also *Ramayyan* v. *Kadir Bacha Sahib* (8). The defects in the applications now in question were not of that character. Only one of them calls for notice, the fact that the application of 1910 was not accompanied by a petition under Order XXXII, rule 12, Civil Procedure Code. The explanation that that rule applies only to pending proceedings is, however, sufficient. In these circumstances the fact that these applications were returned does not deprive

(1) 30 M. 537; 2 M. L. T. 466; 17 M. L. J. 417.
(2) 27 M. 118.
(3) 7 Ind. Cas. 864; (1910) M. W. N. 477; 8 M. L. T. 299.
(4) 22 Ind. Cas. 899; 26 M. L. J. 189; (1914) M. W. 205; 1 L. W. 251; 37 M. 462.
(5) 26 M. 101; 12 M. L. J. 435.
(6) 23 C. 217.
(7) 6 M. 250.
(8) 31 M. 68; 3 M. L. T. 254; 17 M. L. J. 596

them of their character as steps-in-aid of execution.

Appellant, however, contends that this conclusion is affected by the decree-holder's failure ever to re-present these applications properly corrected to the satisfaction of the Court. This is material also to his argument regarding the application of 6th December 1912. It was returned, as they were, for similar defects and had not been corrected and accepted by 31st December 1912. It is true that in the present Code, which was in force at the date of the two last applications in question, there is a special provision for the calculation of limitation from the date of first presentation, "where an application has been amended," Order XXI, rule 17. But that we think assumes, what is not here the case, that the amendment required was essential to the validity of the application. If the application was valid without amendment with reference to the authorities already cited, it must be held to be a step-in-aid and to be valid for the purpose of section 48, Civil Procedure Code.

Appellant's remaining argument based on that section must, therefore, fail, because there had been a valid presentation of the application now before us within twelve years from the date of the decree, that is before 6th December 1912. It is urged that that application is not the one before us, because after it had been returned by the Mayavaram Court for amendment in non-essential respects, it was re-presented on 15th January 1913, after jurisdiction had been transferred to the Kumbakonam Court by notification with effect from 1st January 1913, with a prayer for its return for presentation to the latter Court as the proper one. It was returned and presented accordingly, and we are asked to consider this prayer as a withdrawal of the application by respondent, to which the Court gave effect by its order. We cannot do so, since the Mayavaram Court, on losing its jurisdiction, lost also its power to deal with the application in any way, and respondent's prayer and the Court's order on it could have no legal effect. In these circumstances it is not necessary for us to consider whether respondent's delay in applying to the Kumbakonam Court can be excused under section 14 of the Limitation Act. The application must be treated as having been on the file of the Mayavaram Court, until it was transferred with the other business of that Court to the Kumbakonam Court; and it is immaterial whether it was taken to the latter by respondent or sent there with the Mayavaram Court's other records.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1109 OF 1912.
December 2, 1914.
Present:—Mr. Justice Rattigan and Mr. Justice Rossignol.
MANGHI RAM AND OTHERS—DEFENDANTS—APPELLANTS
versus
FIRM OF RAM SARAN DAS-MAMAN CHAND, THROUGH KUNDAN LAL —PLAINTIFFS—RESPONDENTS.

Principal and agent—Money spent by agent for principal—Right of agent to compensation—Limitation Act (IX of 1908), *Sch. I, Art.* 83.

The right of an agent to be recouped by his principal in respect of losses sustained by the agent in his agency is a direct consequence of the agency contract, and a suit to enforce the right is governed by Article 83 of the Limitation Act.

Second appeal from the decree of the Divisional Judge, Hissar, dated the 11th May 1912, reversing that of the District Judge, Rohtak, dated the 30th November 1911, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The plaintiffs' suit is one for recouper on the allegation that they acted as the defendants' agents in entering upon certain *badni* transactions, that those transactions resulted in a loss to the defendants and that plaintiffs as agents of the defendants, paid those losses to the winning third parties who are outside this suit.

Plaintiffs sued to recover these losses from defendants and the first Court dismissed the claim on the preliminary point that it was time-barred, inasmuch as it was brought just under six years from the date of the

accrual of cause of action, whereas the limitation for the suit was limited to three years by Article 65 of the Limitation Act of 1908.

From this decree of dismissal an appeal was had to the Divisional Court, which held that the suit fell under Article 61 of the Act and remanded the case for a decision on the merits.

In the result the first Court again dismissed the suit on the ground that the defendants had not authorized the plaintiffs to enter into these transactions, but the Divisional Court on appeal reversed this finding and decreed for the plaintiffs.

Against this decree the defendants have preferred a second appeal and we have heard arguments on the point of limitation only.

The appellants' contention, briefly put, is that the plaintiff's claim is based on an implied contract to indemnify him for his disbursements on the defendants' behalf, that when two Articles of the Limitation Act are *prima facie* applicable to the facts of a case, the preference must be given to the particular over the general, consequently Article 83 and, if not that Article, then Articles 65 or 115 provide the proper limitation, whilst Article 61 applies to contingencies such as are contemplated by sections 69 and 70 of the Contract Act.

Article 115 is a residuary Article, and comes into operation only in cases to which no other Article applies. If Article 83 be held not to apply by reason of the fact that plaintiff sues, not on a contract, but on an obligation imposed upon defendant independently of his contract, then Article 115 must be rejected on the same grounds. Article 65 must be ruled out for the same reason. The contest then lies between Articles 61 and 83 and the plaintiffs-respondents quote *Kandaswami Pillai* v. *Arayambal* (1) as authority for the view that Article 61, and not Article 83, governs this case.

Though in the General Act the period of limitation under each of these Articles is three years, under the Punjab Loans Limitation Act the period under Article 61 has been extended to six years.

The plaintiffs-respondents maintain that the obligation to indemnify does not flow from the nexus of principal and agent, is not part of the contract, but is an obligation imposed upon defendants by Statute independently of the contract.

With all respect, we find it difficult to follow the reasoning of the Madras Court and are unable to reach its conclusion. Its *ratio decidendi* appears to be that the agent's right to indemnification is no part of the agency contract, but is conferred upon him by Statute Law.

But section 222 of the Contract Act purports to be and is an integral part of the law of contract and it merely affirms and expressly lays down one of the principles of the law of contract. In effect it says that, unless there be some agreement to the contrary, the establishment of the relation of principal and agent shall inevitably bring in its train the liability of the principal to indemnify the agent. The right, instead of being merely implied in accordance with general principles, is expressed clearly by the Statute. To take the case of a mortgage, could not the mortgagor redeem, if there were no special provision for redemption in the mortgage contract and no Statute Law on the point? Or in this very case, are we to hold that if section 222 of the Contract Act did not exist, no action by the damnified agent would lie?

We have no difficulty in holding that the right of the agent to be recouped by his principal in respect of losses sustained by the agent in his agency is a direct consequence of the agency contract.

Consequently, we hold that Article 83 of the Limitation Act fits the facts of this case exactly. The suit was brought more than three years after the plaintiffs were damnified and is, therefore, barred by time.

The result, therefore, is that the appeal is accepted, the Divisional Court's decree is reversed and the suit dismissed with costs throughout.

Appeal accepted.

(1) 7 Ind. Cas. 399; 34 M. 167; (1910) M. W. N. 316; 20 M. L. J. 989; 8 M. L. T. 194.

KASHI RAM *v.* HET SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1241 OF 1913.

November 25, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

KASHI RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HET SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage - Discharge of previous mortgages—Charge —Priority.

A co-mortgagor who discharges a prior mortgage has a prior charge over the property as against those who discharge a subsequent mortgage.

Har Prasad v. *Raghunandan Prasad*, 1 Ind. Cas. 825; 31 A. 166 at p. 168; 6 A. L. J. 67, referred to.

Second appeal from the decision of the District Judge of Agra, dated the 14th August 1913.

Mr. *S. K. Dar*, for the Appellants.

Mr. *Durga Charan Banerji*, for the Respondents.

JUDGMENT.—The facts connected with the suit out of which this appeal arises are a little complicated, but they nevertheless may very shortly be stated. Tikam Singh made a mortgage in the year 1880 of a village called Kokna. A second mortgage was made in the year 1889 by the same Tikam Singh and five of his sons. A third mortgage was made in the year 1891 by the same Tikam Singh and two sons. The village was at that time joint family property. Subsequently the sons of Tikam Singh divided the village into a number of *mahals*. The mortgagee under the mortgage of 1880 brought a suit against Het Singh, one of the sons, with the result that his *mahal* was sold and the mortgage discharged. Het Singh brought a suit against his brothers and their children claiming contribution under section 82 of the Transfer of Property Act and obtained a decree. In the meantime, however, the plaintiffs had discharged the two later mortgages and they brought the present suit claiming that they also had a charge under section 82. It was useless to them to claim any charge against the *mahal* which had belonged to Het Singh, because that *mahal* had been sold in discharge of first mortgage. A number of questions were gone into in the Court below which, it appears to us, were not very relevant. The Court of first instance granted the plaintiffs a decree. The lower Appellate Court modified the decree of the Court of first instance by dismissing the suit of some of the plaintiffs, on the ground that they pleaded their claim as a set-off to the suit brought by Het Singh, that such plea was decided against them and that accordingly on the principle of *res judicata* they could not now set up a claim which was disposed of in the previous litigation. Had it been necessary to decide the point, we doubt very much that we would have agreed with the lower Appellate Court on this question of set-off. It seems to us very doubtful whether under the circumstances of the present case the claim of the plaintiffs could have been "setoff" against the claim of Het Singh in the previous litigation. In the view we take of the case, however, it is unnecessary to decide this point. It seems to us that the only question which it is necessary to decide is the question of the priority of the charge of Het Singh. The mortgage of 1880 was not discharged until the 20th of April 1907. If Het Singh's charge is to take priority as of this date, then it would appear to us that the plaintiffs would be entitled to make the "interest" of the defendants, *i.e.*, their charge contribute rateably to the discharge of the two mortgages of 1889 and 1891. On the other hand if Het Singh's charge takes priority from the date of the mortgage of 1880, then the plaintiffs are not entitled to any charge under section 82 of the Transfer of Property Act. The very question seems to have arisen in the case of *Har Prasad* v. *Raghunandan Prasad* (1). At page 168 of the judgment there is the following passage:—"The next question is whether this charge can take priority over the plaintiffs' mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage he acquired, we think, priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee or the purchaser of the equity of redemption, who pays off a prior mortgage, acquires on equitable grounds priority over a puisne mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights

(1) 1 Ind. Cas. 825 at p. 826; 31 A. 166 at p. 168 6 A. L. J. 67.

of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other."

Applying this principle to the present case, it would appear that the plaintiffs' position cannot be placed higher than that of standing in the shoes of the mortgagees under the mortgages of 1889 and 1891, that is to say, that they are puisne to Het Singh and his successors-in-title, who for the purposes of the present claim stand in the shoes of the mortgagee under the mortgage of 1880, which was discharged by the sale of Het Singh's property.

This being so, it is clear that none of the plaintiffs have any right against the person or property of the defendants. The result is that we must dismiss this appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1462 OF 1912.

October 8, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KANNU CHETTY—PLAINTIFF—APPELLANT

versus

AMIRTHAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Widow—Necessity—Urgent necessity for lesser amount than realised by sale—Sale, whether valid.

If in the case of a sale by a widow a small portion of the purchase-money was not required for urgent necessity, it does not follow that the sale itself was not due to necessity, unless it could be reasonably presumed or unless it is proved that the sale of lesser property for the exact amount required for urgent necessity was feasible.

Second appeal against the decree of the District Court of Coimbatore, in Appeal Suit No. 172 of 1911, preferred against that of the District Munsif of Erode, in Original Suit No. 149 of 1908.

FACTS.—The plaintiff and the 1st defendant's husband were brothers. These and others originally formed members of an undivided Hindu family. They subsequently became divided, a deed of partition having been executed. After that partition, however, the two brothers lived together, the latter managing the properties. They also carried on a joint trade and executed jointly bonds to third parties. One of the brothers died and after his death the plaintiff, the surviving brother, paid some of his debts. The widow of the deceased having come into possession of the suit property, alienated a portion thereof, the plaintiff sued for possession of the suit property which, he claimed, had fallen to him by right of survivorship, as the brothers had become re-united after partition, and for setting aside the alienation by the widow. The widow was the 1st defendant and the other defendants were her alienees. The defendants contended that there had been no re-union and that the widow was entitled to the property as the same was the separate property of the deceased. The lower Courts found that the brothers lived together after partition, that they jointly traded and executed pro-notes, that the plaintiff paid the debts of his deceased brother and that the alienation made by the widow was not justified by legal necessity to the extent of Rs. 550. They, however, held that there was no re-union and dismissed the plaintiff's suit. Thereupon the plaintiff preferred this second appeal.

Mr. *K. R. Subrahmanya Sastriar*, for the Appellant:—The lower Courts have found that there has been joint management and joint execution of documents and payment of debt of one brother by the other. The only legal inference which these facts are capable of is one of re-union. The lower Courts having found these facts, they were bound to draw the necessary legal inference and they erred in not doing so. On the finding that the sum of Rs. 550 was not necessary, the sale ought to have been set aside, the vendee being given a charge for the amount found to have been required for justifiable necessity. Further the widow has to account for Rs. 700 found to have been collected by her.

Mr. *T. M. Krishnaswamy Iyer*, for the 1st Respondent:—A sale ought not to be set aside when the major portion of the consideration was for necessity. *Thalagara Ramanne* v. *Kalagare Gangayya* (1); *Felaram Roy* v. *Bagalanand* (2) and Appeals Nos. 112 and 113 of 1909.

Mr. *C. S. Venkatachariar*, for the Respondents Nos. 2 to 6, was not called.

JUDGMENT.—We do not think that the lower Appellate Court was legally bound to infer re-union on the facts found by it and it was justified, after considering all the facts including those facts relied on by the plaintiff's learned Vakil, to arrive at the opposite conclusion.

As regards the validity of the sale-deed, Exhibit V, dated 19th October 1904, for Rs. 2,700, there is clear evidence that Rs. 2,150 went to discharge debts binding on the reversioners. Assuming that the remaining Rs. 550 of the purchase-money was not required for urgent necessity, it does not follow that the sale itself was not due to necessity, unless it could be reasonably presumed or unless it is proved that the sale of a lesser area for the exact amount of Rs. 2,150 was feasible. It is not shown that any such reasonable presumption arises on the circumstances of the case (see also Appeal Suits Nos. 112 and 113 of 1909).

The second appeal is dismissed with costs of the 3rd respondent.

Appeal dismissed.

(1) 26 Ind. Cas. 178; 27 M. L. J. 132.
(2) 6 Ind. Cas. 207; 14 C. W. N. 895.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1360 OF 1913.
November 23, 1914.
Present:—Mr. Justice Tudball.

LACHMIN NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
KALKA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 20, 31, 167—Illegal transfer of occupancy holding—Ejectment—Jurisdiction of Civil or Revenue Court—Suit for declaration that mortgage of occupancy is null and void, whether cognizable by Civil Court.

Where an occupancy tenant mortgages his holding and the mortgagee after obtaining a decree on foot of the mortgage forecloses it, the *zemindar* can sue for ejectment in a Revenue Court under section 31 of the Agra Tenancy Act. But a suit for a declaration that such mortgage and decree were null and void and not binding on the landlord, would lie in the Civil Court.

Second appeal from the decision of the Additional Subordinate Judge of Mainpuri, dated 11th June 1913.

Mr. *A. P. Dube*, for the Appellants.
Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This is a second appeal in a suit which has arisen out of the following circumstances. In the year 1897 an occupancy tenant gave a mortgage, with conditional sale to a mortgagee, of one plot of land forming part of his occupancy tenure. That tenant is now represented by defendants Nos. 3 and 4 in the present suit. The mortgagee is represented by defendants Nos. 1 and 2. A foreclosure suit was brought against the tenant by the mortgagees, and it was decreed by the 13th April 1905. Final decree was obtained, was put into execution and the mortgagees-decree-holders obtained possession through the Civil Court on the 14th January 1912. To none of these proceedings was the plaintiff or his representative a party. The present suit was brought on November 15th, 1912, by the *zemindar* against the occupancy tenant and the mortgagees-decree-holders. The following reliefs were asked for: that it may be declared that all proceedings taken in regard to the mortgage, the decree and the obtaining of possession were null and void as against the plaintiffs and, *secondly*, that the occupancy tenants and their transferees be dispossessed and the plaintiffs put into possession. The suit was instituted in the Court of the Munsif who decreed it. On appeal the only point argued before the Court below was one of jurisdiction. The Court below treated the case in a peculiar manner. The point before it was only one of jurisdiction. It actually held that the suit was one under section 31, clause 2, which is mentioned in group (*c*) of Schedule IV of the Tenancy Act of 1901 and as in that Schedule the period of limitation for such a suit is one year calculated from the date on which the illegal transfer was made and as the suit has been brought more than twelve years from the date of the original mortgage, it was barred by limitation. The argument before me is that section 31 of the Tenancy Act does not govern the present

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suit at all, that the Revenue Court has no power to declare a decree of the Civil Court to be null and void, that section 31 does not cover or include those transfers which are declared to be illegal by section 20, clause 2, or section 21 and that the case is one which is cognizable by a Civil Court and is well within the period of twelve years. In the alternative I am asked to grant to the plaintiffs a declaration that the Civil Court decree and all proceedings taken thereunder are null and void as against the plaintiffs and not binding upon them, this being a declaration which the Revenue Court would have no authority to grant.

This is asked with a view to enable the plaintiffs to take further proceedings in the Revenue Court for ejectment of the opposite party. It seems to me that the suit as brought, in so far as the relief in ejectment is concerned, is clearly a suit contemplated by section 31 of the Tenancy Act. At the time when the mortgage was made, *i.e.*, in the year 1897 the old Rent Act was in force, but even under that Act the transfer was illegal and could have been set aside. The present suit, if it had been brought before Act II of 1901 came into force, to obtain this relief, would have been brought in the Civil Court. But Act II of 1901 has clearly in view of sections 20, 21, 31 and 167 removed a suit of this nature from the jurisdiction of the Civil Court and has placed it under the jurisdiction of the Revenue Court. The illegal transfers contemplated by section 31 of the Tenancy Act clearly so include and cover the illegal transfers mentioned in sections 20 and 21. Some stress is laid on the use of the word 'voidable' in section 31. It conflicts, in one sense, with the meaning of sections 20 and 21. But it seems to me that it is quite clear that the word 'voidable' is used in a wrong sense in section 31. The object of that section is simply to state the methods in which a *zemindar* may avoid the result of a void transfer made by a tenant. It points out that the *zemindar* may sue for cancellation of the same, though it seems difficult to understand why a void transfer should require cancellation; it also enables him to eject both the tenant and the transferee. Personally I have no doubt whatever that if an illegal transfer of any description whatsoever is made by a tenant at the present time, the landlord if he wishes to interfere in the matter must do so by a suit brought in the Revenue Court in terms of section 31 of the Tenancy Act. It is clear, therefore, that the present suit in so far as it seeks the ejectment of the transferors and the transferees, is a suit which can only be brought in the Revenue Court and the Court of the Munsif had no jurisdiction whatsoever to deal with that portion of the case. In a suit of that description, moreover, an appeal does not lie to the Civil Court but to the Revenue Court (*vide* Schedule IV of the Act). Otherwise if the appeal had lain to the Civil Court, the question of jurisdiction would have fallen to the ground in the Court of Appeal.

There remains the question of the declaration that the decree and possession thereunder are null and void and not binding on the plaintiffs. This, in my opinion, is correct. Section 20, clause 2, of the Tenancy Act clearly states that the interest of an occupancy tenant is not transferable in execution of a decree of the Civil Court. Also where the interest of the tenant is not transferable, section 21 states that he shall not be competent to transfer his holding or any part thereof otherwise than by sub-lease as hereinafter provided. On behalf of the respondents it is urged that to grant to the plaintiffs this declaration will be of no use because, if they go to the Revenue Court now to seek ejectment they will be met by the bar of limitation. The plaintiff came into Court within twelve months of the delivery of possession by the Civil Court. It is quite possible that the Revenue Court may treat that delivery of possession as an illegal transfer in execution of a decree of the Civil Court and may possibly grant to the present appellants the whole of the period which has been occupied in the present litigation, on the ground that they have *bona fide* brought their suit in ejectment in a wrong Court. It is quite possible that the Revenue Court may, therefore, hold that there is no bar of limitation. It is not for me to lay down for the Revenue Court what it ought or ought not to do. But in view of this possibility and in view also of the fact that the mortgage, the decree and delivery of possession were all contrary to law, I think I shall be justified in granting to the plaintiffs at least the declaration which they seek. It may possibly be of considerable use to

them in the Revenue Court. The grant of the declaration is a matter of discretion. It was clearly asked for by the plaintiffs in their plaint. In the result the suit so far as it is a suit for ejectment, must fail on the ground that the Civil Court had no jurisdiction to entertain it. In so far as the suit is one for declaration, that the decree and proceedings taken in execution thereof are all contrary to law, null and void and not binding on the plaintiff, I think the suit should be decreed. I, therefore, allow the appeal to this extent that I grant to the plaintiffs the declaration that I have just set forth above. The rest of the claim stands dismissed. The parties will pay and receive costs in all Courts in proportion to failure and success. Costs in this Court will include fees on the higher scale.

Appeal partly allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 178 OF 1912.

February 19, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

THE OFFICIAL ASSIGNEE OF MADRAS —PETITIONER—APPELLANT

versus

N. PONNUSAWMY MUDALI AND ANOTHER —PLAINTIFF-DECREE-HOLDER AND PURCHASER—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), ss. 18, 53—Execution sale—Subsequent insolvency of debtor, if affects purchaser's right—Official Assignee, right of, to set aside sale and stop confirmation.

According to the provisions of the Civil Procedure Code, an auction-purchaser's title dates from the date of the sale, provided the sale is confirmed by the Court. Until confirmation, however, he has an inchoate right which he is entitled to have recognised and perfected. An order of adjudication passed against the judgment-debtor does not affect such right, as the Official Assignee only takes the estate subject to the rights of third persons affecting the same and cannot claim to have the sale cancelled on the ground of any equity possessed by the general body of creditors at the time of the order of adjudication.

Appeal against the order of the City Civil Judge, Madras, dated 6th March 1912, in Civil Miscellaneous Petition No. 270 of 1912, in Execution Petition No. 309 of 1911, in Original Suit No. 189 of 1909.

FACTS.—Certain properties belonging to a judgment-debtor had been sold in execution of a decree obtained against him and purchased by the 2nd respondent. Subsequently the judgment-debtor filed his petition and schedule in insolvency in the High Court. Thereupon he was adjudged an insolvent and an order was passed vesting his properties in the Official Assignee. The judgment-debtor then put in a petition under Order XXI, rule 90, Civil Procedure Code, for setting aside the sale, alleging grave irregularities in its conduct. Notice of this petition was also given to the Official Assignee. The latter continued the petition, but subsequently changing his mind presented a petition under sections 18 and 53 of the Presidency Towns Insolvency Act, 1909, for setting aside the sale and withdrew the petition under Order XXI, rule 90, previously filed by the judgment-debtor. The ground on which the Official Assignee put in the application was that the sale not having been confirmed, the property of the insolvent had vested in the Official Assignee and so the Court could not legally confirm the sale. The purchaser contended that title to the property vested in him on the date of the sale and was indefeasible, except by a petition under Order XXI, rules 89, 90 or 91, and a proper order passed thereon. Mr. C. R. Tiruvenkatachariar, City Civil Judge, Madras, dismissed the petition. His reasons were as follows:

"In the present case an application to set aside the sale was made by the defendant (insolvent) under rule 90, which was continued by the Official Assignee and eventually withdrawn on the 21st of February. There can be no doubt that but for the vesting order on the 2nd of December 1911, the Court will be bound to confirm the sale and grant a certificate of sale to the purchaser vesting the property in him from the 6th of November 1911. If the vesting order had been made before the date of sale, there can be no doubt that the purchaser would acquire no title to the property by reason that at the date of sale the property had ceased to belong to the judgment-debtor [See *Sundarappaiyar* v. *Arunachalla Chettiar* (1)]. No case has been

(1) 31 M. 493; 4 M. L. T. 188; 18 M. L. J. 487.

cited to me in which it has been held that the same result will follow where the vesting order was made after the sale and not before it. Under section 316 of the old Code the title to property sold in execution of a decree vested in the purchaser only from the date of confirmation of the sale; and if during the interval between the sale and the confirmation, the defendant (insolvent) ceased to have any title to the property by reason of the vesting order, it may be a question whether the purchaser could acquire a valid title to the property. But section 65 of the present Code is quite clear on the point, and title to the property vests in the purchaser from the date of sale. If on that date the property belonged to the judgment-debtor as whose property it was sold, his subsequent insolvency and the vesting order made in consequence thereof cannot, in my opinion, affect the title of the purchaser provided there is no other impediment in the way of confirmation of the sale by the Court. In the present case the application made under rule 90 to set aside the sale on the ground of material irregularity having been withdrawn, there is no such impediment and if the purchaser applies for confirmation, the Court is bound to confirm the sale unless the position taken by the Official Assignee in the present petition is sound in law. The Official Assignee's Attorney relied on section 53 of the Presidency Towns Insolvency Act in support of his contention. I am of opinion that section does not help him in any way. The first clause of that section to which my attention was drawn concerns itself with a different question, namely, as to the respective rights of the execution creditor and the Official Assignee as regards the proceeds of the execution sale. It assumes that the sale has been completed and that the question for the Court is whether the execution creditor can claim the amount realised by the sale as against the Official Assignee, or whether they pass to the Official Assignee in preference to the execution creditor. Clause 3 of section 54 runs as follows:—'A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Official Assignee.' This provision supports the respondent's contention. It is not urged on behalf of the Official Assignee that the purchase by the respondent was not made in good faith. The circumstance that the Official Assignee withdrew the petition which was presented under rule 90 by the insolvent, may also be relied upon by the respondent as showing that the good faith of his purchase has not been impeached. Section 54 of the same Act tends, in my opinion, to support the view that a sale which has been made is not liable to be affected so far as the purchaser is concerned by any vesting order subsequently made. After the sale the proceeds realised thereby represents property sold and, takes its place as appertaining to the estate of the insolvent and would vest in the Official Assignee, subject to such rights as the execution creditor might have already acquired by the steps taken by him in execution proceedings. The analogy of a private sale made by the debtor before the vesting order against him has been made, also supports the conclusion that the title of the purchaser to the property is unaffected by the subsequent insolvency of the judgment-debtor. In the case of a private sale by the debtor himself the contract of sale could be specifically enforced against the Official Assignee and all that the latter could claim is the payment to him of the balance of purchase-money, if any, which was due at the date of the vesting order. As explained in *Rabbidge Ex parte; Pooley, In re*, (2), the Official Assignee in such a case took the legal estate in the property subject to the equity of the purchaser under the contract, which gave the purchaser a right to say, "convey me the estate on my paying the purchase-money." In that case the balance of the purchase money was paid to the vendor (insolvent) after the vesting order was made, and it was held that the payment cannot be relied on as a valid payment against the trustee in bankruptcy and that the purchaser could claim specific performance only on payment of the balance of the purchase-money to the said trustee. But if the purchase-money had been fully paid before the vesting order had been made, there is no doubt that the trustee in bankruptcy would be bound to convey the property to the purchaser unconditionally.

(2) (1878) 8 Ch. D. 367; 38 L. T. 663; 26 W. R. 646.

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"I am of opinion that the present petition is unsustainable and I accordingly dismiss it with costs."

Against this order the Official Assignee appealed to the High Court

Messrs. *Ranganadham Naidu* and *Tirumalai Pillai*, for the Appellant :—The title of the judgment-debtor is divested only on the confirmation of the sale and the issue of a sale certificate. If in the meanwhile the debtor becomes insolvent, his title vests in the Official Assignee and in such an event the Court cannot confirm the sale as if the property belonged to the judgment-debtor.

Mr. *T. Ethiraja Mudaliar*, for the Respondents:—The purchaser in an execution sale acquires title to the property purchased, from the moment the sale is concluded. If he makes no default in payment of the purchase-money, according to law his title could be defeated only by means of an application under Order XXI, rules 89, 90 or 91. In the absence of such application or where such an application is made and dismissed the Court is bound to confirm the sale and issue certificate to the purchaser.

JUDGMENT.—In this case certain properties were sold in execution of a decree against a debtor. The debtor was adjudicated an insolvent before an order confirming the sale was passed. The Official Assignee then moved the Court not to confirm the sale as the insolvent's property had vested in him.

The learned Judge of the City Civil Court dismissed the petition. We are of opinion that his order is right. According to the provisions of the Civil Procedure Code an auction-purchaser's title dates from the date of the sale, provided the sale is confirmed by the Court. Before the order of confirmation, therefore, he has an inchoate right which he is entitled to have recognised and perfected. There is no reason for holding that an order of adjudication against the judgment-debtor would affect such right. The Official Assignee takes the estate of the insolvent subject to the rights of third persons affecting it. Nor can the Official Assignee claim to have the sale cancelled on the ground of any equity possessed by the general body of creditors at the time of the order of adjudication. We dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 897 OF 1912.

June 29, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

INDAR SINGH—PLAINTIFF—APPELLANT

versus

KARTAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration—Compromise deed—Arrangements about certain estate.

A deed of compromise which gives effect to some arrangement arrived at between parties about a certain estate is compulsorily registrable.

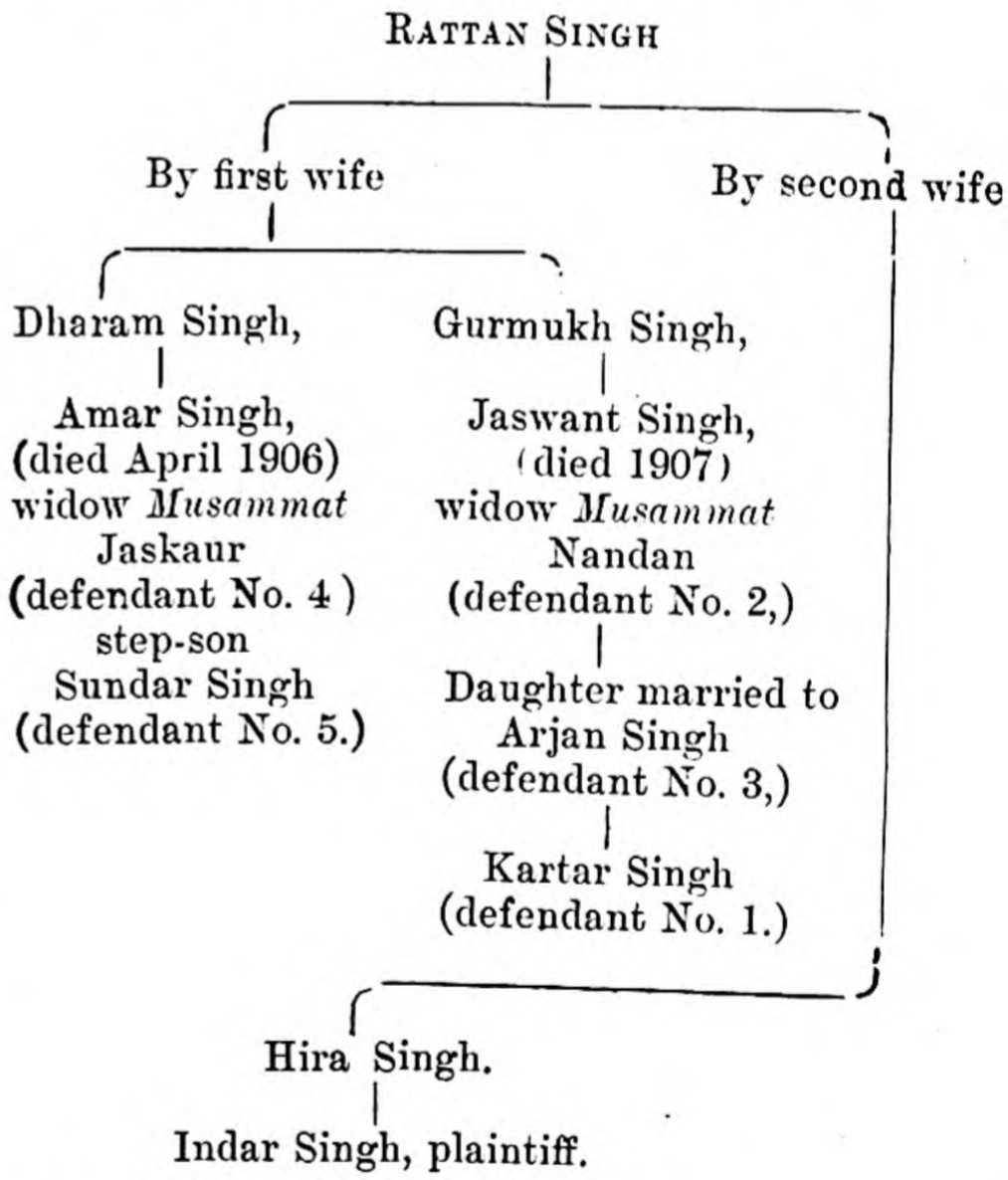
Malukchand v. *Manilal Nansha*, 6 Bom. L. R. 296; 28 B. 364, referred to.

Second appeal from the decree of the Divisional Judge of Hoshiarpur, dated the 22nd of April 1912, affirming that of the Subordinate Judge, second Class, Hoshiarpur, dated the 31st of December 1911, dismissing plaintiff's claim.

Pandit *Rambhaj Datta*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—To make this case clear the material portion of the pedigree concerned is reproduced as follows:—



Indar Singh, plaintiff, has sued as reversioner of Jaswant Singh for a declaration covering a large area of land owned by Jaswant Singh and now said to be the property of the latter's widow for her life.

The defence is that by a registered deed, dated 5th July 190 Jaswant Singh being

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then a very old man, adopted his daughter's son, Kartar Singh.

The suit is primarily one to set aside the adoption deed and treating it as such, the lower Courts have concurred in dismissing the suit. They have held that the adoption of Kartar Singh was genuine and valid by custom. There can be no second appeal on this point without a certificate and the appeal is, therefore, bound to fail on this main issue.

This would have ended the matter if the lower Courts had properly scrutinised the plaint and declined, as they should have done, to go into certain further reliefs asked for by way of declaration. The correct answer to plaintiff in respect of these reliefs was that the suit is premature and cannot be gone into till the succession opens out on the death of *Musammat* Nandan. As, however, the Courts have discussed the question of further relief at great length, we think it better to decide the point so as to save further litigation if possible.

This secondary part of the case turns on the compromise proceedings of 28th November 1906 in respect of Amar Singh's land (on his death in April 1906) in a suit between the present plaintiff, Indar Singh, and Amar Singh's step-son, Sundar Singh. This explains how Amar Singh's widow and step-son came to be made defendants in the present suit with which they are not primarily concerned.

The compromise in question took account of Jaswant Singh's estate, making certain provisions in respect thereof, though his property was not immediately in dispute in 1906. For reasons of their own and under pressure from a *panchayat* Jaswant Singh and his son-in-law, Arjan Singh, agreed that as part of the general settlement between Indar Singh and Sundar Singh certain arrangements should be made about a portion of Jaswant Singh's land also. Agreements appear to have been drawn up accordingly by Jaswant Singh and Arjan Singh, which contemplated, and required, registration. Subsequently Jaswant Singh and Arjan Singh changed their minds and declined to register, and registration was in fact refused.

The plaintiff now contends that registration was not required and asks that he may be given a declaration the effect of which would be to hold defendants Nos. 1 to 3 to the arrangement contemplated in November 1906. The lower Courts have declined to do this and plaintiff can only succeed on second appeal if his plea as stated in ground No. 1 of the appeal be allowed, namely, that registration of the 1906 agreement was unnecessary.

The lower Courts have considered the point carefully and we agree with them that if the agreement was to take effect, registration was compulsory. We see no force in the arguments of the plaintiff's Pleader which are mainly based on a complete misunderstanding of what he has called a composition-deed, thereby misusing a technical term referring to settlements between debtors and creditors which is totally inapplicable to the present case, see *Malukchand* v. *Manilal Nansha* (1).

The short answer to plaintiff is that he had the clearest notice in 1906 of refusal by Jaswant Singh and Arjan Singh to proceed with the complicated settlement then suggested and yet remained silent, taking no steps to enforce such remedy as he may have had at the time. It is too late for him now to attempt to secure any advantage for himself from agreements which undoubtedly required registration and were not in fact registered.

The appeal then fails on the only points with which we are now concerned. It is dismissed with costs to the defendants. Pleader's fee Rs. 80.

Appeal dismissed.

(1) 28 B. 364; 6 Bom. L. R. 296.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 23 OF 1911.

April 24, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

RIJHUMAL SHIVANDAS—DEFENDANTS—APPELLANTS

versus

MICHUMAL HOTCHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 104—Stoppage in

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transit—Sufficient notice—Telegram to carrier not to deliver.

Where an unpaid vendor sent goods by rail to and at the request of the vendee and on becoming insolvent, while the goods were still in transit, telegraphed to the Railway Company asking them not to deliver the goods:

Held, that the telegram was sufficient notice to the carriers, as no particular form of notice is required to effect a valid stoppage in transit under section 104 of the Contract Act.

Appeal against the decree of the Additional Judicial Commissioner of Sind.

Mr. *Wadhumal Oodharam*, for the Appellants.

Mr. *Rupchand Bilaram*, for the Respondents.

JUDGMENT.—The plaintiffs sued defendants No. 1 for damages in respect of goods consigned to defendants No. 1 on the order of defendantsNo. 2, alleging that wrongful possession was taken of the goods by defendants No. 1 after they had been stopped in transit on the insolvency of defendants No. 2. A decree was passed for the value of goods against the 1st defendants. No decree was passed against the defendants No. 2. The defendants No. 1 appeal against this decree. The defendants No. 2 have not appeared.

It has been contended on behalf of theappellants, in the first place, that the plaintiffs were not principals and had no right to sue. But the plaintiffs stated they were principals in respect of the goods and they were supported by the defendants No. 2 and other witnesses. The only point made has been that their account books were not produced. We do not see any sufficient reason in these circumstances for disagreeing with the learned Judge.

It has been contended on behalf of appellants, in the second place, that theplaintiffs had no right to stop the goods in transit because before consigning them to the defendants No. 1 they had already given delivery to the defendants No 2. The plaintiffs, no doubt, weighed out the goods into bags supplied by the defendants No. 2 and arranged their carriage to the railway station in the presence of Rajumal, the agent of the defendants No. 2. But they paid the expenses themselves and loaded the bags into the railway wagons five or six days later and consigned them to the defendants No. 1 in their own name, and not in the name of defendants No. 2, and at that time neither Rajumal nor anybody else was present on behalf of the defendants No. 2. We agree in these circumstances with the finding of the learned Judge.

It has been contended on behalf of the appellants, in the third place, that the telegrams "do not deliver" and "deliver to a third man," did not amount to stoppage in transit inasmuch as they were followed by a letter stating that the consignment to defendants No. 1 was a mistake and that the delivery ought to be made to the third person and inasmuch as no mention was made of unpaid vendors or the insolvency of the defendants No. 2. No case has been cited before us in which any particular form of notice has been required, and the intention of the telegrams is a question of fact which would appear from a subsequent letter of the defendants No. 1 to have been perfectly well-known to the defendants No. 1 and the Railway Company. There was no occasion, however, for developing the evidence as to intention, as it was never disputed in the lower Court, nor has it been distinctly questioned in the memorandum of appeal. We hold, therefore, that the intention of the telegrams was to stop delivery in transit on behalf of the unpaid vendors owing to the insolvency of the purchasers, the defendants No. 2, and that the telegrams were sufficient notice under section 104 of the Contract Act as held by the learned Judge.

It has finally been contended on behalf of the appellants that the plaintiffs would not be entitled to recover the full value of the goods but only the balance of the unpaid purchase-money. This suit, however, was based on tort. The defendants No. 1 were alleged to have taken possession of the goods wrongfully and were bound to restore possession of the goods or to pay the full value of the goods. It was not based on contract and there was no question as regards the amount of the unpaid purchase-money. That could only be a proper question in the suit based on contract against the purchasers, defendants No. 2. It has also been contended that the freight amounting to some Rs. 300 should be deducted from the value of goods, but no satisfactory evidence has been pointed out as to the value of the goods at the time they were taken over by the defendants No. 1 and it appears to us that the damages recoverable would be the value of the goods in Karachi, because possession was wrongfully taken of those goods in

Karachi and in default of any reliable evidence to the contrary, it must be presumed that the value was at least the amount paid up-country for those goods *plus* the freight to Karachi. No merchant could be presumed intentionally to buy goods up-country at such a rate that they would not realize that rate *plus* railway freight to Karachi. Apart from this the claim to deduct the freight is of the nature of a set-off and was, therefore, a claim which should have been particularly pleaded on payment of the appropriate Court-fee.

We, therefore, dismiss this appeal with costs and confirm the decision of the learned Judge.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 71 OF 1911.

April 7, 1914.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

GHAMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KANHIYA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Registered sale-deed—Oral agreement of mortgage, whether can be proved—Fraud, if alleged, should be specifically pleaded.

Oral evidence cannot be given to show that the parties to a deed of sale intended the transaction to be one of mortgage and not of sale.

A party relying on fraud ought to allege it specifically in the plaint.

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 1st December 1910, affirming that of the Munsif, first Class, Multan, dated the 27th June 1910, dismissing the claim.

Mr. *Badr-ud-Din Kureshi*, for the Appellants.

Mr. *Nanak Chand* and Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The land in suit was sold by plaintiffs' father to defendants' father for Rs. 1,300 on 21st December 1880. Plaintiffs sued for redemption alleging that the contract was really one of mortgage and not of sale. The first Court found upon the evidence that there was no separate oral agreement such as is alleged, that the transaction should be treated as a mortgage and dismissed the suit. Upon appeal the Divisional Judge held that plaintiffs were barred by section 92 of the Evidence Act from proving that the transaction was not what it purported to be according to the registered deed. He, therefore, dismissed the appeal.

Plaintiffs have filed a further appeal to this Court.

Mr. Badr-ud-Din, on behalf of appellants, was unable to cite a single authority in support of the contention that evidence could be given to show that the parties to the deed of sale intended the transaction to be one of mortgage and not of sale. There is ample authority to the contrary and we have no hesitation in agreeing with the lower Appellate Court's view of the law.

With reference to the third ground of appeal, it is sufficient to say that no fraud was specifically alleged in the plaint.

Mr. Badr-ud-Din urges that in any case there was no intention to sell a share of the *shamilat*. The deed of sale shows that a share of the *shamilat* was sold. Moreover, it was allotted to defendants-respondents during the partition proceedings which began in 1891 and terminated on 3rd June 1896. During these proceedings Ghaman, present plaintiff, objected saying that the *shamilat* should go to him and his brother, but the decision went against him. Since then defendants have been holding the *shamilat* as proprietors and plaintiffs' claim to it is barred by time.

We note further that in the lower Appellate Court there was no contention that the *shamilat* had been fraudulently entered in the deed of sale, and in the grounds of appeal to this Court there is no reference to it at all. We have no doubt that the *shamilat* was sold along with the proprietary land and we are supported in this view by the mutation, dated 9th June 1881.

The appeal clearly fails on more than one ground and is dismissed with costs.

Appeal dismissed.

GANESH *v.* BABU RAM.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1205 OF 1913.

November 17, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

GANESH—DEFENDANT—APPELLANT

versus

BABU RAM—PLAINTIFF AND ANOTHER DEFENDANT—RESPONDENTS.

Hindu Law—Moveable property—Flag of Pragwals, *whether can be charged for payment of annuity—Mortgage—Auction purchaser—Notice—Estoppel.*

The flag used by the *Pragwals* at the confluence of the Ganges and Jumna at Allahabad is a valuable property and may be charged with the payment of an annuity and may be sold subject to that charge even in execution of a decree for arrears of the annuity.

A person who brings property to sale in execution of a decree without disclosing the existence of a mortgage which he holds on the property, cannot afterwards set up the mortgage against the purchaser, at all events where the purchaser had no notice of the mortgage.

Second appeal from the decision of the Judge of the Court of Small Causes exercising the powers of a Subordinate Judge of Allahabad, dated the 31st July 1913.

Mr. *Lakshmi Narayan Tewari*, for the Appellant:—The lower Court is wrong in the view it takes, that we could have got information about the charge if we had inquired in the Registration Office. Transfers of moveable property are not required to be registered and so registration cannot amount to notice in the case of transfers of moveable property. In the case of immoveable property alone all transactions are acquired to be effected by registered instruments and in those cases registration would be notice.

In the case of auction sales all charges are proclaimed. In this case the charge was not entered in the sale notification. Moreover, the plaintiff who has the charge was himself bidding for the property in execution of his decree and his action would lead the appellant to believe that he had no charge. The plaintiff not having given notice of his charge, is estopped and cannot enforce it against my clients who are purchasers for value and without notice.

I rely on *Tukaram* v. *Ramchandra* (1); *Agarchand* v. *Rakhma* (2); *Ramchandra* v. *Jairam* (3); *Jaganatha* v. *Gangi Reddi* (4); *Ramanath Dass* v. *Boloram* (5); *Muhammad Hamid-ud-din* v. *Shib Sahai* (6); *Kasturi* v. *Venkatachalapathi* (7).

Once a charge has been enforced, it is exhausted and no longer exists. This view was held in *Sheshgiri Shanbhog* v. *Salvador Vas* (8). In this case it was held that not only the right, title and interest of the judgment-debtor was sold, but also rights which the decree-holder and judgment-debtor were capable of passing. Moveable property cannot be sold subject to a charge, *Nanhuji* v. *Chimna* (9).

Mr. *Beni Madho Ghose*, for the Respondent:—There is nothing in law to prevent a property being sold subject to a recurring charge. Moreover, in this case it was admitted by some of the defendants that they were in possession of the property sold and the auction-purchaser did not get possession and the property remained with the judgment-debtor. I can enforce my security against the judgment-debtor.

JUDGMENT.—A suit brought by the respondent, Babu Ram, for possession of moveable and immovable property was settled by an agreement, dated November 17th, 1906, and duly registered, whereby the property there in suit was charged with the payment of an annuity of Rs. 200 to Babu Ram. In 1908 Babu Ram obtained a decree for arrears of the annuity against Brij Mohan, father of the respondent Badri, and in execution thereof part of the property, namely, a *birt jijmani*, some old book containing the names and genealogies of the clients (*jijman*) and a flag were brought to sale. The *birt jijmani* and the book were purchased by Babu Ram himself and the flag was purchased by the appellant Ganesh.

The appeal now before us arises out of a second suit brought by Babu Ram for recovery of further arrears of the annuity by sale of the moveable and immoveable property charged by the agreement of 1906. Brij Mohan(since deceased) and his son, the respondent Badri, were impleaded as the persons in possession of the immoveable property and the appellant, Ganesh, was impleaded as the

(1) 1 B. 314.
(2) 12 B. 678.
(3) 22 B. 686.
(4) 15 M. 303.
(5) 7 C. 677; 9 C. L. R. 233.
(6) 21 A. 309; A. W. N. (1899) 87.
(7) 15 M. 412.
(8) 5 B. 5.
(9) 10 Ind. Cas. 86 7 N. L. R. 72.

purchaser in possession of the flag. The claim was decreed by the first Court and its decision was confirmed by the lower Appellate Court. This is a second appeal by the defendant, Ganesh, in which he repeats all the pleas put forward by him unsuccessfully in the Courts below.

His first point is that the flag having been once brought to sale by the respondent, Babu Ram, cannot be brought to sale by him again. It was indeed suggested that moveable property cannot be charged with the payment of an annuity, but such a contention cannot be accepted. In the case of *Sahib Mirza* v. *Umda Khanum* (10) both moveable and immoveable property was charged with the payment of an annuity. The property was sold repeatedly subject to the annuity in execution of decrees passed for arrears of the same, and there were many suits between the annuitants and the holders of the property and between the holders of the property *inter se*. *Sahib Mirza* v. *Syed Muhammad* (11) is an example of them. It is clear that moveable as well as immoveable property—at all events moveable property which is not perishable or necessarily consumed by use—may be effectively charged with the payment of an annuity and may be sold subject to the charge, even in execution of a decree for arrears of the annuity. The property now in question is of a peculiar character. The flag is one of those used by *Pragwals* at the confluence of the Ganges and the Jumna for the purpose of attracting pilgrims. Each flag bears a distinctive device which may be recognized by an old client. His flag and his books are the ordinary paraphernalia or stock in trade of the owner of a *birt jijmani*. Together, the *birt jijmani*, the books and the flag often form a valuable property, and we may assume for the purposes of this case that such property may be charged with the payment of an annuity and may be sold subject to that charge, even in execution of a decree for arrears of the annuity. This brings us to the appellant's second point, namely, that the flag was not sold to him subject to the annuity and that the respondent, Babu Ram, is by his conduct estopped from asserting that it was. Babu Ram was, of course, not bound to have the flag sold subject to the annuity.

It was open to him to have it sold free of the charge, and such a course would often be advantageous to the owner of the annuity in the case of moveable property of a wasting character—whether by accident or design, it appears that nothing was said about the property remaining subject to the charge. The case appears to be analogous to those cases in which it has been held that a person who brings property to sale in execution of a decree, without disclosing the existence of a mortgage which he holds on the property, cannot afterwards set up the mortgage against the purchaser, at all events where the purchaser had no notice of the mortgage, see, for example; *Hamid-ud-din* v. *Shib Sahai* (6); *Jaganath* v. *Gangi Reddi* (4); *Kasturi* v *Venkata Chalapathi* (7) and *Ramchandra* v *Jairam* (3). It is not suggested that the appellant had any notice of the charge, or that there was anything to lead him to suspect that the flag was being sold subject to a continuing charge for an annuity. On the contrary Babu Ram's own action in allowing the *birt* and the books to be sold separately from the flag suggested that he intended that the flag, the *birt* and the books should all be sold free of the charge for the annuity, for the flag without the *birt* and the books will produce no income. For these reasons we are of opinion that the flag held by the appellant was sold to him free of the charge for the annuity and that the respondent, Babu Ram, is estopped from contending the contrary.

We decree the appeal and dismiss the suit as against the appellant with costs throughout.

Appeal decreed.

(10) 19 C. 444 (P. C); 19 I. A. 83.
(11) Select Case No. 306.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1704 OF 1913.

October 14, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

KAVUTU PURNANANDAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Vidwan Madabhushi LAKSHMI-NARASIMHA CHARYULU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Interest—Damages for breach of contract, whether interest legal from date of breach.

The award of interest on the amount of damages allowed for a breach of contract from the date of the breach is illegal.

Subramania Aiyar v. *Subramania Aiyar*, 31 M. 250; 18 M. L. J. 245; 3 M. L. T. 278; *Boddu Sanyasiraju* v. *Kotra Ramamurthi*, 21 Ind. Cas. 543; (1913) M. W. N. 874; *Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Company, Ltd.*, 1 Ind. Cas. 977; 32 M. 95; 18 M. L. J. 497; 4 M. L. T. 110 (F. B.), followed.

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam, in Appeal Suit No. 64 of 1912, preferred against that of the Additional District Munsif of Bezwada, in Original Suit No. 208 of 1909.

FACTS.—Suit to recover damages for breach of contract. The plaintiffs alleged three different contracts under which defendants agreed to buy paddy from the plaintiffs at certain rates. In respect of two of the contracts plaintiffs' claim was disallowed by the Courts below, but damages were allowed in respect of the third contract. Interest was also allowed on the amount of damages from the date of breach up to the date of suit. The lower Appellate Court relied on *Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Coy. Ltd.* (1). No costs were allowed to defendants in respect of the portion disallowed. The amount of damages was assessed at 8 annas a bag, being the difference between Rs. 3-8-0 which was the contract price and Rs. 3, the price realised on re-sale. Defendants filed a second appeal.

Mr. *V. Ramadoss*, for the Appellants, contended:—(1) The proper measure of damages was not the difference between the contract price and that realised on re-sale but the difference between the contract price and the market price on the day of breach.

(2) The interest ought not to be given on unliquidated damages. He relied on *Subramania Aiyar* v. *Subramania Aiyar* (2) and *Boddu Sanyasiraju* v. *Kotra Ramamurthi* (3). No reasons were given in *Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Coy. Ltd.* (1).

(3). Defendants ought to get costs on the disallowed claim.

[AYLING, J.—Why should recourse be had to the Interest Act when the interest to be awarded is upon an uncertain amount?]

Mr. *V. Ramesam*, for the Respondents, contended:—(1) The re-sale being on a date near enough to the date of breach the price realised on re-sale is evidence of the market price on the date of breach. The defendant has no better or rebutting evidence.

(2) In *Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Coy. Ltd.* (1) interest was correctly awarded though no reasons were given. This judgment was one by three Judges. The other cases are not correctly decided, as the Bombay cases on which the case in *Subramania Aiyar* v. *Subramania Aiyar* (2) was based did not really decide the point. He referred to Illustration to section 23 of the Contract Act.

(3) Costs are in the discretion of the Court.

JUDGMENT.—In our opinion the lower Appellate Court has rightly held that time was not of the essence of the second contract in respect of which he has awarded damages to the plaintiffs: and the defendants (appellants) are liable for their breach of the same on refusal to take delivery.

The amount of damages awarded is attacked on three grounds, with which we shall deal *seriatim*.

It is pointed out that the number of bags refused is only 452 and not 540. The figure 540 is clearly due to an arithmetical error: but apart from this it is now admitted that the number of bags accepted on 18th December 1906 was 434, as stated by the District Munsif, and not 426 as stated by the Subordinate Judge. In any calculation of damages, 452 must be substituted for 540 as the number of bags refused.

(1) 1 Ind. Cas. 977; 32 M. 95; 18 M. L. J. 497; 4 M. L. T. 110 (F. B.).

(2) 31 M. 250; 18 M. L. J. 245; 3 M. L. T. 278.

(3) 21 Ind. Cas. 543; (1913) M. W. N. 874.

In the second place, it is pointed out that the basis of assessment of damages should be the difference between the contract price and the price that the rejected goods would have fetched if sold at the time of refusal *i. e.*, 18th December 1906: and it is argued that this is not the basis on which the lower Appellate Court has proceeded. The Subordinate Judge has calculated damages on the difference between the contract price and that actually fetched by the refused bags when sold at the place of delivery (Bezwada). It does not appear on the record before us when this sale took place. But the appellants adduced no evidence of the market price on the date of breach (18th December 1906) and we are unable to say that the award of the Subordinate Judge is erroneous.

It is next argued that the award of interest on the amount of damages so calculated from date of breach of contract is illegal. This, we think, must be conceded. Whatever view we might be inclined to take if the question were *res integra*, we feel bound to follow the ruling in *Subramania Aiyar* v. *Subramania Aiyar* (2), as did the learned Judges in a recent case of *Boddu Sanyasiraju* v. *Kotra Ramamurthi* (3). The Subordinate Judge has relied on *Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Company Ltd.* (1) in which interest on unliquidated damages was allowed. But in that case no reasons are given for departing from the usual practice: and the point does not appear to have been raised or considered.

The decree must be amended by omitting interest on the damages now found to be due to the plaintiffs.

Lastly it is urged that each side ought to pay and recover proportionate costs. We think this must be conceded. The plaintiffs sued on three contracts and succeeded only on one: damages in the case of the other two were refused by both the lower Courts and their decision in that respect was not appealed against. Plaintiffs should pay the defendants' proportionate costs in the two lower Courts on the amount of their claim eventually disallowed.

The decree of the lower Appellate Court will be modified as indicated above. Each side will bear its own costs in this Court.

Decree modified.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 381 OF 1910.

November 3, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

Rani BHAGWAN KAUR—PLAINTIFF—APPELLANT

versus

Rani HARNAM KAUR—DEFENDANT—RESPONDENT.

Res judicata—*Decision in previous execution proceeding between same parties, whether bars suit on same subject-matter—Civil Procedure Code (Act XIV of 1882), s. 244—Widow in possession of her husband's house, when trespasser—Maintenance, right to claim, when allowed.*

The executors of a deceased proprietor sued his widow and some other persons for recovery of various parts of his estate. The parties came to an amicable settlement and a decree was passed in terms of the written compromise. In execution proceedings, the widow objected to the attachment of the house she was residing in, but the objection was overruled and the execution allowed to proceed, the Chief Court on appeal holding that she had no right to live on in the house. On a suit by the widow for declaration that she was entitled to live during her life-time in the house in suit and for maintenance allowance:

Held, (1) that the decision in the previous execution proceedings between the same parties made this question *res judicata*;

(2) that inasmuch as the widow must be regarded as a trespasser in possession of property to which she had no right, she was not entitled to claim maintenance unless and until she had given possession of the house and accounted for the profits up to the date of possession.

First appeal from the decree of the District Judge, Amritsar, dated the 30th March 1910, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Messrs. *Roshan Lal* and *Duni Chand*, for the Appellant.

Messrs. *Beechey* and *Santanam* and Lala *Bhagat Ram*, for the Respondent.

JUDGMENT.—Sardar Dayal Singh, Majithia, a wealthy *Gil Jat*, died on the 9th September 1898 leaving a very large estate, partly ancestral and partly acquired. On the 15th June 1895 he had executed a Will with regard to the administration of his estate and had appointed certain Indian gentlemen, who were well-known to him, to be his executors. After his death, the executors applied for Probate but were resisted by the present appellants, Rani Bhagwan Kaur, the widow of the deceased, Sardar Gajindar Singh, his nearest agnatic heir,

and others, but after protracted and expensive litigation, Probate was eventually granted on the 5th August 1903. In June 1904 the executors brought a suit for recovery of various parts of the deceased's estate which were in the possession of the said Rani, Sardar Gajindar Singh and other persons, the principal defendants being, of course, the Rani and the Sardar. In July 1907 the executors and the principal defendants arrived at an amicable settlement, and as a result the Additional District Judge passed a decree in terms of a written compromise which was filed in his Court and to which the Chief Court granted sanction upon the application of the parties. Before proceeding it is to be noted that the written agreement upon which the decree of the Additional Distrtct Judge was based, is in some respects different from an agreement which appears to have been arrived at subsequently and of which a copy has been filed in this case as the final agreement between the parties. A copy of the latter agreement was produced before the Additional District Judge, but he rightly proceeded to give his decree in accordance with the written agreement which had come up for sanction to this Court, and had, as the learned Judge expressed it, "received the *imprimatur* of the Chief Court."

Under the terms of the agreement which was embodied in the decree, it was provided that the executors should make an allowance to the Rani, but that this should not in any way affect her right to maintenance from Sardar Gajindar Singh or any other rights which she might have under her late husband's Will. It was, however, provided [see paragraph 2, clause (*l*)] that the executors were to obtain possession through the Court of all properties devised to Sardar Gajindar Singh by the testator and should thereafter hand over the same to him, and further that the Sardar himself should be at liberty to recover possession (by execution of decree) of any part of the said properties which might happen to be put in the possession of any of the parties.

The decree is dated the 4th July 1907, and shortly afterwards Sardar Gajindar Singh applied for execution of it by attachment of the premises at Amritsar which were used by the testator during his life-time as a residential house and which after his death had been taken possession of by his widow, Rani Bhagwan Kaur. The latter immediately objected to the attachment on the ground that according to the conditions of the deed of compromise and the decree thereon, Sardar Gajindar Singh had no right to apply for execution or to take any property from the possession of the petitioner unless and until all the conditions of the deed of compromise had been complied with. The District Judge, by order, dated the 8th January 1908, overruled these objections and held that the applicant was entitled in virtue of the clause above referred to to take out execution on his own account. From this order, which was clearly one passed under the provisions of section 244, Civil Procedure Code, 1882, the Rani appealed to this Court and the first four grounds of her appeal run as follows :—

"Because the learned District Judge has misunderstood the terms of the decree. Paragraph (*a*) clearly makes the decree subject to Rani Bhagwan Kaur's rights secured by the Will, and so the decree cannot be executed for the house she resides in, as the Will clearly provides that she can choose to reside in the family house at Amritsar or Majitha and she has chosen to reside in the family house at Amritsar.

"2. Because on the correct interpretation of the decree the objection of the Rani Sahib ought to have been allowed.

"3. Because the residential house against which the decree is sought to be executed is not included in the decree. Prays that pending the disposal of this application the further execution proceedings be stayed.

"4. Because the Court executing the decree was competent to decide all questions under section 244, Civil Procedure Code, and section 228, Civil Procedure Code."

It is clear from these grounds that the Rani, through her legal advisers, pressed this Court to decide as between her and Sardar Gajindar Singh the question as to her right to retain the house she was living in, and it was with reference to and in accordance with that prayer that the late Chief Judge (Clark, C. J.) by order, dated the 13th May 1908, held that "all that Rani Bhagwan Kaur is entitled to under the decree, compromise and clause 4 of the Will, is a suitable residence at Amritsar or Majitha as she may desire. She has no

right to live in the house she is living in at present.....She has no right to stay execution of decree as to the house in which she is now residing."

On the 12th May 1908, *i.e.*, one day before the date of the last-mentioned order, the Rani brought the present suit in which she claims the following relief :—

(*a*) that she is entitled to live during her life-time in the *haveli* situate in Amritsar, Katra Baggian, *Khata Shumari* No. 2995;

(*b*) future maintenance in accordance with the terms of clause 4 of the Will at a rate to be fixed by the Court but provisionally fixed by plaintiff at Rs. 500 per mensem; and

(*c*) arrears of maintenance from the 1st September 1906 up to date of suit, amounting in all to Rs. 9,720.

The suit was contested and the relief claimed by the plaintiff was objected to by the defendant on various grounds. Pending the suit Sardar Gajindar Singh died and his widow Sardarni Harnam Kaur was brought on the record as his representative. On the 30th March 1910 the District Judge dismissed the suit on the ground that upon a proper construction of the terms of the Will, defendant was under no obligation to grant maintenance to the plaintiff or to carry out such terms of the Will as were in her favour until the whole of the properties devised and bequeathed to him had actually come into his possession, and as to the latter point, the District Judge held upon the evidence given by Sardar Tek Singh, plaintiff's agent and brother, that a very considerable portion of that property had not yet come into the hands of the Sardar or his widow.

The plaintiff has appealed to this Court, and we have heard arguments at considerable length on behalf of the appellant and of the respondent. We do not think it, however, necessary to discuss any but the one point upon which Mr. Beechey laid special stress, namely, that the decision of Clark, C. J., in May 1908 makes the question of the Rani's right to the *haveli res judicata* and that she can no longer claim to be entitled under the terms of the Will to retain possession of it during her life. It is true that this plea was not urged in the District Court, but the question is one of law, is obvious upon the face of the execution proceedings which preceded the present suit and goes to the root of the plaintiff's claim, and we, therefore, are compelled to consider it in the first instance. In our opinion the plea must prevail, for it is quite clear that it was the Rani herself who insisted upon a decision being given by the Chief Judge with regard to her alleged right under the terms of the Will to keep the *haveli* in her possession and the question was one directly connected with the execution of the decree and cognizable under section 244 of the Code of 1882 by the Court executing that decree. We must accordingly hold that it is not competent for the Rani to raise the same question again by a separate suit.

As it has been definitely decided that the Rani has no right to retain the *haveli* and as she has admittedly kept possession of it ever since the death of her late husband, she must be regarded as a trespasser in possession of property to which she has no right and as such, we do not think that she is entitled to claim maintenance or arrears of maintenance from Sardar Gajindar Singh's widow unless and until she hands over the *haveli* to the latter and accounts to her for the income and profits accruing therefrom during her occupation of it. At the conclution of the arguments we suggested to Messrs. Muhammad Shafi and Beechey that a settlement of this dispute between the two widows is eminently desirable and that it might be feasible for the parties to agree that Rani Bhagwan Kaur should remain in possession of the *haveli* during her life, she on her part foregoing any right of further maintenance from Sardarni Harnam Kaur. We believe that both Counsel used their best endeavours to effect a settlement on the above lines, but unfortunately without success. We are thus compelled to decide the case in the appeal upon the merits and in accordance with our conclusions as given above. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

WARYAM SINGH *v.* MAHTAB SINGH.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 1217 OF 1910.
November 3, 1914.
Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.
WARYAM SINGH—PLAINTIFF—APPELLANT
versus
MAHTAB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), *s.* 12 (c) "*secondly*"—*Sub-division*—Patti *created for fiscal purposes—Proprietor of* patti, *pre-emption, right of—Pre-emptor, obligations of—Extension of time to pay pre-emption money, when allowed by Appellate Court—Law of pre-emption, nature and basis of—Villages of recent growth, whether can be subject of pre-emption.*

A pre-emptor is given a very special and peculiar right which overrides the ordinary rights of contract and if he asks the Court to give effect to that right, he must be careful to see that he complies, compatibly with his honest pleas, with the decree which the Court grants him.

Therefore, an Appellate Court will not as of right grant to a pre-emptor an extension of time within which to pay any further sum which that Court finds to be justly payable by him, if in point of fact he has paid no money into Court or has made no tender of a sum to the Court or if the sum he has paid or tendered is unreasonably small.

A *patti* which is created merely for fiscal purposes and in no way represents homogeneity of area or descent of the proprietors, does not constitute a "sub-division" within the meaning and for the purposes of section 12 *(c)* "secondly" of the Punjab Pre-emption Act, 1905, and, therefore, a proprietor in such *patti* has no right of pre-emption.

The law of pre-emption as applicable to village communities was intended, primarily at all events, to protect the village against the intrusion of strangers, who might otherwise obtain a footing in it contrary to the wishes of the community who were bound to each other by the ties of descent and would resent the advent of an intruder.

Therefore, the principle can have no application when the village is of but recent foundation and is composed of individuals whose sole connection *inter se* is that each has been selected by Government as a person to whom a grant of land might fitly be made.

First appeal from the decree of the District Judge, Lyallpur, dated the 2nd November 1910, decreeing the claim on payment of Rs. 56,000.

Mr. *Ralli*, and Sardar *Parman Singh*, for the Appellant.

Mr. *Beechey*, for the Respondents.

JUDGMENT.—Sardar Waryam Singh, *Jat*, is a *lambardar* in what is described as "Patti Waryam Singh" of *Chak* No. 224, Rakh Branch, in the Lyallpur District, and he seeks to pre-empt five squares of land (= 1074 *kanals*, 15 *marlas*) sold by defendant No. 1, on the 16th August 1907, to defendant No. 2 Fatteh Din, an *Arain* and a resident of the said *Chak*, for an alleged consideration of Rs. 56,000. No sale-deed was executed, but the sale is admitted and a memorandum of it was duly made by the *patwari* in his diary (or *roznamcha*) and on the 4th September 1907 mutation was effected in the vendee's favour.

Plaintiff bases his claim on the ground that he is a proprietor in the *patti* in which the land sold is situate, whereas the vendee owns no land in that *patti* [section 12, clause (*c*), sub-clause "secondly", of the Pre-emption Act, 1905]. He also alleges in his plaint that the real consideration for the sale was Rs. 11,000 only and that that sum fairly accurately represents the market-value of the land.

Defendant-vendee pleaded that the plaintiff had no right of pre-emption, as the alleged *patti* was not "a sub-division" of the estate, within the meaning of the sub-clause above referred to, and further that the full amount of Rs. 56,000 had been duly paid by him to the vendor.

The District Judge disposed of the first question, namely, plaintiff's right to pre-empt, by a preliminary order, dated the 14th March 1910, and held that the *pattis* of *Chak* No. 224 constituted "*pattis* or sub-divisions" within the meaning of the Act, and that in consequence plaintiff was entitled to claim pre-emption. The learned Judge thereafter proceeded to take evidence as to the issues relating to the price to be paid by the pre-emptor.

Finding that the direct evidence regarding payment of consideration was not altogether satisfactory, the District Judge had an inquiry made through a Revenue Assistant for the determination of the market-value of the land. The report of the Local Commissioner was that the value was about Rs. 35,000. Thereafter evidence was taken in Court upon this point, and in the result the Court found that the market-value was about Rs. 56,000 and that regard being had to this fact which supported the direct evidence, there was sufficient justification for holding that the price had been fixed and paid in good faith. He accordingly granted plaintiff a decree for possession

by pre-emption of the land in suit subject to the payment by him of Rs. 56,000, and costs, on or before January 3rd, 1911; in default the suit to stand dismissed with costs.

On the 15th November 1910 plaintiff, through his Counsel Mr. Shadi Lal, filed an appeal in this Court taking objection to the findings of the District Judge upon the question of price to be paid and also to the period fixed by the Court for such payment, plaintiff complaining that the period in question was very short and should be extended.

On the 25th January 1911 the vendee, through Mr. Beechey, filed a cross-appeal taking exception to the finding that plaintiff was entitled to claim pre-emption.

Upon the appeals first coming before a Division Bench of this Court for consideration, a question arose as to the correctness of the Court-fee stamp affixed by the plaintiff to his memorandum of appeal. This question was referred to a Full Bench* and, as a result, it was held that the amount of Court-fee payable by plaintiff was to be calculated *ad valorem* on the amount by which he wished the price fixed by the District Judge to be reduced. The late Mr. Pestonji, on behalf of the plaintiff, informed the Division Bench on the 22nd December 1913 that his client asked for a reduction of Rs. 36,000 only and was ready and willing to pay the sum of Rs. 20,000, for the land. The Division Bench directed that the deficiency in Court-fee should be made good and adjourned the hearing to a future date. Plaintiff has complied with that order and we have now heard his appeal on the principal question involved in the case, namely, whether he has a right to claim pre-emption. This was a point decided in his favour by the District Court, but we were so doubtful as to the correctness of that decision that without calling upon Mr. Beechey to support his appeal, we directed Mr. Ralli to confine his arguments in the first instance to that point. We also pointed out to Mr. Ralli that in view of his client's conduct both before and after decree, we would not be prepared to extend the period for payment fixed by the District Judge, namely, the 3rd January 1911, and that as a result, even if we rejected Mr. Beechey's appeal and granted plaintiff a decree for pre-emption, plaintiff's suit must necessarily fail as he could not now comply with the condition affixed to his decree by the District Judge. We might explain here that the conduct of the plaintiff to which we make reference, consisted (1) in his originally fixing the small sum of Rs. 11,000 as the true market-value of the land, though he has had to admit in this Court that such market-value is, as a matter of fact, not less than Rs. 20,000; and (2) in his wilful and deliberate neglect to comply with the order of the Court that he should pay the money decreed into Court by a specified date. It is admitted that plaintiff has not paid a single rupee into Court, but it is urged on his behalf that he did not do so because he was taking exception on appeal to the amount fixed by the Court below. This, however, could not possibly justify his refusal to pay even the sum of Rs. 11,000 into Court. It has been finally decided by a Full Bench of this Court [*Wasawa Singh* v. *Lal Singh* (1)] that an Appellate Court is not bound to grant to a pre-emptor an extension of the period for payment fixed by the Court of first instance, though, no doubt, it has power to do so and will probably exercise that power in favour of a pre-emptor whose conduct has been *bona fide* and does not exhibit a contemptuous disregard of the order passed by the Court. If, for example, an Appellate Court finds that the pre-emptor has paid into Court a sum, which is less than that fixed by the first Court, but yet approximates reasonably to the amount eventually fixed by the Appellate Court, the latter would probably allow the pre-emptor a further period within which he could pay the difference between the amount paid into Court by him and the higher amount fixed by the Court itself. In the case before us, however, beyond giving *security* under section 19 of the Act for Rs. 5,000, the pre-emptor admittedly made no attempt to pay any sum of money into Court, though he knew full well that in no event could he possibly get a decree even from the Appellate Court unless he paid at least Rs. 11,000 to the vendee. It is possible that the plaintiff's misguided action was due to advice which he received from his local

*See *Waryam Singh* v. *Mehtab Singh*, 19 Ind. Cas 961; 76 P. R. 1913; 240 P. L. R. 1913; 141 P. W. R. 1913 (F. B.).—*Ed.*

(1) 48 P. R. 1906 (F. B.); 104 P. L. R. 1906.

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Pleaders, but it should have been obvious to him, if not to his advisers, that he could not possibly hope to obtain a decree for pre-emption except upon payment into Court of a sum which he *bona fide* believed to represent the true value of the land, and that if he wished the Appellate Court to extend the period for payment fixed by the District Judge, it was incumbent upon him to show that he, on his part, had acted in good faith and had not defiantly ignored the order of that Court. A pre-emptor is given a very special and peculiar right which overrides the ordinary rights of contract, and if he asks the Court to give effect to that right, he must be careful to see that he complies, compatibly with his honest pleas, with the decree which the Court grants him. He may well believe that the Court, which passed the decree in his favour, has erred in estimating too highly the value of the property and he is, of course, at liberty to contest that estimate by appeal. But he must recognize that the Appellate Court will not as of right grant him an extension of time within which to pay any further sum which that Court finds to be justly payable by him, and if in point of fact he has paid no money into Court or has made no tender of a sum to the Court, or if the sum he has paid or tendered is unreasonably small, he cannot expect to be granted an extension of time. We make these remarks more for the guidance of litigants and their legal advisers in the future than for the purposes of the case now before us, as in this case we must dismiss plaintiff's suit upon the preliminary ground that he has not established his alleged right to claim pre-emption. We now proceed to discuss this latter point and to give the grounds upon which we decide against plaintiff.

Chak No. 224 is a village which lies just outside the town of Lyallpur. It was founded in 1893 when Government made yeomen grants of five squares of land to each of fifteen *sufedposhes*, all of whom belonged to separate districts and were (with the exception of two grantees who were brothers) in no way related to each other. Each grantee was, as regards the squares allotted to him, entirely separate from his neighbour and with his *abadi* land no one else in the *Chak* had any concern. There was no *shamilat*, or common land, nor was the responsibility for the payment of land revenue joint as well as several. On the other hand, the Revenue Authorities, obviously for the easier collection of land revenue and for their own purposes, divided the *Chak* into three *pattis* and appointed a *lambardar* for each *patti*, each *lambardar* being responsible for the due payment of land revenue by the various grantees who were allotted to him. A *jamabandi* and Settlement Record were prepared and the tenure was declared to be *bhayachara*. But there was no territorial division of the village into ring-fences, and plots belonging to the various *pattis* appear to be intermixed. In these circumstances we have no doubt that Government and its officers had no intention that the law of pre-emption should prevail in a *Chak* thus constituted, and we find from Notification No. 771 of the Local Government, dated 6th December 1910, that it has now been definitely declared that that law is not to obtain in any area to which (as here) the Government Tenants' Act, 1893, has been made applicable. We refer to this fact not as having any direct bearing upon the question before us, as the present suit was instituted long before the publication of the Notification in question, but as showing that Government, which really created this and similar "estates", does not regard them as villages of the ordinary kind in this Province. Mr. Ralli relies strongly upon the ruling of this Court reported as *Bhagat Hira Nand* v. *Lal Khan* (2), which is to the effect that if in point of fact there is a recognized sub-division of a village, such sub-division must be accepted as such for the purposes of the pre-emption law irrespective of any question of principle. It must be remembered, however, that that decision was given before the foundation of the numerous thriving colonies which have since sprung up and had reference to the constitution of the old type of Punjab village. But even so, we may with all deference venture to doubt the correctness of the proposition laid down in such general and unqualified terms, and we do so with the greater confidence because we find that later authorities take a very different view and place a far more limited

(2) 169 P. R. 1889.

construction upon the words "*patti* or other sub-division" of the estate. Thus in *Sher Singh* v. *Maluk Singh* (3) a Division Bench held that "there must be some one or more well-defined attributes to justify treatment of a section of the village as a sub-division, such, for instance, as homogeneity of area or descent of the proprietors, and in determining the point, the first thing to be looked to is the history of the village so far as it can be ascertained from the Settlement Record." In the case before us, it is obvious that there is no "homogeneity of area or descent of the proprietors," as the estate was founded so recently as 1893 by the grant from Government of distinct plots of five squares each to fifteen persons who, with the one exception above-mentioned, had no connection with each other.

Then again, in *Bija* v. *Bishan Singh* (4) another Division Bench drew a marked distinction between a sub-division properly so called and a nominal distribution of proprietors for convenience in collecting revenue or similar purposes, and held that a "*patti*" created for the latter purpose could not be regarded as a sub-division for the purposes of the law of pre-emption. In the case before us, it was clearly for "convenience in collecting revenue" and for no other purpose that the Revenue Authorities nominally distributed the properties of *Chak* No. 224 into three "*pattis*", each under a *lambardar* who was to be responsible for the payment of such revenue by the proprietors within his "*patti*."

The law of pre-emption as applicable to village communities was intended, primarily at all events, to protect the village against the intrusion of strangers, who might otherwise obtain a footing in it contrary to the wishes of the community who were bound to each other by ties of descent, and would resent the advent of an intruder. This principle can obviously have no application when the village is of but recent foundation and is composed of individuals whose sole connection *inter se* is that each has been selected by Government as a person to whom a grant of land might fitly be made.

Both upon principle and authority, therefore, we must hold that plaintiff has no right to pre-empt the land in suit, as the so-called "sub-division" of the *Chak* into three *pattis*, which was made merely for fiscal purposes and in no way represents homogeneity of area or descent of the proprietors, does not constitute a true sub-division of the *Chak* within the meaning and for the purposes of section 12 (*c*) "secondly" of the Punjab Pre-emption Act, 1905.

We accordingly accept defendant-vendee's appeal (No. 117 of 1911) and rejecting plaintiff's appeal, we dismiss his suit with costs. Pleader's fee in each appeal we fix at Rs. 100.

Appeal dismissed.

(3) 142 P. L. R. 1905.
(4) 45 P. R. 1897.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 665 OF 1912.
(WITH 87 OTHER APPEALS NOS. 3394 TO 3426, 2506 AND 2532 TO 2582 OF 1911 AND 1804 AND 1900 OF 1911 ANALOGOUS TO IT AGAINST THE SAME RESPONDENT.)

February 12, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

KALIKANANDA MUKHERJEE—DEFENDANT—APPELLANT

versus

BIPRO DAS PAL CHOUDHURI AND OTHERS—PLAINTIFF—RESPONDENT.

Putni Regulation (*VIII of* 1819), *s* 11—Putni Taluk, *purchaser of, rights of—Limitation Act* (*XV of* 1877), *Sch. II, Art.* 121—*Encumbrance, meaning of—Suit to annul encumbrance—Adverse possession, when encumbrance—"Court may presume possession to follow title," applicability of—Bengal Tenancy Act* (*VIII of* 1885), *ss* 159, 161, 167, 195 (c)—*Encumbrance, suit to annul—Conditions to be fulfilled.*

A purchaser of a *putni taluk* at a sale held under Regulation VIII of 1819 takes the *taluk* in the state in which it was initially created, that is to say, the purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by act of the defaulting proprietor, his representatives or assignees, but also free of the interest acquired by an adverse possession which commenced after the creation of the *putni*.

Therefore, if a plaintiff relies upon Article 121 of Schedule II of the Limitation Act, 1877, he has to establish that the encumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the *putni*.

Naffer Chandra Pal Chowdhury v. *Rajendra Lal Goswami*, 25 C. 167, followed.

Umesh Chunder Gupto v. *Raj Narain Roy*, 10 W. R. 15; *Khantomoni Dasi* v. *Bijoy Chand Mahatap*, 19 C. 787 and *Karmi Khan* v. *Brojo Nath*, 22 C. 244, referred to.

The doctrine "that the Court may presume possession to follow title", however valuable in deciding questions of limitation in cases of conflicting evidence as to possession on both sides, can have no application in a case where the plaintiff has to establish possession at a particular point of time.

KALIKANANDA MUKHERJEE *v.* BIPRO DAS PAL CHOUDHURY.

Runjeet Ram Panday v. *Goberdhun Ram Panday* 20 W. R. 25 at p. 29; *Mohima Chunder Mozumdar* v. *Mohesh Chunder Neogi*, 16 I A. 23; 16 C. 473 (P. C.), followed.

Bibi Sahodra v. *Rai Jang Bahadur*, 8 I. A. 210; 8 C. 224; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108; *Jafar Husain* v. *Mashuq Ali*, 14 A. 193; A. W. N. (1892) 55; *Mohima Chunder Mozoomdar* v. *Mohesh Chundar Neogi*, 16 I. A. 23; 16 C. 473; *Rani Hemanta Kumari* v. *Jagadindra*, 10 C. W. N. 630; 3 A. L. J. 363; 8 Bom. L. R. 400; 1 M. L. T. 135; 16 M. L. J. 272 (P. C.), referred to.

Where in an ejectment suit by the purchaser of a *putni taluk* the purchaser does not establish that the possession of the defendants commenced after the creation of the *putni* or that the proprietor of the estate was in possession at the time when the *putni* was granted, the interest of the defendants cannot be said to be an incumbrance within the meaning of Article 121 of the Limitation Act, 1877, or within the meaning of section 11, clause (1), of Regulation VIII of 1819 and the purchaser is not entitled to a decree of ejectment.

Attorney-General v. *Emerson*, (1891) App. Cas. 649; 61 L. J. Q. B. 79; 65 L.T. 564; 55 J. P. 709; *Malcolmson* v. *O'Dea*, (1862) 10 H. L. C 593; 9 Jur. (N. S.) 1135; 9 L. T. 93; 12 W. R. 178; 11 E. R. 1155; 138 R. R. 317; *Bristow* v. *Cormican*, (1878) 3 App. Cas. 641 at p. 668 and *Blandy Jenkins* v. *Earl of Dunroven*, (1899) 2 Ch. 121; 68 L J. Ch. 589; 81 L. T. 209, referred to.

Under the Bengal Tenancy Act, 1885, also the word *incumbrance* in sections 159, 161 (*a*) includes a statutory title acquired by a trespasser in adverse possession of the land of the defaulting tenure, provided such act of possession commenced after the tenure had been created.

Gokul Bagdi v. *Debendra Sen*, 11 Ind. Cas. 435; 14 C. L. J. 136 and *Arsadullah* v. *Munseb Ali*, 14 Ind. Cas. 349; 16 C. L. J. 539; 16 C. W. N. 831, relied on.

The restriction mentioned in section 195 (*c*) of the Bengal Tenancy Act does not touch the question of the applicability of section 167 to the lands in suit.

Appeal against the decree of the District Judge, Nadia, dated 2nd June 1911, reversing that of the Munsif, first Court, at Krishnagar, dated 28th August 1908.

Mr. *S. P. Sinha* (with him Babus *Jogendra Nath Mukherjee*, *Harakumar Mitra* and *Sarat Chandra Khan*, for the Appellants.

Dr. *Rash Behary Ghosh* (with him Babu *Amarchandra Nath Bose*), for the Respondent.

JUDGMENT.—These eighty-eight appeals arise out of as many suits for declaration of title to immoveable property and for recovery of possession thereof. The case for the plaintiff-respondent may be briefly stated. He alleges that in 1799 an estate was created from which a *putni* tenure was carved out later on on some date not known, but the *putni* was sold in 1807, and the purchaser, Romesh Chandra Mukerjee, on the 26th June 1807 gave a *kabuliat* to the *zemindar*, Moharaj Tej Chandra. In execution of a decree for arrears of rent obtained by the proprietor against the *putnidars*, the tenure was sold under the provisions of the Bengal Tenancy Act on the 28th November 1899, and passed into the hands of the plaintiff. The plaintiff asserts that the defendants in the various suits are in possession of different parcels of land within the ambit of the *putni taluk* purchased by him and that they have no right to continue in occupation. He accordingly prays that his title by his purchase may be declared and that the defendants may be ejected as trespassers. According to the plaintiff the cause of action in each of these suits arose on the 28th November 1899, the date of the auction purchase, and no question of limitation could arise as the suits have been instituted within twelve years from the date of such purchase. The defendants resist the claim on the ground, amongst others, that they hold under rent-free grants and that in any event the claim of the plaintiff is barred by limitation. Their case in substance is that they have been in possession of these lands from the time of their predecessors and that their possession can be traced back to at least 1790, long before the creation of the *putni* as also the formation of the permanently settled estate out of which the *putni* was carved. The District Judge has found in favour of the plaintiff, that the defendants have failed to establish their rent-free tenure and that the suits are not barred by limitation, inasmuch as they have been commenced within twelve years of the date when the sale became final and conclusive within the meaning of Article 121 of the second Schedule to the Indian Limitation Act. On behalf of the defendants-appellants the decision of the District Judge has been assailed on the merits and the view taken by him upon the question of limitation has been attacked as obviously unsound. It is not necessary for our present purpose to examine the merits of the cases, because we have arrived at the conclusion that the suits are barred by limitation.

The District Judge has held that Article 121 of the second Schedule of the Indian Limitation Act is applicable to the cases. That Article provides that suits to avoid incrumbances in a *putni taluk* sold for arrears of rent must be commenced within 12 years from the date when the sale becomes final and conclusive. We shall for the purposes

of the present argument, and for that purpose alone, assume that Article 121 applies to a case in which a suit has been instituted by purchaser of a *putni taluk* at a sale held under the provisions of the Bengal Tenancy Act. The question on this assumption arises, whether the suits before us are suits to avoid encumbrances in a *putni taluk*. The District Judge has held on the authority of the decision in *Naffer Chandra Pal Chowdhry* v. *Rajendra Lal Goswami* (1) that Article 121 is applicable. That decision formulates the proposition that the interest acquired by an adverse possessor of land included in a *putni taluk* is an incumbrance within the meaning of Article 121 of the second Schedule of the Indian Limitation Act. This view is in accord with the principle recognised in the cases of *Umesh Chunder Gupto* v. *Raj Narain Roy* (2); *Khantomoni Dasi* v. *Beioy Chand Mahatap* (3) and *Karmi Khan* v. *Brojo Nath Dass* (4). It is very material to observe, however, that the adverse possession contemplated in these cases is possession which commenced after the creation of the *putni* tenure. These cases are founded on the principle laid down in section 11 of Regulation VIII of 1819. The first clause of that section declares that any *taluk* or saleable tenure that may be disposed of at a public sale under the rules of the Regulation for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by stipulation to that effect in the written engagements under which the said *taluk* may have been held. No transfer by sale, gift or otherwise, no mortgage or other limited assignment is permitted to bar the indefeasible right of the *zemindar* to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under expressed authority obtained from such *zemindar*. The principle consequently is that the purchaser of a *putni taluk* at a sale held under Regulation VIII of 1819 takes the *taluk* in the state in which it was initially created, and the judicial decisions to which we have already referred lay down the doctrine that the purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by act of the defaulting proprietor, his representatives or assignees but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the inaction of the defaulting proprietor. This doctrine is plainly limited in its application to cases where the adverse possession commenced after the creation of the *putni*. In a case in which the proprietor of the estate is out of possession, he cannot merely by the device of the creation of a subordinate *taluk* avert the effect of the adverse possession which has already commenced to run against him, and such possession would be effective not only as against the subordinate tenure-holder but also as against the superior proprietor. Consequently if a plaintiff relies upon Article 121 of the second Schedule of the Indian Limitation Act, he has to establish that the incumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the *putni*. The District Judge has not found that in the cases before us the adverse possession of the defendants and their predecessors commenced after the creation of the *putni*. On the other hand, there is ample evidence that the adverse possession of the defendants and their predecessors commenced before the creation of the *putni*. There are traces on the record to show that there had been assertions of hostile title before the *putni* itself was created. On behalf of the plaintiff-respondent, however, it has been suggested that there is some evidence of ancient possession of the disputed land by the proprietor of the estate. But before we deal with the evidence to which allusion has been made in the course of argument, it may be pointed out that the plaintiff, before he can succeed, must prove that the proprietor was in possession when the *putni* was created. In order to establish that the proprietor was in possession at that time, it has been argued that we should presume that possession follows title. In our opinion, that doctrine has no application to a case of this description. No doubt it was pointed out by their Lordships of the

(1) 25 C. 167.
(2) 10 W. R. 15.
(3) 19 C. 787.
(4) 22 C. 244.

Judicial Committee in the case of *Runjeet Ram Panday* v. *Goberdhun Ram Panday* (5) that in the decision of the question of limitation, if there is conflicting evidence on both sides, the Court may presume that possession was with the party whose title has been established. But it does not follow that when the plaintiff has to establish possession at a particular point of time, he is entitled to call upon the Court to presume that because his title has been established, possession must be presumed to have been with the holder of the title at that specific period of time. This contention, indeed, is clearly opposed to the decision of the Judicial Committee in the case of *Mohima Chunder Mozumdar* v. *Mohesh Chunder Neogi* (6), where their Lordships pointed out that it is not enough for the plaintiff in an action in ejectment to establish his title or his possession at some remote time, but that it is essential for him to prove that he was in possession within twelve years antecedent to the suit. To the same effect are the decisions in *Musammat Bibi Sahodra* v. *Rai Jang Bahadur* (7); *Jafar Hasain* v. *Mashuq Ali* (8); *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* (9); *Rani Hemanta Kumari* v. *Jagadindra* (10). We have next been asked to hold that the grant of the *putni* tenure itself is evidence of possession and in support of this argument we have been asked to consider the terms of the *putni kabuliat*. Our attention has also been invited to the cases of *Attorney-General* v. *Emerson* (11); *Malcolmson* v. *O'Dea* (12); *Bristow* v. *Cormican* (13) and *Blandy Jenkins* v. *Earl of Dunroven* (14) to show that ancient documents produced from proper custody and by which any right to property purports to have been exercised are admissible even in favour of the grantor or his successors in proof of possession. This doctrine is justified on the principle that documents of this character may rightly be treated as presumptive evidence of possession, because ancient possession is incapable of direct proof by witnesses and such documents are themselves acts of ownership, real transactions between man and man, intelligible upon the footing of title or at least of a *bona fide* belief in title, since in the ordinary course of things men do not execute such documents without acting upon them. This principle plainly has no application to the circumstances of the present cases. An examination of the *putni kabuliat* does not show that there is any assertion that the grantor of the *putni* at the time was in possession of every parcel of land comprised within the boundaries of the *putni*, nor is there any allegation in the document that the grantee of the *taluk* obtained actual possession of every piece of land within the tenure granted to him. It has finally been argued that the *thak* map of 1852 is evidence of possession, and that witnesses have been called to speak to possession of two villages by a lessee from the *putnidar*. The evidence, however, is of the vaguest description and does not show that the *putnidar* or the owner of the estate was in actual possession of any particular parcel of land now in dispute. In these circumstances we are of opinion that the plaintiff has not established that the possession of the defendants commenced after the creation of the *putni* or that the proprietor of the estate was in possession at the time when the *putni* was granted. Consequently the interest acquired by the defendants cannot be deemed to be an incumbrance within the meaning of Article 121; nor is it an incumbrance within the meaning of the first clause of section 11 of Regulation VIII of 1819. In this view, the decrees made by the District Judge cannot be supported.

It is clear, however, that the case as made in the plaint is based on an entirely erroneous assumption. The plaintiff has come into Court on the allegation that his cause of action arose on the 20th November 1899 when he purchased the property at a sale held under the provisions of the Bengal Tenancy Act. This statement was material for the purposes of the case, because under section 50, clause (*d*), of the Civil Procedure Code of 1882, it was incumbent on the plaintiff to embody in his plaint a plain and concise statement of the circumstances constituting the cause of action and where and when it

(5) 20 W. R. 25 at p. 29.
(6) 16 I A. 23; 16 C. 473 (P. C.).
(7) 8 I. A. 210; 8 C. 224; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108.
(8) 14 A. 193 ;A. W. N. (1892) 55.
(9) 16 I. A. 23; 16 C. 473.
(10) 10 C. W N 630; 3 A L. J. 363; 8 Bom. L. R. 400; 1 M. L. T. 135; 16 M L J. 272 (P. C.)
(11) (1891) App. Cas. 649; 61 L. J. Q. B. 79; 65 L. T. 564; 55 J. P. 709.
(12) (1862) 10 H. L. C. 593; 9 Jur. (N. S.) 1135; 9 L. T. 93; 12 W. R. 178; 11 E R 1155; 138 R. R. 3.7.
(13). (1878) 3 App. Cas. 641 at p. 668.
(14) (1899) 2 Ch, 121; 68 L. J, Ch. 589; 81 L. T. 209.

arose. It was further his duty if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, to show in his plaint the ground upon which exemption from such law was claimed. In the cases before us the defendants have been unquestionably in possession for more than 12 years antecedent to the suit. The plaintiff, therefore, had to make out an affirmative case to take his suit out of the Statute of Limitation, and he based his case on the ground that the cause of action arose on the 20th November 1899, on the assumption that Article 121 of the second Schedule of the Indian Limitation Act was applicable. But it cannot be disputed that the cause of action did not arise on the 20th November 1899. The plaintiff made his purchase at a sale held in execution of a rent decree under the Bengal Tenancy Act. Under section 159 of the Bengal Tenancy Act he made his purchase with power to annul the interests defined as incumbrances in section 161. Clause (*a*) of that section lays down that the term encumbrance, used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and not being a protected interest as defined in section 160. With reference to the use of the term incumbrance in this section, it was held in the cases of *Gokul Bagdi* v. *Debendra Nath Sen* (15) and *Arsadullah* v. *Museb Ali* (16) that incumbrance includes a statutory title acquired by a trespasser by adverse possession of the land of the defaulting tenure, provided such act of possession commenced after the tenure had been created. It was further held that such incumbrance cannot be annulled in any manner other than that provided in section 167 of the Bengal Tenancy Act. Consequently upon the facts of these cases, it is clear that before the plaintiff can succeed he must establish that the interests acquired by the defendants by adverse possession constitute an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, and are capable of annulment in the manner provided in section 167. The difficulty of the plaintiff, if this view of the matter be adopted, is that he has not established that the adverse possession of the defendants and their predecessors commenced after the creation of the *putni taluk*. But even if he had succeeded in establishing that such adverse possession commenced after the creation of the *putni taluk*, before he would succeed he would have to prove that under sub-section (1) of section 167 he had annulled the incumbrances by service of notice within one year from the date of the sale or the date on which he first had notice of the incumbrances. In the plaint it was stated that notices had been served as contemplated by sub-section (1) of section 167 on the 5th October 1907. But the plaintiff asserted that such service of notice was unnecessary and the Courts below did not investigate whether the notices were actually served, and, if served, whether they were served within one year from the date on which the plaintiff first had notice of the incumbrances. It is not disputed that the notices, which are alleged to have been served on the 5th October 1907, were not served, if served at all, within one year from the date of the sale, which took place, as already stated, on the 20th November 1899. If, therefore, the interests of the defendants constituted an incumbrance, the plaintiff would have to establish that he had notice of the incumbrance within one year prior to the 5th October 1907. The Courts below have not found that the plaintiff had first notice of the interests of the defendants within one year prior to the 5th October 1907. On the other hand, it is extremely improbable, to say the least, that when so many persons in so many suits were in open and peaceable occupation of so many parcels of land, that the plaintiff should not have discovered till after 5th October 1906, that is, nearly seven years after he has purchased the *putni* at the execution sale, that the defendants claimed to hold under an adverse title. The slightest inquiry such as a prudent owner would in ordinary course have made, would have disclosed that the occupants of the lands claimed to hold them without payment of rent to the proprietor or his representatives. Consequently if the provisions of the Bengal Tenancy Act are applied, as they must be applied, the position of the plaintiff becomes even more difficult than it is if reliance is placed only upon Article 121 of the second Schedule of the Limitation Act, on the groundless assumption that the sale took place under the provisions of the *putni*

(15) 11 Ind. Cas. 435; 14 C. L. J. 136.

(16) 14 Ind. Cas. 349; 16 C. L. J. 539; 16 C. W. N. 831.

Regulation. We may add that the restriction mentioned in section 195, clause (*c*), of the Bengal Tenancy Act does not touch the question of the applicability of section 167 to the lands in suit.

The result is that these appeals must be allowed, the decrees of the District Judge set aside and the suits dismissed with costs in all the Courts.

Appeals allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 39 OF 1912.

December 17, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

GOBINDA MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SANTA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r 6 —Suit instituted beyond period of limitation - Plaint silent on ground of exemption from law of limitation—Plaintiff, whether can rely on such ground—Limitation Act (IX of 1908), s. 14.

Under Order VII, rule 6, Civil Procedure Code, the plaintiffs are bound to show in the plaint the ground on which exemption from the law of limitation is claimed and they cannot be allowed to rely upon a ground upon which the plaint is wholly silent.

The proceedings in a Revenue Court do not fall within the purview of section 14 of the Limitation Act so as to extend the period of limitation for a suit.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 10th October 1911, reversing that of the Subordinate Judge, first Class, Ferozepore, dated the 22nd May 1911, decreeing the claim.

Mr. *Kanwar Narain*, for the Appellants.

Mr. *Brij Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for possession as mortgagees of 768 *kanals* 11¼ *marlas* of land, situate in *Mauza* Ghulla, which was mortgaged to them by the defendant-respondent by a registered deed, dated the 23rd September 1898, for Rs. 1,200. According to the mortgage-deed, possession was given to the mortgagees who were to cultivate the land, or get it cultivated, and to pay the land revenue thereof. The suit was instituted on the 15th February 1911, and the defendant pleaded, *inter alia*, that it was barred by limitation. One of the issues framed by the first Court was as to whether the suit was within time, and in connection with that issue the plaintiffs relied on section 14 of the Limitation Act in support of their contention that they were entitled to deduct the time spent by them in prosecuting a suit in a Revenue Court for the ejectment of the defendant. In the plaint reference was made to the litigation in the Revenue Court prior to the institution of the present suit, though it was not alleged in so many words that the time covered by that litigation should be deducted in computing the period of limitation applicable to this suit.

The first Court held that section 14 of the Limitation Act was applicable to the case and after considering certain other matters relating to the merits of the claim, with which we are not now concerned, it decreed the suit. On appeal the learned Divisional Judge held that section 14 aforesaid was wholly inapplicable, and further, with reference to the contention advanced before him for the first time by the plaintiffs' Counsel that by reason of an acknowledgment of liability made by the defendant in March 1899 limitation was saved under section 19 of the Limitation Act, the learned Judge decided that the said section had no application to the alleged acknowledgment. He, therefore, accepted the appeal and dismissed plaintiffs' suit.

In further appeal before us the appellants' Counsel has frankly admitted that he cannot rely upon section 14 of the Limitation Act as the litigation in the Revenue Court, which is referred to in the plaint, does not fall within the purview of that section. He has, however, urged that the decision of the Divisional Judge that section 19 of the Limitation Act is not applicable to the statement of the defendant, dated the 18th March 1899, is incorrect and that the acknowledgment of liability by the defendant as contained in the said statement saves the suit from being barred by time. Now, the suit as laid in the plaint was *prima facie* barred by limitation, and under Order VII, rule 6, Civil Procedure Code, the plaintiffs were bound to show in the plaint the ground upon which exemption from the law

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of limitation was claimed. In the plaint they simply referred to the previous litigation between the parties in the Revenue Court with the object of showing that they relied upon section 14 of the Limitation Act (though they did not mention the section in the plaint) to claim exemption from the operation of Article 135 of the Act. There is no reference in the plaint at all to the alleged acknowledgment of liability by the defendant so as to make section 19 of the Limitation Act applicable to the case; and, in our opinion, the plaintiffs cannot now be alleged to rely upon a ground of exemption from the law of limitation upon which the plaint is wholly silent. We are fortified in our opinion by the decision in *Jogeshwar Roy* v. *Raj Narain Mitter* (1), in fact the case before us is stronger than the Calcutta case, for whereas in the Calcutta case there was a reference in the plaint to a certain alleged acknowledgment of liability by defendant which, however, was different from the acknowledgment which was subsequently relied upon under section 19 of the Limitation Act, in the present case the plaint does not even remotely suggest that any acknowledgment of whatever description had been made by defendant so as to make section 19 of the Act applicable. We have no hesitation in following the principle underlying the Calcutta case; and we hold that it was not open to the plaintiffs, in the circumstances of the particular case, to rely upon the alleged acknowledgment of liability by the defendant as a ground of exemption from the law of limitation applicable to their claim. The decision of the Bombay High Court in *Yakub Ebrahim Sayani* v. *Bai Rahimabai* (2), on which the plaintiffs' Counsel has relied, is clearly distinguishable from this case and it, therefore, does not help them.

For the reasons given, we hold that the plaintiffs' suit was barred by limitation, and accordingly we maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(1) 31 C. 195; 8 C. W. N. 168.
(2) 19 Bom. L. R. 346.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 527 OF 1913

September 9, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

KARAGA *alais* THIMNAPPA MELONTA PLAINTIFF—APPELLANT

versus

DEVAPPA *alias* CHEMNAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Injunction—Religious office, transfer of—Land attached to office transferred, whether right to office also transferred—Injunction, whether allowable.

A religious office cannot be transferred by purchase and, therefore, a purchaser of the land attached to the office as emoluments, acquires no right to the office and is not entitled to an injunction to protect his possession of it.

Rajah Varmah Valia v. *Ravi Varmah Kunhi Kutti*, 1 M. 235; 4 I. A. 76; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; *Narasimma Thatha* v. *Anantha Bhatta*, 4 M. 391, *Kuppa* v. *Dorasami*, 6 M. 76; 7 Ind. Jur. 75; *Lakshmanaswami Naidu* v. *Rangamma*, 26 M. 31, followed.

Rajaram v. *Ganesh*, 23 B. 131, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 20 of 1911, preferred against that of the Court of the District Munsif of Mangalore, in Original Suit No. 115 of 1909.

Mr. *B. Sitarama Rau*, for the Appellants.

Mr. *K. Sundara Rau*, for the Respondents.

JUDGMENT.—The plaintiff sued for an injunction in respect of a religious office, alleging that he held it in virtue of his ownership of certain land. Here it is admitted that he acquired the land by purchase.

The first ground of appeal argued, and the only one with which we need deal, is that a religious office cannot be transferred by purchase and that therefore plaintiff could have acquired no right to this office by that means, and having no right to it he is not entitled to an injunction to protect his possession of it. This is supported by reference to *Rajah Varmah Valia* v. *Ravi Varmah Kunhi Kutti* (1); *Narasimma Thatha Acharya* v. *Anantha Bhatta* (2); *Kuppa* v. *Dorasami* (3) and *Lakshmanaswami Naidu* v. *Rangamma* (4). *Contra*, the plaintiff on the recognition, in the decision first mentioned at

(1) 1 M. 235; 4 I. A. 76; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382.
(2) 4 M. 391.
(3) 6 M. 76; 7 Ind. Jur. 75.
(4) 26 M. 31.

page 250, of the possibility of proof of the custom of the particular institution as authorising sales contends that the conclusion at page 252 is that a custom for sale, as distinguished from gratuitous transfer, would be bad and is consistent with the other decisions referred to. Reference has also been made by plaintiff to *Rajaram* v. *Ganesh* (5). But there the Court statedly refused to apply strictly the principle which it referred to as prevailing in this Presidency. In these circumstances we follow the current of Madras authority and dissent from the lower Appellate Court's conclusion.

Plaintiff then contends that his purchase was of the land, not of the office. As he claims the latter as inseparable from the former, we cannot follow this distinction.

An attempt has been made to argue that plaintiff can succeed on his title by prescriptive enjoyment. If such a case could be made out with reference to an office of this description, it is sufficient that it was not relied on in the lower Courts and cannot be put forward here for the first time.

The second appeal is allowed, the lower Appellate Court's decision being set aside and the suit dismissed with costs throughout.

Appeal allowed.

(5) 23 B. 131.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1990 OF 1913.

November 3, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

MANI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KOMALAN KANNAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s* 153, *O. VI, r.* 17—*Suit to declare mortgage-deed invalid—Mortgage found to be partly valid—Plaintiff, whether entitled to amend relief for redemption.*

Where, in a suit by the junior member of a *tarwad* to declare a mortgage created by the *karnavathi* invalid and not binding upon the junior members of the *tarwad*, a portion of the consideration for the mortgage is found to be binding upon the family, the plaintiff should be allowed to amend his plaint by adding a relief for redemption on payment of the valid portion of the mortgage-debt.

Limba bin *Krishna* v. *Rama* bin *Pimplu*, 13 B. 548 and *Abdul Kadar* v. *Mahomed*, 15 M. 15, followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 445 of 1911, preferred against that of the Court of the District Munsif of Kasargod, in Original Suit No. 596 of 1910.

FACTS.—The plaintiffs are the junior members of a *tarwad* of which the 1st defendant was the *karnavathi*. On 24th November 1907 the first defendant created a mortgage of the family properties for a period of 30 years for a sum of Rs. 800, of which Rs. 400 was the amount due under a previous mortgage executed on 21st March 1894; the rest was for money due to the 2nd defendant for moneys borrowed from time to time. The plaintiffs bring the present suit to declare that the latter mortgage was not binding on them, on the ground that they were not created for family necessity. The plaintiffs, however, admitted that the previous mortgage for the sum of Rs. 400 was binding upon the family, and bring the suit to declare that the whole mortgage is not binding upon them. The District Munsif found that the mortgage was not binding upon the family and gave the declaration prayed for. On appeal the Subordinate Judge held that the plaintiff having admitted that the mortgage for Rs. 400 was binding upon them, the defendants are entitled to retain the lands themselves until that mortgage is redeemed by plaintiffs, and that so long as that is not redeemed, the defendants are entitled to resist any suit brought by plaintiffs, even if it be for mere declaration. He accordingly reversed the decree and dismissed the suit. The present appeal is against that decree.

Mr. *B. Sitarama Rao*, for the Appellants.

Messrs. *K. P. Madhava Rao* and *K. P. Lakshmana Rao*, for the Respondent.

JUDGMENT.—Following *Limba* bin *Krishna* v. *Rama* bin *Pimplu*(1) [which is approved of in *Abdul Kadar* v. *Mahomed*(2)] and the principles embodied in section 153 of the Civil Procedure Code and Order VI, rule 17, we hold that the lower Appellate Court ought to have given an opportunity to the plaintiffs to amend their plaint by adding or substituting a prayer for redemption of items 1 and 2. The decrees of the lower Courts are set aside, and the

(1) 13 B. 548.
(2) 15 M. 15.

case is remanded to the District Munsif to allow the plaintiffs an opportunity to so amend the plaint within four weeks of the receipt of records by that Court and then to re-try the suit as amended. If the plaint is not amended within the time allowed (or within the extended time, if any, allowed by the District Munsif), it will stand dismissed with costs. In any event, the plaintiffs will pay to the defendant his costs incurred by him in the Subordinate Court and in this Court up to this day and bear their own costs in these two Courts.

Appeal allowed: Suit remanded.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 146 OF 1913.

July 8, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

SUNDRA BAHU SHETYE—DEFENDANT—APPELLANT

versus

SAKHARAM GOPALSHET GANDHI—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11 - Matter substantially in issue in both suits same—Plaintiff not adequately represented in former suit, whether barred—Pro forma defendant in former suit, whether can sue for same matter.

Section 11 of the Civil Procedure Code does not bar a suit only on the ground of the matter in suit having been substantially in issue in a previous suit, if the plaintiffs in the second suit were minors at the time of the first and were not adequately represented or if the plaintiff was a *pro forma* defendant in the first suit and took no active part in that suit.

First appeal from the decision of the Assistant Judge of Ratnagiri, in Civil Suit No. 128 of 1912.

Mr. *V. R. Sirur*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondents.

JUDGMENT.—The plaintiffs, three in number, in this suit are seeking to obtain property from the defendant-appellant, grand-daughter of one Tukaram, on the ground that Tukaram and their ancestors were joint. The only question which we have to answer here is, whether the matter in issue is *res judicata* by reason of the decision in a suit of 1909, in which the present plaintiff No. 1 was defendant No. 4 and the father of the present plaintiffs Nos. 2 and 3 was plaintiff. Doubtless we should have been glad to hold that the matter was *res judicata*, although the position occupied by plaintiff No. 1 in that suit might have occasioned some difficulty, for there can be no doubt but that the matter substantially in issue here was substantially in issue there and was decided against the father of the present plaintiffs Nos. 2 and 3. Unfortunately plaintiffs Nos. 2 and 3 were not made parties to that suit. Still the matter might have been *res judicata* against them under the principle, and, we think, also the words of section 11 of the Civil Procedure Code, which has recently been interpreted in this sense by their Lordships of the Privy Council in the case of *Raja Rampal Singh* v. *Ram Ghulam Singh* (1), had it not been for a very important circumstance which distinguishes this case from cases falling in that general class. Here the plaintiffs Nos. 2 and 3 were minors at the time of the suit of 1909, and the finding of the learned Judge who tried that suit shows conclusively that the father of these minors did not adequately represent them. He comments most adversely upon the manner in which the suit was conducted before him and makes the conduct of these plaintiffs' father the ground of saddling the defendants in spite of their success with their own costs. In these circumstances we feel that it would be impossible to say that these minors, who were not parties to that suit and are judicially declared not to have been adequately represented at the trial, are bound by its result. They are, therefore, at liberty to proceed with the present litigation, and since plaintiff No. 1 was no more than a *pro forma* defendant in the former suit and appears to have taken no active part in it, and the decree, speaking generally, appears to have been in his favour as one of the defendants, we feel some doubt in holding that he is bound by the result either, to the extent of being precluded from prosecuting this litigation. We must, therefore, confirm the decree of the Court below upon this preliminary point and remand the case to be dealt with upon the merits. Costs costs in the cause.

Decree confirmed.

(1) 32 I. A. 17; 1 C. L. J. 46; 27 A. 37; 2 A. L. J. 237 (P. C.).

RAS BEHARI LAL *v.* AKHAI KUNWAR.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1250 OF 1913.
November 20, 1914.
Present:—Mr. Justice Chamier and Mr. Justice Piggott.
RAS BEHARI LAL—PLAINTIFF—APPELLANT
versus
AKHAI KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), ss. 59, 60—License—Revocation—Transferee of licensor, right of.

The transferee of a licensor cannot revoke the license where the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution

Second appeal from the decision of the District Judge of Ghazipur, dated 20th August 1913.

The Hon'ble Dr. *Tej Bahadur Supru* (with him Mr. *Purushottam Das*), for the Appellant.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—The facts of this case are that in the year 1888 one Jhingur Singh made over to the first defendant, in consideration of medical services rendered by him, some plots of land in a village. The defendant entered into possession, planted a garden and built houses on the land laying out a considerable sum of money thereon. In 1906 Jhingur Singh sold his rights in the village to the plaintiff-appellant, who at once set to work to compel the first defendant to pay rent for the land. All his attempts in the Revenue Court failed and he then brought this suit praying for proprietary possession of the land and for mesne profits for the three years immediately preceding the suit. The defence was that the plots in question were given by the *zemindar* to the defendant in recognition of his medical services, that the defendant had spent a large sum of money on the land and that the plaintiff had no right to dispossess him. The Courts below have agreed in dismissing the plaintiff's claim. In second appeal it is contended on behalf of the plaintiff that in the absence of a registered document, the defendant is no more than a licensee and that the plaintiff being a transferee of the property is entitled to revoke the license. Reliance is placed on section 59 of the Easements Act, which runs as follows:—

"When the grantor of a license transfers the property affected thereby the transferee is not as such bound by the license."

The defendant, on the other hand, relies on section 60 of the Act which so far as it applies to the present case, is as follows:—

"A license may be revoked by the grantor, unless the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution." The plaintiff admits that on the facts found the case is clearly covered by section 60 of the Act, but he maintains that section 59 lays down an independent rule, which entitles a transferee of property to revoke a license even if the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution, that is to say, even if the license could not have been revoked by the original grantor. It seems to us that the words "as such" in section 59 are extremely significant and would not have appeared in the section if the intention had been to lay down an independent rule that a transferee of property might revoke a license which conld not have been revoked by the transferor. The section was probably inserted in order to meet the possibility of a plea by the licensee of property that no one but the grantor of a license is entitled to revoke it, and that if the grantor does not choose to revoke it his transferee cannot do so. In our opinion section 59 means that when the grantor of a license transfers the property, the transferee is no more bound by the license than the transferor was and, we think, it is impossible to construe this section as meaning that the transferee has a better right than the transferor. For these reasons we are of opinion that section 59 of the Easements Act does not entitle the plaintiff to revoke the license granted to the defendant even if he is only a licensee. We need only add that the plaintiff's claim against the defendant as a trespasser is clearly not maintainable. The suit was rightly dismissed and we dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

ABDUL HAQ *v.* DATTI LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1568 OF 1913.

December 3, 1914.

Present: —Mr. Justice Chamier and Mr. Justice Piggott.

ABDUL HAQ AND ANOTHER - DEFENDANTS—APPELLANTS

versus

DATTI LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *s* 108 (*f*)—*Lease—Occupiers of houses in* abadi qassaban *in* Mohalla Atala, *village* Atarsuiya, Allahabad—*Transfer of house, right of.*

The rights of an occupier of a house in *abadi qassaban*, in *Mohalla* Atala, village Atarsuiya, in Allahabad are those of a lessee holding under a building lease, and as such are transferable.

Second appeal from the decision of the Judge of Small Cause Court, Allahabad, dated 30th June 1913.

Mr. *B. E. O'Conor*, with him Mr. *Zahur Ahmad*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—In this case the plaintiffs are the proprietors of a *mahal* in village Atarsuiya situated on the outskirts of the city of Allahabad. The second defendant, being the owner of a house situated in the plaintiffs' *mahal*, has executed a deed of sale transferring the same to the first defendant. In the suit as originally framed the plaintiffs simply claimed one-fourth of the sale price on the basis of their alleged customary rights as proprietors of the soil. The plaint was subsequently amended so as to claim another relief in the alternative. This was that the defendants should be ordered to remove the materials of the house within a time to be fixed by the Court and that the plaintiffs should thereupon "be put in proprietary possession of the site in question together with the *kacha* built walls." I think it worth while to lay stress at the outset on two points regarding the frame of the plaint. One is that the second relief is claimed only in the alternative, in case the first relief be not granted. The other is that the second defendant is described as "resident of *Mohalla Atala*, Allahabad city." The defendants filed a joint written statement. They put their case in various alternative forms, and some of their pleadings come perilously near denying the title of the plaintiffs. They did, however, expressly admit that the plaintiffs are the proprietors of a certain *mahal* of village Atarsuiya and that they are entitled to receive a ground-rent in respect of the land in suit, calculated at the rate of Rs. 10 per *bigha*. Nevertheless they pleaded that the house in suit is situated in the city of Allahabad in a particular quarter of that city which was assigned, a little more than fifty years prior to the institution of the suit, by arrangement with Government and with the local landholders (including the predecessors-in-title of the plaintiffs) for the residence of a colony of butchers, and has ever since been known by the designation of *Mohalla Atala* of Allahabad city, as stated in the plaint. They pleaded that the sites of houses in this *mohalla* are not subject to the same customary law as the sites of houses occupied by cultivating tenants, or members of the village community, in agricultural villages. More particularly, they pleaded that they were not subject to any custom affecting the purely agricultural portion of village Atarsuiya, under which the proprietors could claim one-fourth of the sale consideration on a transfer. Finally, they pleaded that the owners of houses in *Mohalla Atala* had an established right to transfer the houses themselves, and the right of residence therein, to whomsoever they pleased, and that the proprietors of the soil had no right to question any such transfer or to interfere with the owners of the houses, so long as their ground-rent of Rs. 10 per *bigha* was duly paid.

The learned Munsif of Allahabad before whom the suit was first tried, held that the tenure of the land in dispute (*i. e.*, the site of the house in question) "was subject to the same incidents as the village *abadi* land elsewhere, and that the defendants had failed to prove anything to the contrary." He held further that a certain clause in the *Wajib-ul-arz* of *Mauza* Atarsuiya which recognized a right on the part of the *zemindars* to receive one-fourth of the price, on sales of houses situated in that portion of the *abadi* not within the limits of Allahabad city, referred only to agricultural tenants, to which class the second defendant does not belong. On these findings he dismissed the claim for one-fourth of the sale price, but decreed the alternative claim for possession of the site after removal of the materials. The defendants appealed and the plaintiffs filed cross-objections with regard

to the dismissal of their claim for one-fourth of the sale price. What they meant by this I find it a little difficult to understand. The plaint makes it perfectly clear that the two reliefs were claimed in the alternative. Even if it could be successfully contended on the evidence that the plaintiffs were entitled both to possession of the site after removal of the materials and also to one-fourth of the sale price, it would be a complete answer that no such case was set up in the plaint. The lower Appellate Court in the first instance sent down certain issues for specific findings. Two of these issues relate to a very doubtful plea set up by the defendants, a plea not really consistent with other admissions in their written statement, that the land in suit had been granted to the predecessors-in-title of defendant No. 2 by the Government, and not by the *zemindars* of village Atarsuiya. In any case this point is now concluded against the defendants by an express finding of fact and was not pressed before us. The third issue remitted was in the following terms :—

"Is the land in suit in the *abadi* of village Atarsuiya? Or in the *abadi* which is called in the *Wajib-ul-arz* as *abadi shahr*"?

On this issue there was a finding in favour of the plaintiffs which has been finally endorsed by the lower Appellate Court. The form of the issue requires to be correctly appreciated. It refers to the *Wajib-ul-arz* for village Atarsuiya prepared at the Settlement of 1875 A. D. This document draws a distinction between that portion of the village area which is situated within the limits of Allahabad city and the portion outside those limits. Tenants residing within the city are recognized as having a right of transfer in respect of their houses "along with the sites," without reference to the *zemindars*. Tenants residing outside the limits of the city may sell the materials of their houses after paying one-fourth of the sale price to the *zemindars*. The finding of the lower Appellate Court is that the land in suit is situated outside the limits of the city, as those limits were understood when the Settlement Record of 1875 was drawn up. I think it would be easy to criticise the reasons given for this finding. The learned Subordinate Judge has regarded it as decisive that the site of the house in suit can be shown to have been cultivated land at the previous Settlement of 1839, and that it was part of the area dealt with at the last partition of village Atarsuiya. The latter circumstance is of no weight, unless and until it be further shown that the village area recognized as within the city limits at the Settlement of 1875 was not also formally apportioned between the various new *mahals* formed at the last partition. The former seems to me of very slight weight. I think, however, that I am bound to treat the finding as one of fact and to decline to re-consider it in second appeal I cannot stretch the finding beyond the ground actually covered by it. We were asked to accept it as a finding of fact that the land in suit must be regarded as situated in a purely agricultural village, and, therefore, subject to all the presumptions of law which have been laid down, in various published decisions of this Court, as applicable to the sites of houses so situated. An issue of this sort has always been regarded in this Court as a mixed question of fact and of law. It is necessary to examine the facts actually found by the Court below, and then to consider whether these justify the conclusions of law upon which the decision of that Court is based. There is, as both the Courts below have recognized, another portion of the *Wajib-ul-arz* of 1875 which has an important bearing on the question in issue. In the eighth paragraph of that record reference is made to the butchers' quarter (*abadi qassaban*), in respect of which it is recorded that, inasmuch as the butchers were permitted to build upon land which had been under cultivation at the previous Settlement of 1839, they paid rent for the sites of their houses at a uniform rate of Rs. 10 per *bigha*, which rent could not be reduced and was not liable to enhancement, except by order of some competent authority or Court. This entry requires to be considered in connection with other evidence on the record, not perhaps of great value in itself, but important as explaining the formation of this butchers' quarter in village Atarsuiya. The following facts seem to have been treated by the lower Appellate Court as substantially established; they were not questioned in argument before us, and, I think, I am

justified in treating them as established without discussing the precise evidence on which they rest. Sometime shortly after the Mutiny of 1857, the estates of one or more co-sharers in village Atarsuiya were confiscated by Government, on account of the disloyalty of the proprietors. The Government was, therefore, for a time a co-sharer in village *Atarsuiya*. At about the same time a question arose as to the advisability of settling the butchers of Allahabad in some convenient locality on the outskirts of the city. Negotiations must have taken place between the local landholders, the butchers and the Local Government, the latter probably acting both in its executive capacity and as one of the co-sharers in the village. The result was the arrangement referred to in the eighth paragraph of the *Wajib-ul-arz* of 1875. A certain area previously under cultivation was given up by the proprietary body for the formation of the new *abadi qassaban*. The butchers, no doubt, built their own houses. They covenanted to pay a ground-rent of Rs. 10 per *bigha* to the proprietors of the soil. This seems to be a substantial rent; I notice that the learned Munsif was of opinion that it is considerably in excess of anything the proprietors could hope to obtain even now by letting this land for agricultural purposes. There was a covenant securing the permanence of this rate of rent, unless it should be lowered or enhanced by some competent authority. This last expression is, no doubt, somewhat vague; but it is impossible to interpret it as anything but a stipulation against arbitrary enhancement at the will and pleasure of the proprietors. The *abadi qassaban* thus formed is what is now known as the *Atala Mohalla* of Allahabad City, referred to in the plaint as the residence of defendant No. 2. It has long since been included within Municipal limits.

Taking these as the facts of the case, it seems to me idle to enter into a discussion of the principles involved in a series of decided cases of this Court which deal with the respective rights of proprietors of the soil and occupants of houses in purely agricultural villages. I accept, as already remarked, the finding of the Court below that the *Wajib-ul-arz* of 1875 did not intend to include this butcher's quarter within the limits of Allahabad city, the *abadi shahr* as it then stood. Even so, it seems to me decidedly questionable whether a Court would be justified in applying to an area with such a history as the above the principles laid down for house-sites in purely agricultural villages. The decisions of this Court on which the plaintiffs-respondents rely all proceed on the assumption that, in the ordinary case of occupiers of house-sites in agricultural villages, there is no definite information forthcoming as to the circumstances under which the site came to be occupied. If the occupiers of houses in such villages were to be treated, in the absence of positive evidence to the contrary, as were squatters, it would necessarily follow that twelve years' occupation would give them an adverse title to the house-sites as against the proprietors of the village. It was felt that this would be monstrous, and would lead to all sorts of undesirable consequences. The only alternative was to regard the occupiers of houses in such villages as a peculiar kind of licensees, applying to their case certain presumptions of law which could be based upon general and well-established custom. Now the tenure of a licensee is in its essence non-transferable, and the Records of Rights in thousands of villages in all parts of the Province could be referred to in support of the proposition that the right of residence enjoyed by the occupiers of houses in ordinary village-sites was everywhere regarded as a right, heritable no doubt, but not transferable.

In the present case, we have fairly definite informations as to the circumstances under which the predecessors-in-interest of the second defendant came to occupy this site. The whole transaction by which this "*abadi qassaban*" in village Atarsuiya came to be created, amounts on the face of it to a letting of the village on building leases at a uniform ground-rent, with a stipulation against arbitrary enhancement at the pleasure of proprietors. The contract is essentially one of lease; and the rights of a lessee, in the absence of express stipulation to the contrary, are in themselves transferable: *vide* the Transfer of Property Act (IV of 1882), section 103 (*f*).

The only real question to my mind is whether a stipulation to the contrary can be inferred from the evidence before us. I do not think so. Even the plaint in this case, as originally drafted, shows that the plaintiffs at first desired to bring their suit within the scope of the provision in the *Wajib-ul-arz* of 1875, which gives to tenants residing outside the city limits a right of transfer, subject to payment of one-fourth of the sale price to the proprietors of the soil. It was evidently after the plaint had been filed that a difficulty was felt by reason of the fact that this passage of the Record of Rights refers to *kashtkaran*, a word which as it stands must be rendered "cultivating tenants." The plaintiffs then amended their claim so as to ask for alternative reliefs. They said in effect:—"The second defendant is either a *kashtkar* in the sense in which this expression is used in the third paragraph of the *Wajib-ul-arz*, or he is not. If he is, he can transfer his house with the right of residence thereon, but he must pay us one-fourth of the sale price; if he is not, he has no rights of transfer at all, and we claim forfeiture and possession of the soil, after the purchaser has removed the materials of the house." It was only when they filed their objections in the lower Appellate Court that the plaintiffs for the first time suggested that the clause of the *Wajib-ul-arz* in question must be interpreted as meaning that a *kashtkar* residing outside the limits of the *abadi shahr* can only transfer the materials of his house without any right of residence in the house thus transferred, and even then must pay one-fourth of the sale price to the proprietors of the soil. The lower Appellate Court has very properly ignored this plea. Having come to the conclusion that the second of two alternative reliefs must be decreed, the learned Subordinate Judge contented himself with remarking that the question of the plaintiffs' right to the first relief did not arise. I note this point because I have felt some difficulty about the present position of the plaintiffs with regard to this first relief. They have filed no cross-objections in this Court, and are obviously precluded from claiming that both reliefs ought to have been decreed. Can they ask this Court to consider their claim to the first relief asked for, in the event of the Court's holding them disentitled to the second? I incline to the opinion that it is open to them to do so. The conclusion I come to on this point is that the plaintiffs have an arguable case, but one which ought not to be accepted on the record as it stands. If the suit had gone to trial on the plaint as originally framed and upon issues arising only in respect of the claim for one-fourth of the sale price, I think it just possible that the Courts might have come to the conclusion that the word *kashtkaran* in this particular passage of the *Wajib-ul-arz* was not used in its strict sense of "cultivating tenants," but was intended to apply to all occupiers of houses situated outside the limits of the *abadi shahr*. As the case now stands, the question is much complicated by the fact that the plaintiffs have succeeded in the Courts below upon a precisely opposite contention, namely that the second defendant and the other butchers residing in the *abadi qassaban* are not *kashtkars* within the meaning of the *Wajib-ul-arz*. If the second defendant, as lessee of the land in suit, has in fact a transferable right in respect of the house in suit and the right of residence therein, it is for the plaintiffs to satisfy the Court that this right is subject to a provision entitling the ground landlords to claim one-fourth of the sale price on each transfer. The case in favour of a loose interpretation of the word "*kashtkaran*" is partly rebutted by the proof on the part of the defendants of several instances of transfers in which no claim seems to have been preferred by the landholders to any portion of the sale price. On the record as it stands, I am not prepared to dissent from the finding of the first Court that this particular provision of the *Wajib-ul-arz* refers to "cultivating tenants" only, and does not affect the rights of the butchers occupying houses in the *abadi qassaban*.

The rights of these butchers are, in my opinion, those of lessees holding under building leases, and in the absence of evidence to the contrary they must be held entitled to transfer their rights as such lessees.

I would, therefore, set aside the decrees of both the Courts below and dismiss this suit with costs in all Courts, including in this Court fees on the higher scale.

CHAMIER, J.—I agree.

MOTAN DAS *v.* MORNI BAI.

BY THE COURT:—The appeal is allowed. The decrees of both the Courts below are set aside and the plaintiffs' suit is dismissed with costs throughout including in this Court fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 986 OF 1911.

July 27, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

MOTAN DAS—DEFENDANT—APPELLANT

versus

Musammat MORNI BAI—PLAINTIFF—RESPONDENT.

Custom or Hindu Law – Khattar Aroras *of Multan city – Succession – Daughter, whether can succeed – Custom – Burden of proof.*

In matters of succession, *Aroras* of Multan city are governed by the Hindu law.

Therefore, a daughter of an *Arora* of Multan city is entitled to succeed to the estate of her deceased father.

The burden of proving that they follow any custom in derogation of the Hindu law lies heavily on the person alleging the custom.

Radho v. *Harnaman*, 69 P. R. 1907, followed.

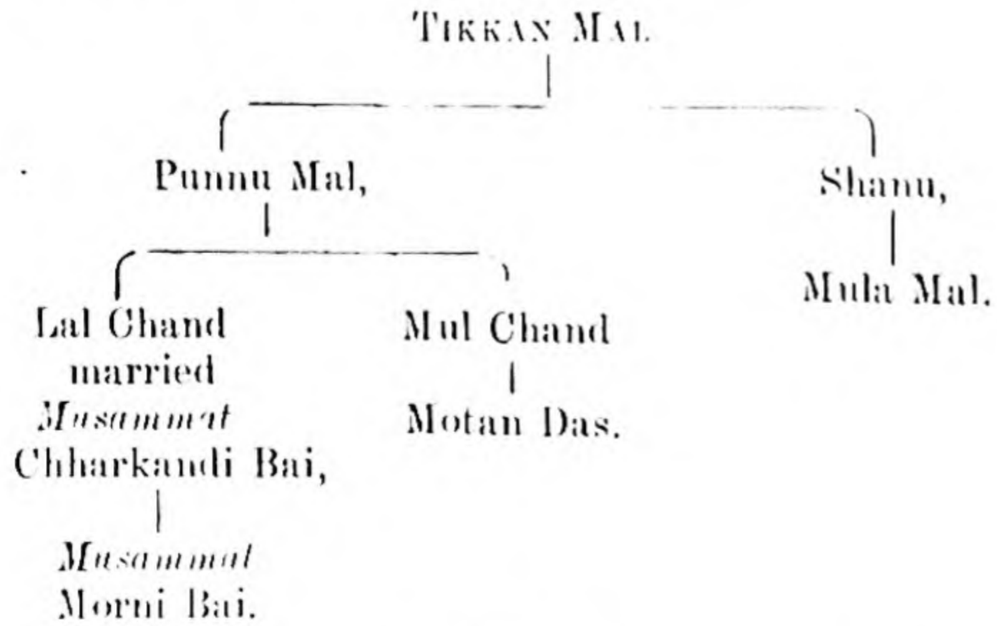
Lacho Bai v. *Asa Nand*, 144 P. R. 1882; *Mokanda* v. *Balli Singh*, 85 P. R. 1884; *Pitambar* v. *Ganesha Ram*, 148 P. R. 1890; *Anant Ram* v. *Hukman Mal*, 62 P. R 1902; 102 P. L. R. 1902, discussed.

Second appeal from the decree of the Additional Divisional Judge of the Multan Division, at Ferozepore, dated the 27th May 1911, varying that of the District Judge, Multan, dated the 22nd of August 1910, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Rai Bahadur Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—The genealogical tree is as follows:—



The parties are *Khattar Aroras* of Multan city. The mere fact of a house having been built recently in *tarf* Ravi, a suburb of the city, can make no difference to the case. The ancestral house of the family is in the city, and for purposes of the main question in this case, *viz.*, whether the parties are governed by personal law or by custom, the parties must be regarded as residing in a town.

The dispute is as to the property of Lal Chand who has not been heard of for many years past; he left Multan about 30 years ago, and is now presumably dead. His wife, *Musammat* Chharkandi Bai, died in 1909, and the dispute is between the daughter, *Musammat* Morni Bai, who is suing for a declaration relying on Hindu Law, and the brother, Mul Chand, who has died since the suit was instituted and is now represented by his son, Motan Das. Apart from a dispute as to some date trees, which will be dealt with in the latter part of this judgment, the only question for decision is whether the daughter or the brother is entitled to succeed to the property. The first ground of appeal raises the question whether a suit for a declaration lies, but this has been given up by appellant's Counsel who realises that the decision of the lower Courts on this point is correct.

Both the lower Courts have decided the question of succession in plaintiff's favour, so it is the defendant who is the appellant in this Court.

For the defendant it is contended that the family should be held to be an agricultural family. It is true that the documentary evidence proves that as far back as *Sambat* 1881(=1824 A. D.) or even earlier, Tikkan Mal, the ancestor, acquired certain land, and that the family has held land ever since, but, on the other hand, it is not shown that any member of the family has ever cultivated with his own hands. Lal Chand was a hawker, Mul Chand was a *patwari* for many years, and Motan Das still is a *patwari*. The members of the family have also had money dealings, and acted as weighmen (*dambirs*) and the whole evidence on this part of the case shows that the family is not mainly dependent on agriculture, but on shopkeeping or service. The mere fact that in certain documents Lal Chand and Mul Chand have described themselves as *zemindars* or *malguzars* is, in our opinion, of no importance whatever.

We start then with the fact that we are dealing with a family of *Aroras*, living in a large town, and not agriculturists though owning land. The initial onus of proving that such a family is governed by agricultural custom and not by personal law lies on the defendant, who undoubtedly would succeed to the property in suit according to the general agricultural custom of the Punjab —the property being ancestral—but who has no right to exclude the daughter if the family be governed by personal law. One point which is relied on as being in defendant's favour is that in this family there is a custom, which has undoubtedly been followed in more than one instance, whereby an elder son takes an extra share on the death of the father. This, however, is not in accordance with general agricultural custom, and the mere fact that in this particular family a special custom exists whereby an elder brother takes an extra share is not, in our opinion, any good ground for presuming that in matters of succession generally the family has adopted agricultural custom and ceased to be governed by their personal law. The peculiar custom of allowing an extra share to an elder son may have been started by the caprice of Tikkan Mal, and may have continued ever since, but it does not follow that Tikkan Mal would have dreamt of a daughter, who was her father's only child, being excluded by her uncle.

According to the *Riwaj-i-am* prepared for Hindus of Multan city, the property of a man who leaves a daughter and a brother is shared between the two, but this is unsupported by instances and is not relied on by either party, so it may be ignored.

We have left for consideration the decisions of the Courts, especially the Chief Court rulings, and the instances cited by the witnesses for the parties.

The earliest reported case is *Musammat Lacho Bai* v. *Asa Nand* (1), a case of *Aroras* of Multan city. This was a suit by certain collaterals of one Gobind Ram for a declaration that two alienations effected by one of the widows of Gobind Ram should not affect their reversionary rights. For the defence it was pleaded that the plaintiffs had no *locus standi* in the presence of Khem Chand, a daughter's son of Gobind Ram. Gobind Ram had also left a daughter, but it was held that "the existence of a daughter entitled to succeed on the widow's death would probably, if there were no daughter's sons, not be enough to bar the right of the person presumptively entitled next after the death of both the widow and the daughter to obtain such a declaration. For the daughter's interest in her father's property is, like the widow's, only a restricted interest, and on her death the property devolves on the line of the last male owner." As to the daughter's son we read (page 427): "It, therefore, becomes necessary to determine whether Khem Chand would be entitled to succeed to the property either as adopted son of Gobind Ram, or, after his mother's death, as daughter's son. This question can only be considered for the purpose of determining whether the plaintiff should be allowed to maintain the present suit. He cannot get a declaration that Khem Chand was not adopted by Gobind Ram, or would not be entitled to succeed in preference to the plaintiff." Then, on page 429 we read: "Coming now to the question whether Khem Chand would inherit in preference to the plaintiff as daughter's son, it appears that though the issue drawn related to the title of the daughter to inherit, this substantially involved the right of the daughter's son to succeed on her death, and the evidence given relates equally to both. On this question the evidence is conflicting, but the evidence for the plaintiff seems entitled to more weight than that for the defendant....There appears, therefore, to be sufficient evidence of a custom excluding daughter's sons to justify us in refusing to treat the daughter's son as the nearest reversioner, and to hold that the plaintiff's suit should, therefore, not be entertained. *It seems enough to decide that the plaintiff is not proved not to be the next reversioner, without attempting to decide finally whether daughters' sons are by custom excluded from the succession.*" So whether daughters or their sons were by custom not entitled to succeed was not finally decided, and we cannot regard this case as of any material value to us.

The next case cited is *Mokanda* v. *Balli*

(1) 144 P. R. 1882.

Singh(2), a case relating to *Aroras* of Multan origin, but residing in Amritsar. Whether the custom of Amritsar *Aroras* is the same as that of Multan *Aroras*, and if not, whether this particular family had kept their Multan customs or adopted the Amritsar customs, is not clear Here the contest was between a nephew and a daughter's son. No evidence was adduced of a nephew excluding a daughter's son, while eight instances of a daughter's son and one of a daughter succeeding were cited. The learned Judges remarked that the Extra Assistant Commissioner who made the inquiry had not taken much care to ascertain the precise facts of the several instances referred to, and after criticizing these instances held that it did not appear that any of them could be regarded as instances of the succession of a daughter's son as of right to the exclusion of brothers or brothers' sons.

Next comes *Pitambar* v. *Ganesha Ram* (3), a case relating to *Aroras* of Dera Ismail Khan and Bhakkar. Here the contest was between a daughter and a nephew. The property was partly ancestral and partly self-acquired. The case was decided in favour of the nephew, and the daughter was excluded even from her father's self-acquired property, so that she fared even worse than she would ordinarily do under agricultural custom. In this case the daughter's Counsel quoted certain rulings in support of his argument that the onus should be placed on the nephew, but the learned Judges noted that the cases referred to did not relate to *Aroras*, and further held that "after a full consideration of all the evidence in the case, we are prepared to hold that the plaintiff has affirmatively established the custom in his favour."

To this ruling is appended as a foot-note, Civil Appeal No. 1422 of 1887 [*Nihal Chand* v. *Prem Bai* (4)], a case relating to *Aroras* of Multan city. Here the property was self-acquired, and as regards onus it was held that if custom applied the onus should lie on the plaintiffs (brothers and father of the deceased) to show that by custom they could exclude a daughter or her sons (this was held with reference to "the caste of the parties, the locality in which they live, and the nature of the property in dispute"). The judgment states: "We find it impossible to hold that any established custom as to the respective rights of the daughter and her son on the one hand, and the near collaterals on the other, is satisfactorily made out. The cases cited have not been very fully elucidated; but if genuine precedents they rather go to show that there is no invariable customary rule of succession, though the balance fluctuates a little in favour of the daughter." The judgment then goes on to hold that the entry in the Customary Law to the effect that daughters share equally with brothers is not a correct record of custom. Lastly the judgment, after referring to *Musammat Mulo* v. *Phulo Missar* (5), states: "to succeed in their suit the plaintiffs must prove affirmatively that they have a right preferential to the daughters and their sons, and this they have certainly failed to establish. If we fall back upon the Hindu Law on the ground that no custom governing the issue in the case has been proved by either side, the result will be the same, as under that law the daughter will succeed in preference to either a father or the brothers of the deceased proprietor."

In *Anant Ram* v. *Hukman Mal* (6) the parties were *Aroras* of Kasur, of the shop-keeping and money-lending class and residing in a town, and it was held that the onus of proving that the daughters were excluded lay on the plaintiff, a brother of the deceased. But though the instances cited by the plaintiff were not altogether satisfactory, for the judgment says: "in several instances the meagre nature of the details was partly due to the action of the District Judge in not making a full record," it was held that the other side should have shown by cross-examination or evidence in rebuttal that those instances did not in reality support the alleged custom. So it was held that the plaintiff had proved his right to succeed. As decided cases amongst *Aroras* in favour of the collaterals and against the daughter, *Musammat Lacho Bai* v. *Asa Nand* (1); *Mokanda* v. *Balli Singh* (2); *Pitambar* v. *Ganesha Ram* (3) and the foot-note to the last ruling are here cited. Though in the first ruling the question of succession was *not* finally decided, in the second and third case the onus was placed on the daughter although the parties were, as in *Anant Ram* v. *Hukman Mal* (6), *Aroras* residing in a town, and in

(2) 85 P. R. 1884.
(3) 148 P. R. 1890.
(4) 148 P. R. 1890 foot-note.
(5) 108 P. R. 1888.
(6) 62 P. R. 1902; 102 P. L. R. 1902

the case published as a foot-note the decision was in favour of the daughter. In this ruling, *Anant Ram* v. *Hukman Mal* (6), the property was, partially at least, self-acquired, but the learned Judges found themselves unable on the evidence to make any distinction "between ancestral, immoveable and self-acquired moveable property in the matter of succession...the subject-matter of the suit not being a woman's *peculium*." They added, "we are not prepared to go further than to say that the nature of the property might slightly affect the onus, as appears to have been suggested in Civil Appeal No. 1422 of 1887." So in this case too the daughter lost even the self-acquired property of her father, faring worse than an ordinary agriculturist's daughter would do.

Lastly comes *Radho* v. *Harnaman* (7), a case of *Aroras* of Amritsar city, where it is held that in a case relating to high caste Hindus residing in a town, the burden of proving that the parties follow any custom in derogation of their personal law lies heavily on the person alleging the custom. The facts of this case were somewhat peculiar. One Nathu Mal left a daughter, two full brothers and two half brothers. The contest was between the daughter and one of the half brothers, the full brothers and the other half brothers not being parties to the suit for some unexplained reason. In this judgment the rulings already referred to in the present judgment have been fully dealt with, and it is pointed out that in some of the earlier cases, owing to the omission of the parties to plead that they were governed by Hindu Law, an assumption seems to have been made that there was a general custom in favour of the collateral, and so the onus was placed on the daughter or the daughter's son.

We have no hesitation in following the last mentioned ruling, and in holding that the onus in this case lies on the defendant. We do not forget that the property in question in this case is landed and ancestral property, but still we hold that, the parties being non-agricultural *Aroras* and residing in a town, the burden of proving that the daughter is excluded rests on the defendant, for the daughter would succeed to her father's whole estate under her personal law. If the property were self-acquired, then even the general agricultural custom of the Punjab would be in her favour. It may be noted, too, that in the majority of the reported cases above dealt with no distinction has been made between ancestral and self-acquired property; such of these decisions as are in defendant's favour would deprive the daughter even of her father's self-acquired property.

Lastly, we come down to the instances cited in this particular case, and these are to be found on page 10 of the paper-book, where the District Judge has dealt with them in detail. In the first place we note that, as has been admitted before us in arguments, only three instances relate to *Aroras* living in Multan city or a suburb of Multan city. Apart, therefore, from the other reasons given by the learned District Judge for holding these cases to be of no value, we cannot regard them as proving the rule of succession in the family of the parties. We are not inquiring into village custom but town custom, and instances relating to villagers are of no value. Remembering how often a daughter may be excluded by consent, owing either to the property being small in value or to her being married and well-off and living at a distance or to other reasons, we think three instances far too small a number to prove any such custom as is alleged by the defendant in the present case. We note that several instances of a daughter's succession have been cited by the plaintiff, but we do not think it necessary to deal with them.

While discussing *Radho* v. *Harnaman* (7), we omitted to note that Mr. Shafi's objection to the applicability of that judgment is that in that case both parties admitted that *Aroras* were governed by Hindu Law. But in the present case too the plaintiff relies on Hindu Law, and the parties being *Aroras* living in a town the presumption is that Hindu Law applies, and so we hold that the onus of proving any custom opposed to Hindu Law has rightly been placed on the defendant.

We hold that the daughter is entitled to succeed, and the only question remaining for decision is the matter of the date trees.

In 1875 Lal Chand and Mul Chand divided their lands, but kept certain date

(7) 99 P. R. 1907.

trees joint. The trees continued to be shown joint, and in 1899 when *Musammat* Chharkandi Bai got mutation of her husband's estate effected in her name, she was entered as owner of one half share in the trees. But in the next *jamabandi* we find the trees shown in two separate *khatas*, as if there had been a partition. (It may here be noted that in Multan there is a custom whereby date trees are given a *khata* number of their own, apart from the *khata* number of the land on which they stand). So we now find two *khatas*, one, No. 143, consisting of 27 trees standing in Mul Chand's name, and one, *khata* No. 144, consisting of 86 trees standing in *Musammat* Chharkandi Bai's name. Plaintiff claims full ownership of the 86 trees, while defendant denies that there has ever been any partition of the trees. The District Judge finds no proof of any partition, and thinks a mistake has crept into the *jamabandis*. The learned Divisional Judge presumes a partition, presuming the revenue entries to be correct even though no mutation sanctioning the change is forthcoming. In the absence of any mutation entry, we do not think the entries in the *jamabandis* can be presumed to be correct. There is no proof of any partition, and we cannot presume any partition to have taken place. It would, moreover, be a curious partition by which 86 trees fell to one person, and 27 to the other.

Further, it is to be noted that in the District Court the plaintiff made a statement offering to limit her claim in the 86 trees to one-half on condition that defendant admitted her right to one-half in the 27 trees. This offer the defendant was ill-advised not to accept. (His acceptance would, of course, have been conditional on plaintiff's proving that she had a right to succeed her mother in the estate.) We hold that plaintiff has a half share only but that it extends to all the trees.

As regards ground 5 of the present appeal, which relates to claims for Rs. 250 for repairs to a house and Rs. 100 spent on *Musammat* Chharkandi Bai's funeral, there are concurrent findings of the lower Courts, and Mr. Shafi has not addressed us on this ground.

We accept the appeal only so far as to vary the Divisional Judge's decision as to the trees. The decree will be that the plaintiff is declared to be owner to the extent of one-half share in both *khatas* (No. 143, consisting of 27 date trees, and No. 144, consisting of 86 date trees). The decree declaring plaintiff owner of the rest of the property in suit will stand.

As to costs the defendant has failed except in the minor matter of the date trees, and even that could have been settled satisfactorily in the lower Court had the defendant been sensible. We order, therefore, that the defendant do bear the plaintiff's costs in all Courts.

Appeal partly accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 83 OF 1914.

November 23, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

RAM LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TIRBENI SAHAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25—Appellate Court not definitely reversing lower Court's finding—Procedure—Practice.

Where an Appellate Court **does not definitely** reverse the finding of the first Court that the suit was barred by limitation, but is of opinion that in the event of a finding that a certain person was not in possession on a particular date the suit was still liable to be dismissed on the ground of limitation, the proper procedure for the Appellate Court to adopt is to proceed under Order XLI, rule 25, and not under Order XLI, rule 23.

First appeal from the order of the Additional District Judge of Gorakhpur, dated the 13th February 1914.

Mr. *Jang Bahadur Lal*, for the Appellants.

Mr. *Parmeshwor Dayal*, for Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—This was a suit in which the plaintiffs claimed possession of certain property, alleging that it had belonged to one Gopal Baksh, who mortgaged it with possession in the year 1896; that the plaintiffs had redeemed that mortgage and had entered into possession, but had been

dispossessed by the defendants. There were a number of defences raised, including a denial that Gopal Baksh had any title to the property in suit in the year 1896. The first Court framed four issues. We are at present concerned with the first of them. One of the pleas in defence was to the effect that the defendants had been in adverse possession for more than twelve years prior to the institution of the suit. The learned Subordinate Judge framed an issue on this point and proceeded to discuss the evidence. The parties were at issue on a question of fact, as to whether the plaintiff had or had not obtained possession after the date of the alleged redemption of the mortgage of 1896. On this point the first Court found against the plaintiffs and held that the defendant had in fact been in possession for more than twelve years prior to the institution of the suit. The learned Subordinate Judge expressly declined to go into the question whether Gopal Baksh was in possession in the year 1896, that is to say, at the date of his mortgage. On appeal the learned Subordinate Judge differed from the view of law taken by the first Court. He remarked that, if Gopal Baksh was in fact in possession at the date of his mortgage, time would not begin to run against him, or any person claiming through him, merely because of the fact that the mortgagees whom he had put in possession might have been dispossessed by a trespasser. He, therefore, came to the conclusion that the first Court's finding on the question of limitation could not be maintained on the ground on which it proceeded, and the question whether Gopal Baksh was or was not in possession in 1896 at the date of the mortgage was one which required to be determined before the issue as to limitation was decided. Having come to this conclusion, the lower Appellate Court did not proceed to examine the evidence itself, as it might well have done, and come to a finding with regard to Gopal Baksh's possession. The lower Appellate Court should have either affirmed or definitely reversed the finding of the first Court on the issue of limitation. As a matter of fact the learned Additional Judge, purporting to act under Order XLI, rule 23, has remanded the case to the Court of first instance for trial on the merits. This procedure was not justified by Order XLI, rule 23, for the lower Appellate Court has not definitely reversed the finding of the first Court that the suit was barred by limitation. On the contrary the learned Additional Judge was clearly of opinion that in the event of a finding that Gopal Baksh was not in possession in 1896, the suit was still liable to be dismissed on the ground of limitation. Under the circumstances we are of opinion that if the lower Appellate Court was not prepared to come to a finding itself on the question of Gopal Baksh's possession at the date of the mortgage, it should have exercised its powers under Order XLI, rule 25, to remit an issue. This might have been done with a further direction that findings should also be recorded on the remaining issues in the case, in the event of the Court's finding in favour of Gopal Baksh's possession. In taking this view we are fully supportd by the procedure set by a Bench of this Court in *Habib-ullah Khan* v. *Lalta Prasad* (1). We set saide the order of remand under appeal. We send the record back to the Court of the Additional Judge and direct him to re-admit the appeal to his file of pending cases and to dispose of it according to law with due regard to the remarks made above. Costs here and hitherto will abide the result.

Order set aside.

(1) 17 Ind. Cas. 94; 34 A. 612; 10 A. L. J. 190.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 119 OF 1913.

October 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

ALAMELU AMMAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BALU AMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Daughters taking estate of father under Will from mother—Oral partition—Survivorship, right of, whether extinguished—Evidence Act (I of 1872), s. 115 - Estoppel - Daughters taking under Will, whether estopped from claiming as heirs—Partition, oral whether valid.

ALAMELU AMMAL v. BALU AMMAL.

Daughters taking the estate of their deceased father, according to a Will executed by their mother, are not estopped from claiming subsequently as heirs to their father on the ground that the Will executed by their mother in respect of such properties is invalid.

But when they divide the properties equally among themselves under an oral partition, they must be deemed to have given up their rights to succeed by the right of survivorship to the estate of a sister who may die subsequently.

A partition of immoveable property of whatever value can be effected by oral arrangement and need not be in writing and registered, as it is not an 'exchange,' 'sale,' 'mortgage,' or 'lease.'

Therefore the mere fact that the rights mutually relinquished under an oral partition are to continue for periods of greater or less duration, cannot have much bearing on the question whether written instruments are required to effect valid partitions.

Dalton v. *Fitzgerald*, (1897) 2 Ch. D. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685; *Paine* v. *Jones*, (1874) 18 Eq. 320; 43 L. J. Ch. 787; 30 L. T. 779; 22 W. R. 807; *Rup Chand Ghosh* v. *Sarveswar Chandra Chandra*, 33 C. 915; 10 C. W. N. 747; 3 C. L. J. 629; *Gyannessa* v. *Mobarakunnessa*, 25 C. 210; 2 C. W. N. 291; *Satya Kumar Banerjee* v. *Satya Kripal Banerjee*, 3 Ind. Cas. 247; 10 C. L. J. 503, *Rawan Pershad* v. *Musammat Radha Beeby*, 4 M. I. A. 137; 7 W. R. 35 (P. C.); 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 E. R. 651, referred to.

Subramania Aiyar v. *Sivithri Ammal*, 4 M.L.T. 354; *Ariyaputhira* v. *Muthukumaraswamy*, 15 Ind. Cas. 343; 37 M. 423; (1912) M. W. N. 854; 23 M. L. J. 339; 12 M. L. T. 425; *Lakshmiammal* v. *Gengiammal*, 7 Ind. Cas. 858; 34 M. 72; 8 M. L. T. 233; (1910) M. W. N. 692; *Tirurengadachariar* v. *Ranganatha Aiyangar*, 13 M. L. J. 500; *Ramakkal* v. *Ramasami Naicken*, 22 M. 522; 9 M. L. J. 101, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 2 of 1911, preferred against that of the District Munsif of Tiruvadi, in Original Suit No. 71 of 1910.

Mr. *T. Narasimha Aiyangar*, for Mr. *A. Venkatarama Aiyar*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar* and *P. S. Vaidanatha Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. They are two out of the three daughters of one Sambasiva Aiyar, who died in 1880. The first defendant is the daughter and heir of Subbammal, who is now dead and who was also a daughter of Sambasiva Aiyar like the two plaintiffs. The mother of the plaintiffs and of Subbammal died in 1899 having enjoyed a widow's estate in the properties. Shortly before her death, however, she executed a Will treating the properties as her absolute properties and bequeathing the lands described in the plaint, B schedule, absolutely to her three daughters namely, the two plaintiffs and Subbammal. The daughters accordingly divided the B schedule properties into three equal shares by an oral division shortly after their mother's death, purporting to take each one-third absolutely according to the Will of their mother. Subbammal died in 1908 and her one-third share (the plaint schedule property) was taken possession of by *her* daughter (the first defendant) as her heir. Now, the two plaintiffs have brought the suit out of which this second appeal has arisen, on the allegation that the plaint schedule property was taken by their sister Subbammal as heir of their father Sambasiva Aiyar after the death of their mother in 1899 and that that property which the first defendant has so taken possession of belongs to them after the death of their sister Subbammal. (The plaintiffs in their plaint dishonestly suppressed the fact that Subbammal had been enjoying the plaint one-third share separately under a partition to which the plaintiffs were parties, and they made a false allegation that the plaintiffs' two shares and Subbammal's share were all enjoyed according to the convenience of the three sisters without any permanent division by the plaintiffs and their sister, Subbammal, till the latter's death.)

The lower Courts dismissed the plaintiffs' suit on the ground that the plaintiffs are estopped from claiming title to possession of this one-third share as heirs of their father, because they and their sister purported to take the land under the Will of their mother which gave one-third absolutely to Subbammal. The Subordinate Judge relied upon the English case of *Dalton* v. *Fitzgerald* (1) in support of his view. The case of *Dalton* v. *Fitzgerald* (1) and the prior case of *Paine* v. *Jones* (2) were considered in *Rup Chand Ghosh* v. *Sarveswar Chandra Chandra* (3). Rampini, J., says: "In *Dalton* v. *Fitzgerald* (1) the defendant obtained possession of certain land from a grantor, who had no title to it. By means of that possession he was able to acquire a good title by possession

(1) (1897) 2 Ch. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685.

(2) (1874) 18 Eq. 320; 43 L. J. Ch. 787; 30 L. T. 779; 22 W. R. 807.

(3) 33 C. 915; 10 C. W. N. 747; 3 C. L. J. 629.

against the true owner. Hence, he was held to be estopped as against the grantor and his remainder-men from disputing the validity of the deed of grant." Thus, the case of *Dalton* v. *Fitzgerald* (1) is authority only for the proposition that if possession is acquired under a particular grant, and could not be traced to any other title than as regards that particular property of which possession was so obtained, the grantee cannot claim the benefit of the English Statute of Limitations, *i.e.*, a claim to acquire an absolute title by adverse possession so as to deprive the remainder-men who were granted rights in remainder under the same grant under which the life-tenant secured possession and entered into possession as life-tenant. As Rampini, J., says: "The rule of estoppel laid down in Bigelow would seem to be that the estoppel only exists so long as the grantee claims under the title of his grantor alone." Woodroffe, J. says that "if a grantee assert no other right or title than that from a common grantor, he will be precluded as against another grantee under the same instrument from denying that his grantor had a title when he conveyed." See also Bigelow on Estoppel, 6th Edition, pages 376 and 377, as to the limits within which the doctrine of estoppel laid down in *Dalton* v. *Fitzgerald* (1) should be confined.

Without going so far as was said in *Rup Chand Ghosh* v. *Sarveswar Chandra Chandra* (3), that section 115 of the Evidence Act is exhaustive of the law of estoppel to be applied by the Courts in India, I am of opinion that *Dalton* v. *Fitzgerald* (1) should not be extended beyond what is absolutely necessary to support the decision on the facts of that particular case. So confining it, the present case is clearly distinguishable because (1) the plaintiffs do not rely upon the possession got under the Will to claim the benefit of any statute of limitations giving the possessor absolute title; (2) the plaintiffs do not claim a higher right *to the two-thirds share* which was granted to them by the Will (and of which they are in possession) than the right which was so given by the Will, but their claim relates to the other one-third share to which no right was granted to them by the Will; (3) neither their title nor their possession as regards the two-thirds share need be traced to the invalid Will at all, but it can be traced to their undoubted right as legal heirs of their father. The decisions of the lower Courts cannot, therefore, be supported on the ground on which they have based the said decisions. Mr. C. V. Ananthakrishna Aiyar, Vakil for the respondent, argued that the lower Courts' decisions could be supported on two other grounds: (*a*) that the plaintiffs are estopped by section 115 of the Evidence Act from claiming title to the one-third share, (*b*) that in any event, as the plaintiffs and Subbammal effected partition on the understanding that Subbammal should enjoy the property without any right in the plaintiffs to take her one-third share from her heirs or her assignees on her death, the plaintiffs cannot rely on their right of survivorship which they relinquished by the partition arrangement. As regards the first contention, I do not think there is anything on the record from which it could be established that the plaintiffs by their conduct induced Subbammal to do anything to her own detriment. Subbammal and the plaintiffs all allowed their mother to execute the Will and they all took under that Will. No representation was made by the plaintiffs to Subbammal or by Subbammal to the plaintiffs. Either all of them were ignorant of their real rights or all of them knew their real rights and chose to act according to their ignorance or in spite of their knowledge, as the case may be. This contention, therefore, fails. The second contention involves more difficult questions. It must be now taken as settled that a partition of immoveable properties of whatever value can be effected without any registered instrument in writing as it is not an exchange, sale, mortgage, or lease. [See *Gyannessa* v. *Mobarakannessa* (4) which was decided by Ameer Ali and Macpherson, JJ.] I feel bound by the authority of the decision of the eminent Judges who took part in that case, as that decision seems not to have been questioned in any other High Court. In *Satya Kumar Banerjee* v. *Satakripal Banerjee* (5) the decision in *Gyannessa* v. *Mobarakannessa* (4) was followed and reference is further made to the Privy Council case in *Rewun Pershad* v. *Musammat Radha Beeby* (6). But the Privy Council case had been decided long

(4) 25 C. 210; 2 C. W. N. 91.
(5) 3 Ind. Cas. 247; 10 C. L. J. 503.
(6) 4 M. I. A. 137; 7 W. R. 35 (P. C.); 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 E. R. 651.

before the Transfer of Property Act came into force. In *Subramania Aiyar* v. *Savithri Ammal* (7) it was held that if a partition was effected by an instrument in writing and if the property was of the statutory value, the deed of partition must be registered. But as pointed out in *Satya Kumar Banerjee* v. *Satya Kripal Banerjee* (5) the case in *Subramania Aiyar* v. *Savithri Ammal* (7) does not lay down that partition cannot be effected orally. As I said before, I am not prepared to dissent from the view that notwithstanding the Transfer of Property Act, a partition of immoveable property of whatever value may be effected by oral arrangement. In *Ariyaputhira* v. *Muthukumaraswamy* (8) I have ventured to state that "all conveyances of ownership right in lands were intended to be brought under 'sale' or 'gifts' or 'exchanges' and to be effected as a rule by registered instruments," and I also expressed the wish that the British Indian Legislature would pass an enactment making a registered writing, indispensable for the validity of all settlements, partition agreements and Wills and authorities to adopt, making very few exceptions in special cases (such as soldiers' and sailors' Wills). I took it for granted in that decision that it was too late to hold that partition agreements could be validly made only by registered instruments.

In *Latchumammal* v. *Gengammal* (9) Benson and Krishnaswamy Aiyar, JJ., held that there is nothing in the Transfer of Property Act to prevent co-widows from effecting an absolute division of properties orally. It seems to have been conceded there that if the partition be only for life with the right of survivorship, it may be valid, though oral. Reliance was placed in that case on *Thiruvengadachariar* v. *Ranganatha Aiyangar* (10) for the view that partition need not be in writing. But the case in *Tiruvengadachariar* v. *Ranganatha Aiyangar* (10) was the case of an oral transfer of lands to a sister by two brothers in satisfaction of a claim made by her. I ventured to doubt the correctness of that decision in *Ariyaputhira* v. *Muthukumaraswamy* (8). But so far as partition agreements are concerned, I have not come across any case which treats such transactions as coming under sales or exchanges. While I do not adopt the entire reasoning in *Latchumammal* v. *Gengammal* (9) therefore, I think that if a partition (which involves relinquishment of mutual rights) can be effected orally, the mere fact that the rights mutually relinquished under the oral partition are to continue for periods of greater or less duration cannot have much bearing on the question whether written instruments are required to effect valid partitions. In this view, the plaintiffs having effected an oral partition with Subbammal giving her under the oral partition agreement an absolute right in plaint properties, which gift involves the relinquishment by themselves of their right to claim possession of the property if they survived Subbammal, the said partition arrangement is binding upon them, though it may not bind the reversioner entitled to the estate of Sambasiva Aiyar after the plaintiffs' death, and hence I hold that the plaintiffs' suit was rightly dismissed. [See *Ramakkal* v. *Ramasami Naicken* (11).]

In the result the second appeal is dismissed with costs.

NAPIER, J.—I concur with my learned brother in holding that there was an oral partition acted on by the parties and that accordingly the second appeal should be dismissed.

Appeal dismissed.

(7) 4 M. L. T. 354.

(8) 15 Ind. Cas. 343; 37 M. 423; (1912) M. W. N. 854; 23 M. L. J. 339; 12 M. L. T 425.

(9) 7 Ind. Cas. 858; 34 M. 72; 8 M. L. T. 233; (1910) M. W. N. 692.

(10) 13 M. L. J. 500.

(11) 22 M. 522; 9 M. L. J. 101.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1393 OF 1913.

November 6, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

BANWARI LAL—PLAINTIFF—APPELLANT

versus

KHUBI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 97—Lease—Endorsement by Kanungo—Date from which it takes effect—Subsequent registered lease—Priority.

BANWARI LAL *v.* KHUBI RAM.

A document endorsed by a Kanungo or Revenue Officer under section 97 of the Agra Tenancy Act takes effect from the date on which it was executed.

Therefore, a lease executed prior to, but endorsed after, the execution and registration under the Registration Act of another lease for the same holding, has priority over the latter.

Second appeal from the decision of the Subordinate Judge of Aligarh, dated the 6th September 1913.

Mr. *P. L. Banerjee*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.

CHAMIER, J.—The facts of this case as found by the lower Appellate Court are as follows. The occupancy tenants of some land executed in favour of the defendant, Khubi Ram, on November 15th, 1910, a lease for five years. On December 7th, 1910, they took it to a Kanungo under section 97 of the Tenancy Act and got him to sign and date an endorsement thereon under sub-section (2) of that section. In the meantime on November 21st, 1910, they had executed a similar lease in favour of the plaintiff and caused it to be registered under the Registration Act on the same day. The plaintiff brought a suit against the defendants second party and that suit was dismissed on their pleading that they had paid the rent to Khubi Ram, defendant No. 1. The plaintiff then brought the present suit for possession of the property and for a declaration that the lease held by Khubi Ram, defendant No. 1. was void and ineffectual as against his lease of November 21st, 1910. The Court of first instance dismissed the suit and its decree was confirmed on appeal by the Subordinate Judge. This is a second appeal by the plaintiff. On his behalf it is contended that the lease in favour of the defendant, Khubi Ram, did not take effect until it was endorsed by the Kanungo; while on behalf of Khubi Ram, defendant, it is contended that the lease took effect from the date on which it was executed. The decision of the question depends on the construction of sub-section 3 of section 97 of the Tenancy Act. That sub-section runs as follows: "Such instrument shall thereupon be as valid as if it had been registered under the law for the time being in force for the registration of assurances." It appears to me that this sub-section means that an instrument which has been endorsed under section 97 by a Revenue Officer or Kanungo is to be as valid in all respects as if it had been taken to the registration office and registered under the Indian Registration Act, and that full effect will not be given to this provision if it is held that such an instrument takes effect from the date on which the endorsement is made under this section and not from the date of execution. In this particular case such a view would result in the lease held by the defendant, Khubi Ram, having no effect at all, for it would have to give way to the lease which has been registered. It was contended that if any provision of the Registration Act is applied to an instrument endorsed under section 97, all the provisions of the Act must be applied including the provisions regarding the time within which a document is to be presented for registration and the provision allowing a document to be registered after the expiry of four months in certain cases. I am not prepared to go as far as this. It seems to me such matters should be governed by the rules which the Local Government is empowered to make under section 203 (*c*) read with section 97 of the Tenancy Act, and this, I think, sufficiently meets the contention that unless all the provisions of the Registration Act are considered to be applicable to the case of an instrument taken to a Kanungo to be endorsed under section 97, it would be possible for a party to a lease of this kind to take it to a Revenue Court or officer several years after it was executed. It appears to me also that the procedure regarding the presentation of a document for registration stands on an entirely different footing from such a provision as that contained in section 47 of the Registration Act, *i. e.*, that a document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. I am not prepared to say that the question we have to decide is entirely free from difficulty; but on a full consideration of the arguments addressed to us and of the language of the section it appears to me, as I have said before, that full effect will not be given to sub-section 3 if we do not hold that an instrument endorsed by a Kanungo or a Revenue Officer under this section takes effect from the date on which it was executed. The result is, in my opinion, that the appeal should be dismissed.

PIGGOTT, J.—The point for determination in this appeal has been stated by my learned colleague. I am bound to confess that I felt, and still feel, considerable difficulty in coming to a decision. The argument on which considerable stress was laid on behalf of the appellant, that if documents endorsed under section 97 of the Tenancy Act are held to operate from the date of their execution, the result will be to open a wide door to fraud, in the absence of any provisions limiting the period within which a document must be presented to the Revenue Court or Officer referred to in the said section (97), seems to me of considerable weight. I agree, however, with what my learned colleague has said as to the powers of the Local Government in this matter. In section 97 itself the right conferred thereby to substitute attestation before a Revenue Court or officer for the regular procedure of registration is made subject to such conditions as the Local Government may, by rules under this Act, direct. It is probable that the question of appropriate rules to be made for the regulation of procedure in this matter and avoidance of fraud requires further consideration by the Local Government. At the same time it must be admitted that under the Registration Act itself there are possibilities of fraud or, at any rate, of dishonest dealing, and that the Courts are sometimes called upon to decide difficult questions of fact, when two documents have been executed dealing with the same immoveable property and registered on different dates. A plea to the effect that a document subsequently registered was fraudulently antedated has been raised in cases to which the Registration Act applies and is often difficult to determine satisfactorily. The real question, however, is as to the wording of the two enactments bearing on the question in issue. The case on behalf of the plaintiff-appellant seems to me to be put in its strongest form when reference is made to the provisions of section 47 of the Registration Act as embodying a special privilege intended by the Legislature to apply only to a registered document in the sense in which that expression is used in section 47 itself. The word "registered" is defined in the General Clauses Act (Local Act I of 1904), section 4, clause (35), as registered in British India under the law for the time being in force for registration of assurances. Now in section 97 of the Tenancy Act, clause (3), it is not laid down that a lease endorsed by a Revenue Court or Revenue Officer under the provisions of that section shall be deemed to be a registered document, but only that it shall be "valid as if it had been registered under the law for the time being in force for the registration of assurances." The real question to my mind is whether any intention on the part of the Local Legistature favourable to the contention now urged before us on behalf of the present appellant can be inferred from the use of the latter expression rather than the former. On the whole, while feeling the force of the arguments urged in support of this appeal, I have come to the conclusion that the view which has been expressed by my learned colleague is correct. If the lease of the 15th of November 1910 had been registered under the law for the time being in force, it would have been valid for the purpose of conferring title from the date of its execution, that is to say, from the 15th of November 1910; and, on the whole, it appears to me that we should be making law on our own account rather than interpreting the law as it stands if we refuse to give its full force to the word "valid." I concur in dismissing the appeal.

BY THE COURT.—The appeal is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 773 OF 1913.

December 3, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

VENGALA VENKAYYA—PLAINTIFF—APPELLANT

versus

THALLAM VENKATARAMIAH—DEFENDANT—RESPONDENT.

Slander—Invited guest turned away because he had taken meals at widow marriages—Excommunication—Outcasting—Defamation—Caste questions—Jurisdiction of Civil Courts—Penal Code (Act XLV of 1860), s. 499, Expl. 4.

VENGALA VENKAYYA *v.* THALLAM VENKATARAMIAH.

The defendant invited the plaintiff, a Brahman, to attend a *sradha* ceremony at his house, but on his arrival turned him away saying that, as he had taken meals at widow marriages, some other Brahmans refused to attend the *sradha* if he was present. The plaintiff sued the defendant for damages for slander:

Held, that the defendant had not slandered the plaintiff.

Sadasiva Aiyar, J.—Civil Courts may discuss and deal even with a caste question where the membership and character of a member have been injuriously affected.

Pragji Kalan v. *Govind Gopal*, 11 B. 534, followed.

Defamation as defined in section 499, Explanation (4), of the Indian Penal Code, is wide enough to include caste questions within it, even where those questions do not necessarily imply defect of character.

To tell a Hindu, who does not wish to be out of his caste, that he has been excommunicated or is out of caste is defamation.

To impute to a Brahman unfitness to officiate or be the guest at a *sradha* does not necessarily amount to defamation of his character in respect of his caste.

Unless the words used in respect of the caste of a Hindu are tantamount to saying "you have become an outcaste or you have been excommunicated from your caste," the words are not defamatory.

Second appeal against the decree of the District Court of Kurnool, in Appeal Suit No. 121 of 1912, preferred against that of the District Munsif of Kurnool, in Original Suit No. 196 of 1912.

Mr. *K. Pandalay* (with him Mr. *S. Ranganatha Aiyar*), for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—I need not repeat the facts which have been set out fully in the judgment just now pronounced by my learned brother. So far as the case-law is concerned I do not wish to go further back than what has been laid down in *Cuppusami Chetty* v. *A. T. Doraisawmy Chetty* (1) and in *M. Coopoosami Chetty* v. *A. T. Duraisawmy Chetty* (2). On these caste questions, the law, in my humble opinion, ought to be made progressive. Social customs among Hindus have begun to change with quite appreciable rapidity and conservative observations, therefore, which may be found in cases decided about 30 years ago [as in *Queen* v. *Sankara* (3) and *Venkatachellapati* v. *Subbarayadu* (4)], even though those observations were made by very learned and eminent Judges, ought not to be pushed now-a-days too far.

Even the highest judicial minds, like those of Lord Eldon, Lord Mansfield or Lord St. Leonards, are affected to some extent by the spirit of conservatism or of liberalism, as the case may be and the recognition of that fact by even lesser minds implies no disrespect to those great jurists. I do not at all mean to question the soundness of the actual decisions in *Queen* v. *Sankara* (3) and *Venkatachellapati* v. *Subbarayadu* (4), but only to submit that all the incidental observations therein need not be strictly adhered to without the necessary qualifications at the present day.

Mr. Justice Chandavarkar said in *Nathu Velji* v. *Keshavji* (5): "Roughly speaking, a suit raising a caste question must fall within one of three classes: *firstly*, it may be a suit brought by a member of a caste complaining of his expulsion from it and asking for a declaration that the expulsion is illegal, and that he is still a member of the caste and as such entitled to its *social privileges*; *secondly*, a member of a caste expelled from it may sue for a declaration that the excommunication is illegal, and that he is entitled *to certain rights of property or office* as a member of the caste; or, *thirdly*, it may be a suit brought by such member for damages on account of *loss of caste or character*. The decided cases, of which there is a large number, show that a suit involving a caste question must fall under one or other of these heads."

The present suit belongs to the third class. As regards this third class, Mr. Justice Chandavarkar says: "Turning now to the *third* class, suits claiming relief for loss of caste and character are *in the nature of suits for libel* and fall within the law applicable to the latter. The Bombay Regulation expressly provides for them. As held by West, J., in *Pragji Kalan* v. *Govind Gopal* (6), 'the Civil Courts may discuss and deal even with a caste question where the *membership and the character of a member have been unjustly injured*.' "

I do not know whether it is not a matter

(1) 3 Ind. Cas. 955; 33 M 67; 6 M. L. T. 290; 19 M. L. J. 714.

(2) 17 Ind. Cas. 527; (1912) M. W. N. 1220.

(3) 6 M. 381; 1 Weir 595.

(4) 13 M. 293.

(5) 26 B. 174; 3 Bom. L. R. 718.

(6) 11 B. 534.

for some regret that the Legislature should have given so wide a definition of defamation in the Penal Code (see section 499, Explanation 4) as to include caste questions within it where those questions do *not* involve implications as to moral character. I have heard of a theiving caste in which a man born in that caste loses "*character in respect of his caste*," if he is taunted with not having had a theft to his credit before he attains the adult age. If the words "character of that person in respect of his caste" in section 499, Explanation 4, of the Indian Penal Code, be too liberally interpreted, it would lead to a person taunted as above bringing a suit or launching a criminal case in respect of such an imputation.

In many cases, no doubt, a caste offence is committed by an act which implies a defect in the moral or intellectual character of the person, but the imputation of such an act is "defamation" irrespective of the fact that it is also a caste offence. The giving up of the rules of caste by birth now-a-days does not, however, always mean any defect in the moral character as is shown by the actions of the members belonging to the Brahma Samaj, the Arya Samaj and other liberal movements. That a person does not care for the rigidity of caste rules is even a sign of moral strength in many cases, though, of course, in other as numerous cases, it is a sign of moral weakness if the neglect of caste rules is due to the weakness of the will in resisting temptations of the flesh. The mere fact that Hindus who believe in caste by *birth alone* are just now in the majority and look down upon those Hindus who do not believe exclusively in it is, in my opinion, immaterial in the consideration of the question. It was decided in an English case that to call a man a homeopath when homeopaths were usually looked down upon as quacks, is not defamation. It follows that to impute actions to a Hindu which show him to be a reformer is not defamation, unless it also necessarily implies that he has ceased to belong to his caste. However, it seems to be now settled that to tell a man who does not wish to be out of his caste that he has been excommunicated or is out of caste, is defamation and it seems not possible to unsettle that view for several years to come.

It is well-known to every Hindu that while 30 years ago the fact that a South Indian Brahman took even his ordinary meals in the presence of a non-Brahman or on the same table with a non-Brahman might have entailed the penalty of a *prayaschitham*, such a risk is almost absolutely negligible now-a-days, especially in towns like Madras or Kurnool. Again, while dining with England-returned persons who had not undergone *prayaschitham* is even now a little risky, dining with those who have so dined is quite common and unnoticed now-a-days. Hence if a person merely refuses to associate with another, giving out as his reason that he has associated in meals with a person who has himself associated in meals with another person who has contracted re-marriage with a widow or who has gone to and returned from England, such allegations do not impute to the person about whom they are made an unworthiness to call himself a member of the caste and are, therefore, not defamatory. Unless the words used in respect of a caste Hindu are tantamount to saying "you have become an outcaste or you have been excommunicated from your caste," the words are not defamatory. Such I take to be the principles of the decisions for which Benson and Sankaran Nair, JJ. are responsible in the cases reported as *Cupusami Chetty* v. *A. T. Doraisawmy Chetty* (1) and *M. Coopoosami Chetty* v. *A. T. Duraisawmy Chetty* (2). It was held in these cases that even if the words imputed to the plaintiff a ceremonial impurity which required an expiation by a *prayaschitham*, provided that the *prayaschitham* to be performed is not of the kind which is required *to bring back an outcaste into the caste* but only such minor ceremonies which are performed by even those who remain within the caste and who have incurred only ceremonial impurities, the words are not defamatory and do not give rise to a cause of action for libel. I might be permitted to say that the appeal decided in *M. Coopoosami Chetty* v. *A. T. Duraisawmy Chetty* (2) was against the decision of this City Civil Court presided over by Mr. K. Kumaraswamy Sastri (now a Judge of the Court and a profound Sanskrit scholar) and that the appellate decision confirmed his views on this question.

It is rather curious that the plaintiff in this case, who has in direct opposition to

the opinion of the late Head of the Sringeri Mattam (a very learned and respected and influential Matadhipathi) supported the Komatti community in their claim as Vaisyas to study and pronounce the Vedas and to perform Vedic Sandyavandhanam and other Vedokta ceremonies and who has thus definitely broken with the orthodoxBrahmans, should consider himself libelled because he was said to have become liberalized a little further by countenancing the re-marriage of widows, even to the extent of dining at feasts given on the occasions of Brahman widow marriages.

The words alleged to have been used by the defendant do not impute that the plaintiff has ceased to belong to the Brahman caste, but only that the defendant does not wish to associate the plaintiff with the defendant's ultra-orthodox *purohits* in the performance of *sradhas* in the defendant's house. I am quite clear that to impute to a Brahman unfitness to officiate or be the guest at a *sradha* is not necessarily to defame his character "in respect of his caste." As Manu says in the 3rd Chapter "To a student who has not read the Vedas" (now-a-days most of the caste Brahmans have not read the Vedas, though it is obligatory to read at least one of the Vedas thoroughly): "Let him never give food at the sacred obsequies. Physicians (many Brahmans are physicians), image-worshippers for gain must be shunned in oblations to progenitors. A public servant (many are public servants), a man with whitlows on his nails, or with black yellow teeth, a deserter of the sacred fire (very few Brahmans now keep up to sacred fire), one omitting to do the five great sacraments, (same observation as above), a younger brother married before the elder, an elder brother not married before the younger, the son of a twice-married woman, a man who has lost one eye, one who teaches the Veda for wages and one who gives wages to such a teacher, a man with elephantiasis, the husband of a younger sister married before the elder, a father instructed in the Veda by his own son, a blind man, one who teaches the use of arms, one who subsists by astrology, the husband of a twice-married woman, a Brahman unlearned in holy writ, a sacrificer for the *sudra*, is considered unfit by many to officiate as priest at a *sradha*." Surely if a man refuses to allow any of the above persons to officiate a *sradha* in his house, it cannot be held that that person is libelled or slandered in his character in respect of his caste.

I should like on the question of plaintiff's claim for damages to quote a few further passages from the judgment of Mr. Justice Chandavarkar in *Nathu Velji* v. *Keshavji* (5): "In the second place, so far as the plaintiffs claim damages on account of loss of reputation, they have not proved that their reputation has suffered or that they have sustained any damages on that account. Their own evidence and the evidence they have led proves that about twenty of their caste people still hold social intercourse with them, and all that has occurred is that the other members of the caste do not invite them to dinner or give them water. Assuming that their reputation has suffered by reason of their exclusion from social privileges by a majority of the caste, there is nothing to show that they have sustained any damage beyond the loss of some dinners, or how, if they have suffered in reputation, the damages are to be estimated. In fact, no specific issue was raised in the lower Court, nor was any evidence led on the point. On this ground, therefore, the claim for damages must fail." In the present case also it is clear that even if the plaintiff had associated with Brahmans who had partaken meals at a widow marriage, he is still in very good company and there are very influential and good men in Kurnool who are remaining in the Brahman caste notwithstanding their encouragement of the widow re-marriage movement by dining at such re-marriages, and there is no evidence worth the name that he has sustained any damages. Three witnesses have been examined for the plaintiff, including the plaintiff himself. Even his own statements do not prove that he has sustained any damages, while neither of the other two witnesses gave evidence that any pecuniary damage has been sustained by the plaintiff.

I might be permitted to state that a person like the plaintiff who is himself a social reformer, should not be too sensitive on account of its being stated that he is a reformer, not only in the matter of allowing Vedokta ceremonies to Komattis and perform-

ing such ceremonies in Komattis' houses, but also in considering that re-marriage of widows is not prohibited by the Shastras. It is even difficult to state in these changing times whether it is defamatory at all to call a person a social reformer or as one supporting reform. Unless words are used regarding a person which impute that that person is no longer a member of his caste, Courts ought not to encourage suits for libel or defamation merely because some of his (plaintiff's) castemen or even a majority of his castemen state that they will not associate with him in meals or ceremonies on the ground that he holds reformed views or has done actions which the extreme orthodox party disapprove of or that he has associated with reformers, provided these latter have not been excommunicated. In the result, I agree that the second appeal and the memorandum of objections should be dismissed with costs.

HANNAY, J.—The plaintiff sued for damages for slander, claming Rs. 50 as the amount of damages. In the Court of the District Munsif, he succeeded in getting decree for Rs. 20. On appeal to the District Court, however, in respect of the amount disallowed, the plaintiff's suit was dismissed. The plaintiff now appeals.

The parties belong to Kurnool. The plaintiff is a *Purohit* Brahman who appears to have settled at that place about fifteen years before suit. The defendant is a Komati. The plaintiff appears to have gained the respect of the Komati community since he settled at Kurnool, for the evidence shows that although he is not himself a family Purohit of the Vaisya community there, he is allowed to officiate jointly with the family Purohits of Komattis during family ceremonies and on one occasion he was selected by the Vaisya community to represent them at an assembly when the Vedokta rights of Vaisyas came up for discussion (see Exhibit A). The defendant admits that the plaintiff officiated at his second marriage. This state of affairs continued for several years until a widow marriage was celebrated at Kurnool, which resulted in dissension in the Brahman community at that place, some approving of the marriage, while others condemned it as being contrary to the Shastras and the recognised custom among Brahmans. Those who approved of the marriage appear to have testified their approval either by directly dining with the re-married widow or by dining with those who had dined with her. This act of dining as well as other acts indicating approval are regarded by those who oppose widow marriage as a sin. The defendant's *Purohits* Seshiah and Viriah, are opposed to such marriages. The plaintiff, though he does not admit he is in favour of widow marriages, says he is willing to dine with persons who are in favour of them. There can be little doubt that the plaintiff's attitude in that matter has given ground for the view that he supports the party in favour of widow marriage. It found as a fact, however, that the plaintiff did not go so far as to take meals at the widow marriages at Kurnool.

It was after this marriage that the incident occurred which has given rise to this suit. It appears that on the 27th November 1911, a ceremony called Aradhana was to take place at the defendant's house. Aradhana appears to be equivalent to an annual ceremony among Brahmans. The lower Courts find that the defendant invited the plaintiff to attend at his house and to bring four or five other Brahmans with him in order to assist at the ceremony. The plaintiff as plaintiff's witness No. 1, states that the defendant asked him to bring the other Brahmans because he feared that his own family *Purohits* might refuse to perform the ceremony along with the plaintiff. However that may be, when the plaintiff and the other Brahmans arrived at the defendant's house, it is found by the lower Court that defendant turned them away, saying in effect that as they had messed and taken part in other things during widow marriages, his *Purohits*, Seshiah and Viriah, refused to attend if they were present. What the exact words used were has not been found by either of the lower Courts, but I take it that the above (which is a reproduction from the plaint) contains the substance of what the defendant said. When the lower Appellate Court sent back the case for findings upon certain points the plaintiff, who was then examined as defendant's witness No. 2, stated that the words used were: "As you have taken meals at widow marriages, our *Purohits*, Seshiah and Viriah,

refuse to come. So you are not fit. Hence go away." The words, "So you are not fit". do not appear in the plaint or in the original deposition made by the plaintiff as plaintiff's witness No. 1. These words are plainly an after-thought on the part of plaintiff and as the lower Courts do not find that the respondent used any such words, they must be left out of consideration.

The question is whether the defendant can be said in these circumstances to have slandered the plaintiff. For the plaintiff reliance is placed upon the cases of *Queen* v. *Sankara* (3); *Venkatachellapati* v. *Subbarayudu*(4); *Cuppusami Chetty* v. *A. T. Doraisammy Chetty* (1). In the first case it was held by Sir Muthusawmi Aiyar that widow re-marriage is contrary to the usage and custom of Brahmans and other regenerate classes in this Presidency, and the case further shows that a person who attended at and advocated a widow marriage was then liable to excommunication at the hands of the spiritual head of his caste, nothwithstanding that the Legislature had legalised widow marriages by Act XV of 1856. In the second case the continuance of the general usage in the particular temple was held to be sufficient ground for excluding a Brahman, who had married a widow, from entering the temple. As regards the case at *Cuppusawmy Chetty* v. *A. T. Duraisami Chetty* (1) reliance is placed on the observation at page 69: "Words, therefore, which are intended to bring about disastrous consequences resulting from the loss of caste, such as deprivation of religious and social communion, by imputing unworthiness to any person to continue a member of his caste, are *prima facie* defamatory and give rise to a cause of action. They certainly may lower him in the estimation of his own caste and of other castes."

The decision of this case seems to me to turn upon the question whether at the present time attending or advocating widow marriages necessarily involves liability to excommunication and whether the defendant intended by his allegation to impute that the plaintiff was an outcaste or had lost caste status. The cases cited for the plaintiff no doubt show that in 1883 attendance at a widow marriage resulted in excommunication and that in 1890 in a particular institution a person who had married a widow was, on that ground, subjected to disability in that he had lost caste status in respect of that institution. There is, however, nothing in the evidence in the present case to show that the act attributed to the plaintiff, even if true, would, in present conditions, have rendered him liable to be outcasted or otherwise caused him to lose his caste status. The plaintiff, no doubt, says he has lost hundreds of rupees through the defendant's accusation, but he does not prove a single specific instance in which he has lost anything and he values his damages at Rs. 50. He admits he has not been excommunicated. It seems to me, therefore, that the lower Appellate Court is right in holding that the defendant has not libelled the plaintiff, inasmuch as he has not called him an outcaste and is not proved to have said anything which necessarily implies that he was an outcaste or had lost caste status. The case of *Cuppusawmi Chetty* v. *A. T. Doraisawmy Chetty* (1) is, if anything, against the plaintiff, because the words there used, "*Prayaschitham* must be performed as Coopoosami Chetti attended the *Karmanthiram*", were held not to imply that Coopoosami Chetty was an outcaste and that, therefore, there was no cause of action. See *Coopoosami Chetti* v. *A. T. Duraisawmy Chetty* (2). On the whole, I think the lower Appellate Court was right in taking the view that the words complained of in this case meant nothing more than the defendant desired no longer to associate with the plaintiff or utilize his services, on the ground that he was a sympathiser with the party in favour of widow marriage. I would, therefore, dismiss this second appeal with costs. The order of the lower Appellate Court refusing defendant his costs seems to me to be right and I would, therefore, dismiss the memorandum of objections with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 136 AND 200 OF 1912.

August 10, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Haji RAHIM BAKHSH MANDAL AND OTHERS—DEFENDANTS NOS. 1 TO 4—APPELLANTS IN NO. 136 AND RESPONDENTS IN NO. 200

versus

SAJJAD AHMAD CHOWDHARY AND ANOTHER—PLAINTIFFS—RESPONDENTS IN NO. 136 AND APPELLANTS IN NO. 200.

Lease, construction of—Plain and unambiguous words—Words in written deed, how to be construed—Contemporaneous usage, when ground for interpretation of doubtful words—Damages, suit for—Lessee, failing to pay Government revenue as contracted, liability of—Damages, measure of—Loss sustained by sale—Transfer of Property Act (IV of 1882), ss. 123, 129—Gift—Registration of gift without delivery of possession, whether valid under Muhammadan Law.

Where the true effect of the language used in a lease is perfectly clear, no reference is permissible to the conduct of the parties, because if according to its true construction the deed says one thing, it cannot be said that it means something else merely because the parties have gone on so long without understanding it.

Therefore, the words of a written instrument must be construed according to its natural meaning and no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

The doctrine that "contemporaneous usage is a strong ground for the interpretation of doubtful words or expressions" in a document, has no application where the document is neither ancient nor ambiguous.

In the case of sale of an estate by reason of the default of a lessee to perform his part of the contract, the measure of damages is the loss actually sustained by reason of the sale.

Obiter dicta:—

A party is not entitled to damages for breach of contract, if by the use of reasonable precautions he might have avoided loss.

The mere registration of a deed of gift in accordance with section 123 of the Transfer of Property Act cannot make up for the want of delivery of possession required by the rules of Muhammadan Law.

Appeals against the decrees of the Subordinate Judge, Murshidabad, dated the 30th of March 1912.

Dr. *G. H. B. Kenerick*, Advocate-General, Mr. *Z. R. Zahid Suhrawardy*, Counsel, Moulvi *Songhat Ali* and Babu *Sudhangser Sekhar Mukerjee*, for the Defendants.

Dr. *Rash Behary Ghose* and Babu *Bankim Chandra Mukerjee*, for the Plaintiffs.

JUDGMENT.—These appeals are directed against the decree in a suit for damages instituted by the proprietors of an estate against their lessees, on the ground that the estate has been sold for arrears of revenue by reason of the default of the lessees to pay the revenue they had undertaken to deposit. The claim was valued at over Rs. 17,486. The Subordinate Judge has given the plaintiffs a decree for Rs. 4,000. The plaintiffs as well as the defendants have preferred appeals against this decision, the former on the ground that they were entitled to a larger sum than what has been decreed by the Subordinate Judge, the latter on the ground that the claim is wholly unfounded and should have been dismissed. The facts essential for the appreciation of the questions raised before us may be briefly narrated.

On the 11th February 1892 one Kuran Mani Dasi, now represented by the plaintiffs, granted a *patni* lease to Safiunnissa, wife of the first defendant, in respect of an one-third share of estate No. 126 on the Revenue Roll of the Collector of Dumka in the District of Sonthal Parganas. A bonus of Rs. 5,000 was paid by the lessee, and the annual rent was fixed in perpetuity at Rs. 318-9-8. The lessee was directed to pay into the Collectorate, instalment by instalment, out of the annual rent, a sum of Rs. 308-9-8 which was the annual revenue fixed for the one-third share. The lessee was further directed to pay the balance, Rs. 10 direct to the lessor. The details of the instalments in which the Government revenue for the one-third share was payable, were specified as follows in a schedule to the lease:—

	Rs.	a.	p.
March	118	0	0
June	85	0	0
September	22	0	0
January	83	9	8
TOTAL	308	9	8

The sum of Rs. 10 was, according to the direction given in another schedule, made payable in four equal instalments in the months of *Jaistha*, *Aswin*, *Pous* and *Falgun*. The estate, it may be added, though it stood on the Revenue Roll of the Collector of Dumka included four villages in the District of Murshidabad. As regards the portion included within the Sonthal Parganas, a separate account had been opened, during

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the year 1881-82, in respect of an one-third share which belonged to one Krishna Sundari Chowdhurani and subsequently passed into the hands of Hare Krishna Saha, whose name was substituted in the register during the year 1888-89 (Exhibit 23). Consequently, in 1892 when Kuran Mani Dasi granted the *patni* lease, there was a separate account for an one-third share in the name of Hare Krishna Saha and the balance (two-thirds share) owned by her constituted the residuary share. In respect of the villages included in the District of Murshidabad the position was similar. There was a separate account for an one-third share in the name of Hare Krishna Saha, the balance (two-thirds), which constituted the residuary share, stood in the names of Sasadhar Ghose, Bankey Behary Chowdhury and Harihar Das. Kuran Mani Dasi acquired by purchase the share of Bankey Behary Chowdhury and got herself registered for a five-twenty-fourths share before the lease was granted. The position, consequently, was that the shares held by Kuran Mani Dasi in the residue of the two portions of the estate were not identical in extent. From the materials on the record, it has not been found possible to determine the basis on which the Government revenue payable by her was calculated to be Rs. 308-9-8. This much is known that there was a re-distribution of the revenue (Exhibit 14) and the instalments of the revenue were fixed as follows for the residuary share on some date not definitely ascertained, but presumably subsequent to the creation of the *patni*:—

	Rs.	a.	p.
28th June	91	8	5
28th September ...	24	11	11
12th January ...	53	8	2
28th March ...	172	2	1
TOTAL	341	14	7

It will be observed that by the re-adjustment of the revenue, the amounts of the different instalments and the ratio of each instalment to the aggregate sum were varied. On what principle this was done has not been ascertained, but we know that Kuran Mani Dasi lost an one-sixth share by an adverse decision in a suit by Anukul Chandra Chowdhury. It also appears from Exhibit 23 (copy of an extract from the D. R. of the Collector issued on the 8th May 1908 after the revenue sale) that the residuary shares, at that time, in the two portions of the estate were different (namely, one-half in the Sonthal Parganas portion and five-twenty-fourths in the Murshidabad portion). This may possibly account for the re-distribution of the revenue. In any event it is indisputable that by the *patni* lease the lessee undertook to pay into the Collectorate a sum of Rs. 308-9-8 annually in four specified instalments. On the 11th January 1908 the representatives of the original lessee paid into the Collectorate a sum of Rs. 42-8-0 instead of Rs. 83-9-8. The result was that on the 20th March 1908, the residuary estate was sold for an arrear of Rs. 39-1-9 and passed into the hands of one Reajuddin. The lessees were not prejudiced by this sale because under section 54 of Act XI of 1859, the purchaser acquired the share subject to all encumbrances. The plaintiffs, who had acquired the proprietary interest by purchase from Kuran Mani Dasi on the 14th January 1897, however, lost their right in the estate. Consequently they commenced this action for recovery of damages against the representatives of the original lessee Safiunnissa, namely, her husband and four sons. They resisted the claim as entirely unfounded. They denied that there had been any default on their part and asserted that the purchase at the revenue sale had been made by the maternal uncle of the plaintiffs on their behalf and for their benefit. The first defendant further alleged that at the time of the default, if any, he had no subsisting interest as lessee, as he had many years before transferred his right by gift to his sons. The Subordinate Judge did not frame any issues before the trial commenced and when he formulated the points for decision in his judgment, did not specify the special ground of exemption urged by the first defendant, although he alludes to it in his summary of the pleadings. The Subordinate Judge has held that the defendants defaulted to pay the Government revenue, that the estate has been sold and has passed into the hands of a stranger, that the plaintiffs have suffered loss thereby, but that their claim is exaggerated. In this view he has partially decreed the suit. On behalf of the defendants, this decree has

been assailed substantially on four grounds, namely, *first*, that there was no default on their part, as they had deposited whatever they were bound to pay into the Collectorate on a true construction of the lease, *secondly*, that if it be assumed that there were default on their part, the plaintiffs are not entitled to damages as they might and should have saved the estate from sale by payment of the arrears, *thirdly*, that the first defendant is not liable for the default, if any, and *fourthly*, that the plaintiffs are not entitled to more than rupees five hundred, which was fixed in the lease as the maximum amount of compensation payable in the event of sale of the estate by reason of the failure of the lessee to pay the Government revenue. On behalf of the plaintiffs, the decree of the Subordinate Judge has been assailed on the ground that the damages have been calculated on an erroneous basis, and that they are entitled to the full sum claimed. The grounds urged in the appeal by the defendants must obviously be examined first.

In support of the first ground, it has been urged that, upon a true construction of the lease, the lessees were bound to pay into the Collectorate, not Rs. 308-9-8 in the instalments mentioned, but only such sum as might, from time to time, be fixed as the revenue payable in respect of the share covered by the lease. Reference has, in this connection, been made to the fact that from January 1897 to January 1908 the lessees remitted to the Collectorate Rs. 42-7-12 *gds.* on account of the January instalment. Reliance has also been placed on the principle that in the construction of ambiguities in an ancient instrument, reference may be made to contemporaneous usage, as indicated in the cases of *Waterpark* v. *Fennell* (1); *Doe d. Pearson* v. *Ries* (2); *Chapman* v. *Black* (3). In our opinion there is no foundation for the contention of the defendants. The terms of the lease are perfectly plain. The rent for the lease is fixed at Rs. 318-9-8. The lessor directs the lessee to pay into the Collectorate on her behalf a definite sum of Rs. 308-9-8, instalment by instalment, the balance of Rs. 10 to be paid to the lessor in four equal instalments. No doubt, the sum directed to be deposited in the Collectorate is described as the Government revenue, but it does not follow from this description that the lessor directed the lessee to deposit in the Collectorate only such sum as might, from time to time, be determined as the Government revenue. If the sum required to be deposited in the Collectorate had been regarded as variable, the sum payable to the lessor would also be variable, inasmuch as the rent was constant. If the contention of the defendants were well-founded the covenant in the lease would have been differently framed. As the true effect of the language used in the lease is perfectly clear, no reference is permissible to the conduct of the parties. The principle upon which the defendants relied was thus formulated by Sugden, L. C., in *Attorney-General* v. *Drummond* (4): "One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed, tell me what you have done under such a deed, and I will tell you what that deed means." To the same effect is the observation of Lord Brougham in the same case in the House of Lords: "Contemporaneous usage is, indeed, a strong ground for the interpretation of doubtful words or expressions." *Drummond* v. *Attorney-General* (5). But this doctrine has no application where the deed is neither ancient nor ambiguous. This is clear from the observation of Cranworth, L. C., in *Sadlier* v. *Biggs* (6): "If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it." Equally emphatic is the statement by Halsbury, L. C., in *North Eastern Railway Co.* v. *Lord Hastings* (7): "The words of a written instrument must be construed according to their natural meaning and...no amount of acting by the parties can alter or qualify words which are plain and unambiguous." It is worthy of note that the acts and conduct of parties on which

(1) 7 H. L. C. 650 at p. 685; 11 E. R. 259; 5 Jur. (N. S.) 1135; 7 W. R. 634; 115 R. R. 317.

(2) 8 Bing. 178; 131 E. R. 369; 1 M. & Scoth 259; 1 L. J. C. P. 73.

(3) 4 Bing. (N. C.) 187; 5 Scoth 513; 1 Arn. 15; 7 L. J. C. P. 100; 2 Jur. 206; 132 E. R. 760.

(4) (1842) 1 Dr. & War. 353 at p. 368; 3 Id. 162; 1 Com. & L. 210; 2 Id. 98; 58 R. R. 292.

(5) 2 H. L. C. 837 at p. 861; 14 Jur. 137; 9 E. R. 1312; 81 R. R. 433.

(6) 4 H. L. C. 435 at p. 458; 10 E. R. 531; 94 R. R. 172.

(7) (1900) A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325.

reliance was placed in the case just mentioned extended over a period of forty years. Lord Davey in the same case adopted a similar view and referred in support to the speech of Lord Watson in *Trutees of Clyde Navigation* v. *Laird* (8). To the same effect are the observations of Shadwell, etc., in *Monro* v. *Taylor* (9), and of Lindley, M. R., in *Lord Hastings* v. *North East Railway Co.* (10). Consequently even if it be assumed that the Government revenue for the one-third share covered by the *patni* is Rs. 243-12-1, payable in four instalments in June, September, January and March in the sums of Rs. 65-5-0, Rs. 17-6-3, Rs. 38-3-8 and Rs. 122-13-3 respectively, the mere fact that the defendants have for eleven years made deposits accordingly, cannot in any way affect the question of construction of the lease and of their liability thereunder. We hold accordingly that the defendants were bound under the lease to deposit Rs. 308-9-8 annually in the Collectorate, and that the sum payable in January 1908 was Rs. 83-9-8. As the defendants deposited only Rs. 42-8-0 on account of that instalment, there was default in the payment of Government revenue. The first ground urged by the defendants consequently fails.

In support of the second ground, it has been contended by the defendants that the plaintiffs are not entitled to damages, as they might and should have saved the estate from sale by payment of the arrears. To justify the argument, it is necessary to establish that the plaintiffs were aware that default had been made by the defendants, but this has not been proved. The defendants contend that the plaintiffs must have known of the default, because as the defendants themselves had, in previous years, deposited only Rs. 42-8-0 for the January instalment, the plaintiffs themselves must have, year by year, deposited in that month Rs. 11-0-2, otherwise the estate would have been sold for Government revenue. This argument is wholly fallacious. In the first place no direct evidence is produced to show that the plaintiffs ever deposited Rs. 11-0-2 for the January instalment. If once payment had ever been made, evidence could easily have been produced from the Collectorate. In the second place, the mere fact that the defendants had on previous occasions deposited in January less than the amount of the instalment fixed for that month and that the estate had not been sold notwithstanding such circumstance, does not necessarily show that the plaintiffs must have deposited Rs. 11-0-2 to make up the deficiency in that instalment. The estate may not have been sold for various other reasons. The defendants did, as a matter of fact, pay into the Collectorate Rs. 252-8-4 annually during many years, which would be sufficient to meet the annual demand for revenue, Rs. 243-12-1, and cesses, Rs. 8-8-10. Moreover, the residuary share would not be sold under section 13 of Act XI of 1859 unless there was an arrear upon the entire estate; for if there is over-payment in respect of any share, another share actually in default does not run the risk of a sale if the deficiency in the one account is made up by the surplus in the other. Then again, the Collector is not bound to bring the estate or a share thereof to sale whenever there may be a default. We find, as a matter of fact, from Exhibit 18 that this very estate had been in default on more than one occasion previously and yet was not brought to sale. We hold, accordingly, that the defendants have failed to show that the plaintiffs had on any previous occasion supplemented their payment of Rs. 42-7-12*gds.* in January by a payment of Rs. 11-0-2. It cannot consequently be said that the plaintiffs were aware in January 1908 that they were expected to pay Rs. 11-0-2 and that if such payment was not made by them, the estate would be sold. It is further worthy of note that as the defendants made the deposit on the day previous to the last day of payment, the plaintiffs could not very well receive information in time to enable them to make a supplementary deposit; and after the expiry of the last date, the payment would be useless, unless the Collector could be induced to accept the payment. On the other hand, there is ample evidence to show that the defendants were aware that the sale would be held for arrears of revenue. On the 14th February 1908 their Mukhtar, Babu Ballabh Mitra, who had discovered that the estate was in default, applied to the Deputy Commissioner, in anticipation of the sanction of his principals, for leave to deposit the arrears due (Exhibit 5).

(8) (1883) 8 App. Cas. 658 at p. 673.

(9) 8 Hare 51 at p. 56; 8 Mac. & G. 713; 21 L. J. Ch. 525; 85 R. R. 194; 68 Eng. Rep. 269.

(10) (1899) 1 Ch. 656 at p. 663; 68 L. J. Ch. 315; 80 L. T. 27; 15 T. L. R. 247.

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This application was granted (Exhibit 19), but although he wrote to the defendants and asked them to send the money, they refused to comply (Exhibit 7), on the ground that they were not bound to pay the arrears and that their *patni* rights would not be affected by the sale. The Mukhtar protested against the adoption of this course (Exhibit A). But the defendants adhered to their decision and allowed the estate to be sold. In these circumstances, the conduct of the defendants is open to the legitimate comment that they should have apprised the plaintiff that the estate was in default and was about to be sold. It is probable that if the plaintiffs had been informed in time they would have taken steps to save the estate by the payment of the small sum due, Rs. 39-1-9 (Exhibit 20) and in view of the favourable order recorded by the Deputy Commissioner on the 15th February 1908 (Exhibit 19), the sale would have been averted. The position consequently is that the defendants deliberately allowed the estate to be sold and never intimated the danger to the plaintiffs who were ignorant that default had been made by their lessees. The contention that the plaintiffs could have saved the estate thus turns out to be unfounded, and there is no room for the application of the doctrine that a plaintiff is not entitled to damages for breach of contract when by the use of reasonable precautions he might have avoided loss (Sedgwick on Damages, sections 201,205). Consequently, no question arises in what way their right to recover damages would have been affected, if it had been shown that they did not save the estate though they had the opportunity to do so. The second ground taken by the defendants must be overruled.

In support of the third ground urged by the defendants, it has been contended that the first defendant cannot be held liable as he had no subsisting interest in the *patni* and consequently no obligation thereunder at the date of default. The point was taken in the joint written statement filed by the first four defendants and is mentioned by the Subordinate Judge in the summary of the pleadings given in his judgment. But the question is not included in any of the four points formulated by him for decision. No issues were raised in this case before the commencement of the trial. This was clearly not the right course to pursue, as questions of some complexity were in controversy between the parties. We are consequently left in some uncertainty as to whether the special ground of exemption claimed by the first defendant was really pressed in the Court below; but there are circumstances which tend to support the view that the point was not seriously pressed, and they may be briefly summarised. In the first place, the point is not mentioned by the Subordinate Judge as one of the questions for determination. In the second place, the point was taken in a joint written statement and the defendants were throughout represented by the same Pleaders, although if the point was pressed there would clearly be a conflict of interest between the first defendant and his sons (the other defendants). If the point was urged and prevailed, the whole of the liability under the claim of the plaintiff would be thrown upon the sons to the exclusion of their father. A similar observation applies to the proceedings in this Court. Here also the ground is taken in a memorandum of appeal presented jointly on behalf of the defendants who are all represented by the same Counsel and Vakil. In the third place, the evidence was not directed to the elucidation of this special defence. The whole of the evidence on the record bearing on this point consists of casual statements by Babu Ballabh Mitra, the Mukhtar of the defendants, who was called by the plaintiff to depose to a very different matter, and Bajruquddin, a servant and relation of the first defendant. Even the time of death of Safiunnissa and the date of the alleged gift by the first defendant were not set out in the written statement. In this Court it has been mentioned that, as recited in a conveyance executed by the fifth defendant on the 18th November 1910 (Exhibit 4), Safiunnissa died on the 8th May 1895 and the first defendant made a gift of the one-fourth share inherited by him by a registered deed dated the 25th August 1895. The recitals, however, are plainly no evidence of the facts mentioned, and if the first defendant seriously maintained in the Court below that he had divested himself of all rights in the *patni*, the original deed of gift should have been produced and proved. Furthermore, it would be necessary to establish

under the Muhammadan Law that a valid gift was effected by delivery of possession, for, under section 129 of the Transfer of Property Act, the registration of the deed of gift in accordance with section 123 cannot make up for the want of delivery of possession required by the rules of Muhammadan Law [*Mogulsha* v. *Mahomed Saheb*(11); *Ismail* v. *Ramji* (12); *Vahazullah* v. *Boyapati* (13)]. A question might also arise as to the validity of a gift of an undivided share in property capable of division [*Muhamad Mumtaz Ahmed* v. *Zubaida Jan* (14); *Ibrahim* v. *Saibo* (15)]. Finally, evidence of actual possession and enjoyment subsequent to the date of the alleged gift would have a material bearing in the determination of the question, whether the gift by the father to his sons was intended to be real and operative or was a sham transaction. From this point of view, the circumstance that the name of the second defendant alone appears in connection with various transactions relating to the *patni* would require explanation. The fact that immediately after institution of this suit and shortly before the written statement was filed, the second defendant on the 1st May 1911 conveyed to his father, the first defendant, one-fourth share in the *patni* for an ostensible consideration of Rs. 3,000 (Exhibit B) may also have an important bearing on the subject. No trace of these questions, however, can be found in the judgment of the Subordinate Judge, and the evidence requisite for the determination is conspicuous by its absence. The legitimate inference is that the special ground now urged on behalf of the first defendant, though mentioned in the written statement, was not seriously pressed at the trial. The third ground taken in support of the appeal preferred by the defendants must be overruled as untenable.

In support of the fourth ground taken by the defendants, it has been contended that upon a true construction of the *patni* lease the plaintiffs are entitled at most to Rs. 500 as damages, that in any event the sum decreed by the Subordinate Judge is excessive, and that he should not have allowed interest on the compensation, decreed at Rs. 12 per cent. per annum. These contentions must be considered along with the argument advanced by the plaintiffs in support of their appeal, *viz.*, that the Subordinate Judge has under-estimated the damages sustained by the plaintiffs by the loss of their estate. It is necessary to bear in mind that the *patni* included only a portion of the residuary estate which has been sold for arrears of revenue and that the part outside the *patni* was in the direct possession of the plaintiffs. To measure the loss sustained by the plaintiffs, it is necessary to determine the worth and value of the residuary share which would be necessarily dependen upon the annual income derivable therefrom. The plaintiffs in their plaint relied for this purpose upon the returns by themselves under the Bengal Cess Act, 1880. These papers have been rightly discarded by the Subordinate Judge, because under section 95 they cannot be used as evidence in favour of the persons who filed them or of their representatives-in interest. The plaintiffs had consequently to fall back upon their collection papers, which if produced and found trustworthty would be the most valuable evidence on this matter. But they were produced only in respect of the villages in the District of Murshidabad and even these are obviously unreliable. There is no evidence to show that rent was ever actually realised for the amounts mentioned in the collection papers, and the officer who produced them merely stated that they had been prepared from other collection papers which were not produced. As regards the villages in the District of Sonthal Parganas no collection papers have been produced; this omission justified the adverse comment of the defendants that the papers were held back because they would not support the exaggerated claim made by the plaintiffs. Instead of these papers extracts from a Record of Rights prepared under Regulation III of 1872 and published under section 24 on the 27th July 1905 have been produced; the entries therein, however, are not conclusive. Besides the fact that they were liable to be challenged after publication by the parties affected, there is nothing to show that the rents payable by the actual occupants of

(11) 11 B. 517.
(12) 23 B. 682.
(13) 30 M. 519; 17 M. L. J. 562.
(14) 16 I. A. 205; 11 A. 460; 5 Sar. P. C. J. 433.
(15) 34 I. A. 167; 35 C. 1 (P. C.); 11 C. W. N. 973; 6 C. L. J. 695; 9 Bom. L. R. 872; 4 A. L. J. 572; 17 M. L. J. 408.

the soil were received by the proprietors themselves; there might be intermediate tenure-holders who hold under rent-paying or rent-free grants and intercept a considerable proportion of the rent. In these circumstances the only material on which the damages can be calculated is that afforded by the *patni* lease. We are not prepared to accept the contention of the defendants that the plaintiffs are limited to a maximum sum of Rs 500. The clause upon which reliance is placed provides that in the event of sale of the estate for arrears of revenue brought about by the default of the lessees, the lessors would be entitled to fifty-times the annual profit of Rs. 10 reserved in their favour. This clause must be read along with the previous clause that the lessee would have a separate account open in respect of the one-third share covered by the *patni*. The parties contemplated that if this was carried out, the only loss which the lessors could suffer by the default of the lessee would be the sale of the one-third share and a consequent loss of Rs. 10 annually. It was from this point of view that the measure of damages was taken to be the capitalised value of the annual rent reserved at fifty years' purchase. What has happened, however, is, that the separate account has not been opened and by the default of the lessees the whole of the residuary share has been sold. Consequently the measure of damages is the loss actually sustained by the plaintiffs. Now the *patni* lease recites that the gross income of an one-third share of the estate is Rs. 888, consequently the income of the one-sixth share outside the *patni* is Rs. 444. If we deduct from this amount 10 per cent. for collection charges, 10 per cent. for vacancies and also the road-cess payable, there is left a net income of Rs. 341. To this must be added Rs. 318, the net income from the one-third share covered by the *patni*. This makes a total income of Rs. 659 from which a deduction of Rs. 343 must be allowed for Government revenue. The capitalised value of the balance Rs. 316 at fifteen years' purchase gives Rs. 4,740 as the value of the residuary share, which fetched at the Revenue sale Rs. 2,600. Consequently the damages sustained by the plaintiff may be estimated approximately at Rs. 2,000. There is no reason why the plaintiff should be allowed interest on this sum at more than 6 per cent. per annum.

The result is that the appeal by the plaintiff (No. 200 of 1912) is dismissed with costs, while the appeal by the defendants (No. 136 of 1912) is allowed and the decree of the Subordinate Judge discharged. The plaintiff will have a decree for Rs. 2,000 with interest thereon at 6 per cent. per annum from the 13th January 1908 (the date from which title vested in the purchaser) to the date of realization. In Appeal No. 136 of 1912, as also in the Court of first instance, each party will have costs in proportion to his success. A self-contained decree will be drawn up which will specify the sums payable to each party by his opponent under this order.

Appeal No. 136 *allowed;*
Appeal No. 200 *dismissed.*

MADRAS HIGH COURT.

CIVIL SUIT No. 253 OF 1913.

October 21, 1914.

Present:—Mr. Justice Bakewell.

C. KANDASAMI CHETTI—PLAINTIFF

versus

S. MURUGAPPA CHETTI—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Limitation Act (IX of 1908), s. 5—Application to set aside abatement—Delay in obtaining Probate—Probate and Administration Act (V of 1881), s 4—Application by executor for Probate—Acceptance of office.

The plaintiff sued defendants Nos. 1 to 4 for an account and the profits of a concern which they carried on jointly. The 2nd defendant died pending the suit on the 23rd November 1913 leaving a Will, thereby appointing the plaintiff and another as executors. The plaintiff applied for Probate on 5th March 1914, the other executor having renounced office. On 18th September 1914 the Court made a declaration that the suit had abated as against the 2nd defendant. The plaintiff made the present application on 2nd October 1914 to set aside the abatement, alleging that he hesitated for a long time to obtain Probate on account of the hostile attitude of the testator's son, that he had not yet obtained Probate and that he was under an impression that if he brought himself on the record as the legal representative of the 2nd defendant he could not sue himself:

Held, that the application was barred by limitation and no sufficient cause had been shown for excusing

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the delay in bringing the legal representative on the record.

Held, also, that the delay in making the application to set aside the abatement was not accounted for.

Lakshmichand v. *Kachubhai*, 11 Ind. Cas. 559; 35 B 393; 13 Bom. L. R. 517, distinguished.

If, an executor applies for Probate, he must be taken to have accepted the office of executor and he becomes the legal representative of the deceased testator and the property of the deceased vests in him as such.

FACTS.—The plaint stated that the plaintiff and the defendants, who were four in number, were trustees under a composition-deed executed by a firm of debtors, that the trustees agreed to take over the properties of the debtors and pay the debts due by them at the rate of 6 annas per rupee, that they made themselves personally liable to the creditors of the firm, many of whom signed the trust-deed, and that the trustees agreed amongst themselves that the balance remaining out of the assets of the firm after payment out to the creditors at 6 annas per rupee should be divided between the trustees.

Sometime after the suit was filed, that is on 23rd November 1913, the 2nd defendant died leaving a Will, thereby appointing the plaintiff and another as his executors. The other executor having renounced office, the plaintiff applied for Probate on the 5th March 1914. The case came on for hearing on the 28th August 1914, when the Vakils for defendants Nos. 1, 3 and 4 pointed out that no steps had been taken to bring the 2nd defendant's representative on the record. The case was adjourned and again came on the 18th September 1914, in the meantime nothing having been done by the plaintiff. The Court made a declaration on that day that the suit had abated as against the 2nd defendant, and at the plaintiff's request the suit was adjourned three weeks, as he desired to apply to set aside the abatement.

The plaintiff now files the application and the grounds relied on by him are (1) that the testator's son assumed a threatening attitude towards the plaintiff and his co-executor (2) that the plaintiff for a long time hesitated to take out Probate and finally determined to apply on 5th March 1914 and had not yet obtained a grant and (3) that he was also under the impression that if he came on record as the legal representative of the 2nd defendant, he could not sue himself,

Mr. *C. P. Ramaswami Iyer* (with him Mr. *C. Venkatasubbaramiah*), for the Plaintiff.

Messrs. *M. Venkatasubba Rao* and *Radhakrishnaiya*, for Defendants Nos. 1, 3 and 4.

Mr. *C. P. Ramaswami Iyer*, for the Plaintiff:—There was sufficient cause for the delay. Till Probate is obtained the plaintiff cannot represent the deceased testator. He has applied for Probate within time. Moreover, this is a case in which it is difficult for the plaintiff to judge what he has to do. I rely on *Lakshmichand* v. *Kachubhai* (1) where in order to adequately deal with the rights of parties, a legal representative was brought on record even after the period of limitation. Plaintiff is already on record. Only a formal amendment is necessary.

Mr. *M. Venkatasubba Rao*, for the Defendants Nos. 1, 3 and 4:—No sufficient cause has been shown in affidavit for failure to make application to bring legal representative on record within six months from date of death.

Nor is sufficient cause shown for failure to apply to set aside abatement within 60 days from abatement.

Applicant is bound to show sufficient cause *first*, under Order XXII, rule 9, and *secondly*, under section 5 of the Limitation Act. He has shown neither.

Suit abated automatically on 23rd May 1914 and what happened on 18th September 1914, was that an entry to that effect was made on the record.

The cases have held that the party in whose favour the order sought to be set aside was made, acquires a vested right and the applicant must account for every day's delay.

The applicant's only ground seems to be that he was under a mistake of law or that he was not well advised. This is not sufficient cause.

Lakshmichand v. *Kachubhai* (1) cited by the other side does not apply. The party was in that case entitled in his own right to be made a party and did not derive that right from another. The party was added under Order I, rule 10.

ORDER.—The plaint in this case recites an agreement, under which the parties took over the property of a certain firm and agreed to pay thereout a dividend to the creditors

(1) 11 Ind. Cas. 559; 35 B. 393; 13 Bom. L.R. 517.

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within a fixed period and which stipulated that any balance should be retained by them as their remuneration, and alleges that the plaintiff and 3rd defendant advanced certain moneys for the purposes of the agreement, which has been fully carried out, and prays for an account of those transactions and payment of the plaintiff's share of any balance.

As regards the parties to this suit the contract was, I think, one of partnership, and all of them were necessary parties to the taking of the accounts. The suit was instituted on 15th September 1913, and the 2nd defendant died on 23rd November 1913, leaving a Will whereby he appointed the plaintiff executor, who applied for Probate, but has not as yet obtained a grant. On 28th August 1914 the suit was posted for trial, and was adjourned, apparently because the representative of the 2nd defendant had not been brought on record; and on 18th September 1914, when it was posted again, I made a declaration that the suit abated as against the 2nd defendant and directed the plaint to be amended by striking out his name and I adjourned the case for three weeks in order that the plaintiff might apply to set aside the abatement. On the 2nd October the plaintiff took out this Judge's summons for an order to set aside the abatement and asked that the cause title may be amended by entering plaintiff as the legal representative of the 2nd defendant, or in the alternative, that plaintiff may be allowed to sue also as executor of the 2nd defendant, and that the delay in making the application may be excused. The application is not to add a party to the record, within the meaning of Order I, rule 10, of the Code, because the 2nd defendant was a party at the time of institution of the suit, and the addition to the record can only be made by bringing on a person in his capacity of representative of that defendant. In the case of *Lakshmichand* v. *Khachubhai* (1) relied upon by the applicant, the party added to the record was entitled in his own right to a share of the family property and could have brought a separate suit for partition; and it is to be noted that the order directed the party to be added as defendant, and not as representative of the deceased plaintiff, and was expressly made under Order I, rule 10. The plaintiff admits that he was aware of the death of 2nd defendant, and of his appointment as executor, but states that for various reasons he hesitated to apply for Probate for some time. Having determined to apply for Probate he must be taken to have accepted the office of executor, and accordingly he became the legal representative of the 2nd defendant for all purposes, and the property of the deceased vested in him as such (Probate and Administration Act, 1881, section 4). Under section 187 of the Succession Act, 1865, which applies to this case, the right of the plaintiff as executor cannot be established in any Court of Justice unless Probate has been granted, and this Court cannot, therefore, recognise his title as legal representative of the deceased.

I am inclined to think that, had no application to add the legal representative of the deceased been made within the prescribed period, opportunity might have been given to the plaintiff to perfect his title, upon his showing that he was proceeding with due diligence to obtain a grant, but as matters stand the Court cannot at present make the order prayed. Under Order XXII, rule 4, the suit abates automatically, and upon an application under rule 9 to set aside the abatement the plaintiff must prove that he was prevented by a sufficient cause from continuing the suit. The only reason alleged for the delay is that the son of the deceased used threats to the applicant, and there is no explanation of his failure to make an application under rule 4 during the period from 5th March 1914 to 13th July 1914, when the Court re-opened after the vacation, and the suit abated. Under Article 171 of the first Schedule of the Limitation Act, 1908, an application for an order to set aside an abatement must be made within 60 days from the date of the abatement, and this application is barred unless the plaintiff can satisfy the Court that he had sufficient cause for not making it within that period (Limitation Act, section 5).

There is absolutely no explanation of the delay except that the plaintiff was ill-advised, and I accordingly dismiss this application with taxed costs of defendants Nos. 1, 3 and 4.

Application dismissed.

NARAYANASAWMY NAIDU GARU *v.* KAMURI RAMAYYA

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 569 TO 571 OF 1911.

August 20, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

G. NARAYANASAWMY NAIDU GARU, RECEIVER, NIDADAVOLE AND MEDUR ESTATES—PLAINTIFF—PETITIONER

versus

KAMURI RAMAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction, how determined - Cause of action, whether affected by subsequent events - Subordinate Courts, right of.

Plaintiff's remedy in a suit should ordinarily be restricted to the cause of action with which he comes into Court. The events that transpire since will not enable him to add to his reliefs nor will they cut down his rights.

Jurisdiction lies in the forum which is competent to grant the appropriate relief at the time of the institution of the suit.

A Subordinate Court has no right to question the order of an Appellate Court when the parties are willing to abide by it.

Young v. *Adams*, (1898) A. C. 469; 67 L. J. P. C. 75; 78 L. T. 506; 14 T. L. R. 373, *Midland Railway Company* v. *Pye*, 10 C. B. (N. S.) 179 at p. 191; 30 L. J C. P. 314; 4 L. T. 510; 9 W. R. 658; 142 E. R 419; 128 R. R. 666, *Queen* v. *Ipswich Union*, 2 Q. B. 269; 46 L. J. M. C. 207; 36 L. T. 317; 25 W. R. 511, *Rai Charan Mandal* v. *Biswanath Mandal*, 26 Ind. Cas. 410, 20 C. L. J. 107; *Govinda* v. *Perumdevi*, 12 M. 136; *Ramanadan Chetty* v. *Pulikutti Servai*, 21 M. 288; 8 M. L. J. 121, followed.

Petitions, under section 115 of Act V of 1908, praying the High Court to revise the orders of the Court of the Subordinate Judge of Kistna at Ellore, in Miscellaneous Appeals Nos. 13, 14 and 15 of 1910, preferred against those of the District Munsif of Tanuku, in Original Suit Nos. 416, 417 and 415 of 1908, respectively.

Mr. *P. Nagabushanam*, for the Petitioner.

JUDGMENT.—The facts of this case are not in dispute. The suit is one for damages against defendant for having cultivated the plaintiff's land without permission. It was instituted on the 30*th June* 1908. The Estates Land Act came into force only on the 1st of July 1908. It is contended by Mr. Nagabushanam who appeared for the plaintiff, that under the new Act the claim ought to be laid in the Revenue Court. It is also clear that prior to the Act, the Civil Courts had jurisdiction to entertain this suit. The question for consideration is whether the fact that the trial of the suit had to be commenced after the new Act came into force, takes the case from the jurisdiction of the Civil Courts. We are clearly of opinion that it does not. It is now well established that plaintiff's remedy in a suit should ordinarily be restricted to the cause of action with which he comes into Court. The events that transpire since will not enable him either to add to his reliefs nor will they cut down his rights. It follows from this, that jurisdiction in respect of his remedy is in the forum which was competent to grant the appropriate reliefs at the time of the institution of the suit. As was pointed out by Lord Watson in delivering the judgment of the Judicial Committee in *Young* v. *Adams* (1): "It does not seem to me very probable that the Legislature should intend to extinguish, by means of retrospective enactment, rights and interests which might have already vested." Erle, C. J., in *Midland Railway Company* v. *Pye* (2) and Cockburn, C. J., in *Queen* v. *Ipswich Union* (3) have laiddown the same principle. In a very recent case decided by the Calcutta High Court, *Rai Charan Mandul* v. *Biswanath Mandul* (4) Mookerjee, J., points out that a suit is to be tried in all its stages on the cause of action as it existed at the date of its commencement. Reference may also be made to *Govinda* v. *Perumdevi* (5) and *Ramanadan Chetty* v. *Pulikutti Servai* (6). We, therefore, hold that the Civil Courts which had jurisdiction to entertain the suit must try it in all its stages.

One other argument should be noticed. When the Civil Court originally returned the plaint on the 21st August 1908, the plaintiff filed it on the 24th in the Munsif's Court on its original side. That officer held that he had no jurisdiction and returned the plaint. Against this order an appeal was preferred to the Subordinate Judge. The Appellate Court decided on the 31st March 1909 that the Munsif had jurisdiction and directed him to take the case on his file. The Munsif again came to the conclusion that he had no

(1) (1898) A. C. 469; 67 L. J. P. C. 75; 78 L. T. 506; 14 T. L. R. 373.

(2) 10 C. B. (N. S.) 179 at p. 191; 30 C. L. J. C. P. 314; 4 L. T. 510; 9 W.R. 658; 142 E. R. 419; 12 8 R. R. 666.

(3) 2 Q. B. D. 269; 46 L. J. M. C. 207; 36 L. T. 317; 25 W. R. 511.

(4) 26 Ind. Cas. 410; 20 C. L. J. 107.

(5) 12 M. 136.

(6) 21 M. 288; 8 M. L. J. 121.

jurisdiction. We are surprised at this attitude of the Munsif. If the parties do not choose to question the order of the 31 March 1909, it was the duty of the Munsif to obey it. It would strike at the root of judicial efficiency, if the Court of first instance takes upon itself the responsibility of criticising the judgment of the Court to which he is subordinate, when the parties are willing to abide by it. We are of opinion that the Munsif was bound by the order of the Appellate Court passed on the 31st March 1909 and that it was not open to him to go behind it.

For the above reasons, we reverse the orders of the Court below and direct the Munsif to re-take the case on his file and to dispose of it according to law. Respondents will pay petitioner's costs of these petitions in this Court.

Order set aside; Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 933 OF 1912.
August 5, 1914.

Present:—Mr. Justice D. Chatterjee.

SARDAKAR PODH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BISSESWAR GOANTIA—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (IX of 1883), ss. 21, 32—Unregistered lease by thekadar, *whether can confer permanent title—Sanction of* zemindar, *effect of—Improvement made by tenant under* bona fide *belief of permanent title, compensation for, whether allowed—Equitable estoppel—Landlord, whether bound by equities binding on his* thekadar—*Compensation, assessment of—Assessors, failure to appoint, effect of—Irregularity.*

An unregistered lease by a *thekadar* of a village cannot confer any permanent title, although the lessee may have been in possession for a long time, nor can the assent or sanction of the *zemindar* in very guarded terms be construed as sanctioning the tenancy "for ever."

If a tenant under a *bona fide* belief that he has a perpetual lease makes a permanent improvement within the knowledge of his landlord, which is advantageous not only to his own holding but can also enure to the benefit of the other holdings of the *zemindar*, he is entitled to compensation on ejectment.

A landlord who gets possession of a holding by the surrender of the person who held it and who gave a permanent lease for valuable consideration, may be considered to be bound by the equities binding upon the person surrendering.

A Munsif who is authorized under the Central Provinces Tenancy Act to assess compensation for an improvement in a holding but is directed to associate with him assessors, commits an irregularity if he does not associate them, but the irregularity is such as can be waived.

Second appeal from a decision of the Sub-Judge of Sambalpur, dated 25th March 1912, affirming that of the Munsif of Bargarh, dated 20th November 1911.

Babu *Satis Chandra Ghose*, for the Appellants.

Babu *Ram Chandra Mazumdar*, for the Respondent.

JUDGMENT.—One Naga, who was either a *goantia* or a *thekadar* of some kind in a village in the Central Provinces gave to the defendant a lease *for all time* in respect of some lands, which are found to be *Bhojra* lands of the village, on receipt of a *salami* of Rs. 300 in 1893. Naga afterwards surrendered the *mouza* to the *zemindar* who, while in *khas* possession, made an endorsement on the lease granted by Naga saying that he sanctioned the holding of the defendant as a *ryot*. The *zemindar* then settled the *mouza* with the plaintiff, who is the present *goantia*. The lease by Naga was not by a registered document and no effect has been given to it in the Courts below The defendant, however, claimed compensation for improvements effected by him. There was no dispute in the first Court as to the fact of an improvement having been made. The dispute was as to the cost of the improvement, the plaintiff putting it at Rs. 120, the defendant at Rs. 400. On the evidence of the plaintiff's own witness the first Court awarded Rs. 300 as compensation. There was an appeal by the defendant and a cross-appeal by the plaintiff as to the amount of the compensation. The learned Subordinate Judge confirmed the decision of the first Court and there is a second appeal by the defendant and a cross-appeal by the plaintiff. The learned Vakil for the appellant contended that the lease of the defendant was a permanent lease ratified by the landlord and in any case his possession under it for a long time gave him title. I do not share the doubt of the learned Subordinate Judge as to the permanency of the lease as granted, but it is not necessary to go into that question as

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the lease being unregistered could not have conferred any permanent title. Assent or sanction of the *zemindar* also is in very guarded terms and I do not think that he intended to sanction the holding of the defendant *for ever*, although the defendant may have believed that the lease as granted was being sanctioned. The appeal, therefore, fails.

The cross-appeal, however, raises a more difficult point. It is contended, in the *first* place, that the defendant is not a tenant who could under the Central Provinces Tenancy Act effect an improvement and even if it be taken that he made the improvement he could not claim compensation and *secondly*, that the Courts below had no jurisdiction to determine the amount of the compensation without the aid of assessors as required by section 33 of the Central Provinces Tenancy Act and the rules made thereunder.

Section 31 provides that in respect of *Bhojra* lands the landlord alone could make an improvement. Section 32 provides that a tenant who makes an improvement with the consent of the landlord shall be entitled to compensation for the same before he is ejected, and the Civil Court making a decree for ejectment shall determine the amount of the compensation. Section 33 says the Local Government may frame rules requiring the Civil Court to associate with itself for the purpose of estimating the compensation to be awarded under section 32 such a number of assessors as the Local Government may think fit: and rule 1 under section 33 directs that the Court shall take not less than two and not more than six assessors and rule 8 directs that when the assessors are finally chosen, the Court shall fix a date for hearing the case.

No question under the Central Provinces Tenancy Act seems to have been raised before the learned Munsif. No question was raised as to whether the improvements had been effected with the consent of the landlord or if so effected, whether assessors should not be appointed. The parties seem to have proceeded on the assumption that some compensation was payable, the dispute being as to the amount. The learned Munsif says: "They constructed the *munda* to the knowledge of the former *goantia* who did not prevent them: apparently they believed they were holding as perpetual lessees, otherwise they would not have spent so much money." He then refers to the payment of Rs. 300 as *salami* and looking to the equities of the case, decrees Rs. 300 as compensation. The only question pressed before the learned Subordinate Judge on the cross-appeal was that assessors should have been appointed and there should be a remand for that purpose. The learned Judge said the point had never been raised in the first Court and not even in the cross-appeal and was at least an irregularity which had been waived. He says further on: "But considering the long time the defendant had been allowed to hold the land and allowed to effect the improvements without any objection and the fact that the plaintiff has reaped its fullest advantage and it has been the cause of the defendants' rents having been doubled at the last survey, I think this is a case in which compensation should be equitably allowed."

It is contended that the findings arrived at are not sufficient to support the equitable estoppel upon which relief has been granted. It was held in the case of *Beni Ram* v. *Kundan Lal* (1) that a tenant for a term who has built valuable structures on his holding, the landlord standing by and making no objection, was liable to ejectment without compensation. It was not shown in that case that the tenant *bona fide* believed that he had good title and the facts found did not lead to the inference that there had been acquiescence by the landlord. In this case the first Court found that the defendant was under a *bona fide* belief that he had a perpetual lease: the second Court has not upset that finding and held further that the landlord has derived a decided advantage from the improvement as the rents have been doubled. The improvement, again, is not of a kind that can be removed: it remains where it is and will enure to the benefit of the landlord not only in respect of the disputed lands but also other lands which may be irrigated from the tank. Besides, the landlord came in by the surrender of the person who gave the permanent lease for a valuable considera-

(1) 21 A. 496; 26 I. A. 58; 1 Bom. L. R. 400; 3 C. W. N. 502; 7 Sar. P. C. J. 523.

tion and may be considered to be bound by the equities binding upon the person surrendering. On the merits, therefore, I think the Courts below are right.

But then it is said that the assessment of the compensation without assessors is without jurisdiction and reliance is placed on the case of *Kamini Dasi* v. *Secretary of State* (2), which is a case under Act X of 1870. Section 21 of that Act required the Judge and the assessors to determine the amount of the compensation. Section 32 of the Central Provinces Tenancy Act, however, requires the Court to determine the amount and the rules direct the Court to associate assessors with it. There is, therefore, no want of initial jurisdiction in the Court and it is the manner in which that jurisdiction is to be exercised which has been defective in this case. In this view of the case, I think the lower Appellate Court was right in treating it as a mere irregularity, which could be and has been waived.

I, therefore, dismiss this appeal and cross-appeal. Each party will bear its own costs in this Court.

Both appeal and cross-appeal dismissed.

(2) 17 C. 380.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 134 OF 1912.

December 7, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, and Justice Sir Henry Hartnoll, KT.

THE TWINZAS OIL COMPANY, LIMITED —DEFENDANT—APPELLANT

versus

MOWER & COMPANY, LIMITED—PLAINTIFF—RESPONDENT.

Principal and agent—One limited Company acting as managing agent for another, whether can make profits in supplying goods.

The plaintiff Company were managing agents of the defendant Company and supplied to the latter, at reasonable retail prices, goods which they themselves had bought wholesale at lower prices:

Held, that the plaintiff Company were not entitled to make any profit on the goods supplied to their principal, the defendant Company.

Bentley v. *Craven*, (1853) 52 Eng. Rep. 29, 18 Beav. 75; 104 R. R. 373, referred to and followed.

Mr. *J. R. Das*, for the Appellant.

Mr. *Eggar*, for the Respondent.

JUDGMENT.

FOX, C.J.—The plaintiff Company, Mower and Co., Limited, were managing agents of the defendant Company, the Twinzas Oil Company, Limited. Mower and Company, Limited, carried on a general merchant's business and dealt amongst other things in what are called engineering stores. The Twinzas Oil Company's field manager when he required such stores would write to Mower and Company, Limited, to supply them. Sometimes the latter would obtain them from other firms and sometimes they would supply them from their own stores. Their suit was to recover what they charged for certain stores which they had supplied from their own stock. So far as the evidence goes, the charges they made for goods supplied to the defendant Company were what they would have made to any of their customers, and were reasonable retail prices. They themselves had bought the goods wholesale at lower prices.

On behalf of the defendant Company it was contended that the plaintiff Company having been its managing agent at the time the goods were supplied, it could not make any profit on goods supplied to it, and consequently no more than the actual cost price would be charged against them.

On the one hand, vigorous expressions of the rule that no agent in the course of his agency can be allowed to make any profit out of a transaction on behalf of his principal without the knowledge and consent of the principal, have been relied on. On the other side, some more recent decisions, the result of which is that a Court should not interfere where the contract has not been rescinded by the principal and where the thing bought and sold cannot be restored, have been quoted as affording a rule which debars the defendant's contention. The learned Judge held that as the defendant Company had accepted the contracts, had not rescinded them and could not restore the goods, it was bound to pay the prices charged. He was influenced in this decision by a conisderation chiefly of the reports of the first and second stages of the litigation between a contributory and a former direction during the winding-up of the Cape Breton Company. [*In re Cape Breton Co.* (1)]. The report of the last stage of this litigation was not brought to the

(1) (1885) 29 Ch. D. 795; 54 L.J. Ch. 822; 53 L.T. 181.

learned Judge's notice: it is to be found in *Cavendish Bentinck* v. *Fenn* (2) before the House of Lords. The facts in that case were that Fenn the Director had been a party to a purchase of some property by the Company for £42,000, which he and others had purchased two years previously for £5,500 at a time when he was not a Director of the Company. The contributory sought to make Fenn liable for misfeasance or breach of trust on the ground that the Director had allowed the Company to make the purchase without disclosing his own interest, and at a price far exceeding the value. The contributory's claim was dismissed by all the Courts, but the case is remarkable for the variety and divergence of the grounds on which the learned Judges dealing with the case based their decisions. In the House of Lords the case was decided on grounds which had not been dealt with by either of the lower Courts. One noble Lord expressly stated that he did not desire to rest his judgment on the reasons which were assigned for the decision of the learned Judges in the Court of Appeal, without questioning in any way the decisions of Pearson, J., and the majority of the Court of Appeal in that case. It does not appear to me that the judgments apply to the case we have to deal with. In that case Fenn the Director had acquired an interest in the properties long before their purchase by the Company and his becoming a Director of it. He alone did not buy the properties for the Company, the purchase was made by the Board of Directors. Some years afterwards during the course of the winding-up, two proposals were put before the Company, one that the purchase should be repudiated, and the other that it should be adopted and that the properties should be sold to the best advantage. The latter was adopted by the Company in meeting, and the properties were subsequently sold by the liquidator. It would have been strange if under such circumstances a shareholder or contributory of the Company could have been entitled to make Fenn account even if he had not disclosed his interest in the properties to his fellow-Directors. In the present case we have not to deal with agents for the purchase of specific properties. The supply of the goods, their sale and purchase were entirely in the hands of the plaintiff Company and were carried by them alone. There is nothing to show that the Directors of the defendant Company were supplying it with goods on the terms on which it was doing so. It appears to me that in such a case the rule stated in *Bentley* v. *Craven* (3) is applicable and the plaintiff Company was not entitled to make any profit on the goods supplied to its principal, the defendant Company.

It may be noted that Cotton, L. J., referred to *Bentley* v. *Craven* (3) in his judgment in the Court of Appeal in the Cape Breton case. [*In re Cape Breton* (1)]. He did not disagree with the decision, on the contrary his remarks imply that it was undoubtedly right, but he distinguished the case from the one they were dealing with.

In the House of Lords, Lord Herschell in some passages of his judgment refers to a description of agency, such as we have to deal with in the present case, as not being parallel with the case they had to deal with. No doubt his remarks contemplate that a Company's agent employed to make purchases of goods for the Company at market rates, who supplies his own goods at his own prices, could only be made to re-pay to the Company any excess over market prices, but he was not deciding this question, and what he said cannot be taken as overruling the long standing rule referred to in *Bentley* v. *Craven* (2).

For these reasons, I hold that for their own goods which they supplied to the defendant Company the plaintiff Company is not entitled to recover more than the cost price of the goods to themselves.

I would consequently set aside the decree of the original Court and remand the case to it for an inquiry as to the cost of the goods supplied and for a decree for the amount of the price of the goods at cost rates.

The plaintiff Company should pay the defendant Company costs of this appeal.

HARTNOLL, J.—I concur.

Decree set aside; Case remanded.

(2) (1887) 12 App. Cas. 652; 57 L. J. Ch. 552; 57 L. T. 773; 36 W. R. 641.

(3) (1853) 52 Eng. Rep. 29; 18 Beav. 75; 104 R. R. 373.

SASHI SEKHARESWAR ROY *v.* SASHIBALA DEBI.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 254, 284 AND 300 OF 1912.

August 7, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Mr. Beachcroft.

IN NO. 254 OF 1912

Raja SASHI SEKHARESWAR ROY BAHADUR—DEFENDANT NO. 3—APPELLANT

versus

Rani SASHIBALA DEBI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

IN NO. 284 OF 1912.

Rani HEMANGINI DEBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Rani SASHIBALA DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contribution, suit for—Maintenance grant to widow by three brothers—Charge created on their share of properties—Sale of some properties—Maintenance decree satisfied by one purchaser—Purchaser, liability of—Contribution between purchaser and legal representatives, principle of.

Three brothers executed an *ekrarnamah* granting a certain annual maintenance to the widow of their fourth brother, by making themselves jointly and severally liable therefor and by creating a charge on half shares of their *zemindari* properties. The maintenance fell into arrears with the result that the widow obtained a decree. The plaintiff, who had purchased the share of one of the three brothers in one of his properties, satisfied that decree of the widow and sued the holders of the different properties for contribution:

Held, that the three brothers or their representatives were equally liable; and

that as between the plaintiff and the representatives of his vendor the liability should be determined on the basis of the value of the properties respectively in their hands at the time when the decree for maintenance was passed.

Appeals against the decrees of the Subordinate Judge, Rampore Baolia, of Zillah Rajshahye, dated 21st of December 1911.

IN APPEAL NO. 254 OF 1912

Babus *Dwarka Nath Chuckerbutty* and *Brojolal Chuckerbutty*, for the Appellant.

Babus *Bepin Behary Ghose, Debendra Nath Bagchi, Priya Sankar Majumdar* and *Profulla Chunder Chuckerbutty*, for the Respondents.

IN APPEAL NO. 284 OF 1912

Babu *Priya Sankar Majumdar*, for the Appellants.

Babus *Bepin Behary Ghose, Debendra Nath Bagchi* and *Profulla Chandra Chuckerbutty*, for the Respondents.

IN APPEAL NO. 300 OF 1912.

Babu *Sarat Chandra Khan*, for the Appellant.

Babu *Brojolal Chuckerbutty*, for the Respondent.

JUDGMENT.

R. A. NO. 254 OF 1912.

This is an appeal by the third defendant in a suit for contribution. The facts which have given rise to the litigation are complicated, but in so far as it is necessary to state them for the decision of the question raised before us, they may be briefly narrated.

On the 16th July 1883, three bothers, Tarakeshwar, Kasiswar and Biseswar executed an *ekrarnamah* in favour of Jagadishwari, the widow of their deceased brother Jagadishwar, by which they undertook to pay her Rs. 2,400 a year as maintenance for her life. They made themselves jointly and severally liable for this sum, which was secured by a charge on a share of three estates numbered 207, 215 and 233 on the Revenue Roll of the Collector of Rajshahye. The maintenance fell into arrears, with the result that the lady sued and obtained a decree. The plaintiff who has purchased the share of Tarakeshwar in estate No. 207 and has satisfied the decree, now seeks contribution from the holders of the different properties. The share of Tarakeshwar has vested in the plaintiff and the first two defendants; the share of Kasiswar has passed to defendants Nos. 4 to 9 and the share of Biseswar is held by the third defendant, the appellant in this Court. It appears that the share of Tarakeshwar in estate No. 215 was subject to a prior charge at the time when the *ekrarnamah* was executed on the 16th July 1883. Tarakeshwar did not redeem the property. The result was that the mortgagee sued to enforce his security and obtained a decree in execution whereof the property has passed into the hands of defendants Nos. 13 to 15, who have acquired it free of the charge under the maintenance grant. The position, consequently, is that Tarakeshwar did not really furnish security to the same extent as his brothers did, and this has raised the present controversy as to the respective liability of the parties for contribution.

It is plain that the failure of Tarakeshwar to furnish security to the same extent as

his brothers could not in any way prejudice the rights of their sister-in-law to satisfy her claim from any portion of the properties charged. It is equally clear that as amongst the brothers themselves such failure on the part of Tarakeshwar could not increase the liability upon the property of Kasiswar and Biseswar, whose representatives are thus liable to bear the burden of the maintenance claim only to the extent of two-thirds. But as between the plaintiff on the one hand and the first two defendants on the other, a question of some nicety arises. They now hold the share of Tarakeshwar, but while the plaintiff has acquired by purchase some of the properties charged under the maintenance grant, the first two defendants are the personal representatives of Tarakeshwar. When, as now, a question of contribution arises as amongst these persons, it is obviously just and equitable that the liability of the plaintiff should be determined on the footing that Tarakeshwar had carried out his undertaking and had given as security property of the same value as his brother. The first two defendants are the representatives of Tarakeshwar and cannot be allowed to take a defence which would not have been available to Tarakeshwar himself. If the brothers of Tarakeshwar had sought for contribution as against him, he could not have successfully pleaded that he was liable to contribute less than one-third share as he had furnished security to a smaller extent than his brothers had done. The answer would have been conclusive that property furnished as security by him was liable to the extent of one-third precisely in the same manner as the property of his brothers. But the plaintiff stands in a different position: she has purchased the share of Tarakeshwar in estate No. 207 and has taken that property subject to the maintenance charge, but she is under no personal obligation to satisfy the liability created by the maintenance grant. Consequently, as between her and the first two defendants, contribution must be allowed on the footing that Tarakeshwar has furnished security to the extent of one-third. This the Subordinate Judge has not done, and the result has been that a larger measure of liability has been thrown upon the appellant than she is in equity bound to bear. The liability must be determined on the basis just explained with reference to the value of the properties at the time when the decree for maintenance was made.

The result is that this appeal is allowed and the decree of the Subordinate Judge modified. Accounts will be taken in this Court of the respective liabilities of the parties. The representatives of Kasiswar as also those of Biseswar will be liable to the extent of one-third each, and the properties in their hands will be made liable as directed by the Subordinate Judge. The plaintiff and the first two defendants are liable to the extent of one-third, but as between them the amount payable by the plaintiff will be determined on the footing that Tarakeshwar had furnished security to the extent of one-third; the balance will be payable by the first two defendants and will be charged on their share. The order for costs made by the Court below will stand. In this Court the appellant and the plaintiff-respondent will each receive his or her costs from the first two defendants. We assess the hearing fee for each at two gold *mohurs*. The other parties will pay their own costs in this Court. A self-contained decree will be drawn up here in supersession of the decree of the Court below.

R. A. Nos. 284 and 300 of 1912.

In view of our decision in R. A. No. 254 of 1912 these appeals are not pressed. They are, therefore, dismissed. There will be no order for costs.

Appeal allowed; Decree modified.

PUNJAB CHIEF COURT.

First Civil Appeal No. 1200 of 1911.

March 31, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

THIRAJ and others—Plaintiffs—Appellants

versus

KASIM and others—Defendants—Respondents.

Adverse possession—Joint holding—Possession by one co-sharer, when adverse to other co-sharers—Revenue Records—Statutory presumption—Burden of proof.

THIRAJ v. KASIM.

There is a statutory presumption in favour of the correctness of the Revenue Records and the onus lies on the party who disputes the correctness to prove that they are incorrect.

In a joint holding, the possession of one co-sharer is the possession of all the co-sharers and in the absence of a clear and unequivocal overt act, the possession of a joint owner cannot be regarded as adverse to his co-owner.

Where the Revenue Records of two successive Settlements and the entries in the *jamabandis* were in favour of the defendants and the predecessors-in-interest of the plaintiffs had agreed to the property in dispute being mutated in the defendants' names:

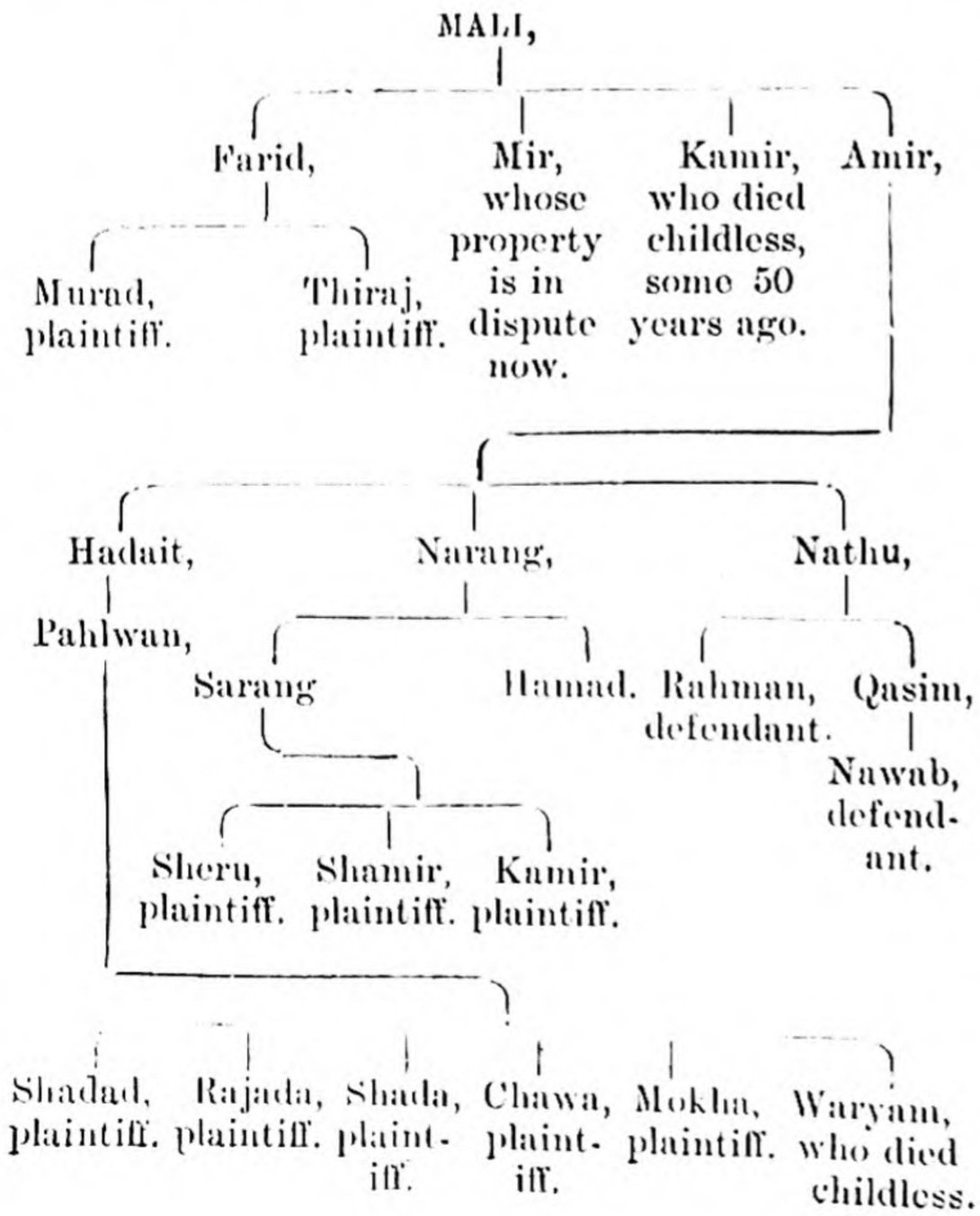
Held, that the title in the property had passed to the defendants and though the plaintiffs were in possession, their possession being permissive and in their capacity as co-sharers, could not ripen into ownership.

First appeal from the decree of the District Judge, Montgomery, dated the 31st July 1911, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain* and Messrs. *Akbar Omar* and *Khem Chand*, for the Respondents.

JUDGMENT.—The appellants who were plaintiffs in the District Court have appealed from the decree of that Court dismissing their suit. To understand properly the contentions and the relationship of the parties we consider it necessary to set out the following pedigree-table, which is admitted to be correct by both sides.



Kamir died sonless many years ago and for the purpose of the present litigation may be left out of consideration altogether. The dispute relates to a plot of land in village Dadan of Tahsil Montgomery, which is the estate of Mir who died before the Settlement of 1871. Plaintiffs, who are descendants of Farid and of Hadait and Narang (two out of the three sons of Amir), sue the descendants of Nathu, a third son of Amir, for a declaration that the plaintiffs are entitled to 5/6ths share of the estate of Mir in accordance with the ancestral shares and that the defendants are entitled to the remaining one-sixth and that the entries in the Revenue Records showing the defendants as owners of the entire estate of Mir are incorrect. The plaintiffs further allege that they have been in possession of that share of the land, enjoyed its produce and paid revenue assessed thereon. The defendants contest the allegations of the plaintiffs and state that Mir adopted Nathu and consequently Nathu's sons succeeded to his estate and that they were minors at the time and Hadait, the ancestor of some of the plaintiffs, acted as their guardian and that the mutation in their favour was effected in the presence and with the consent of all the reversioners of Mir. They also pleaded bar by estoppel and limitation. On these pleadings, the District Judge framed the following three issues :—

(1) Whether the plaintiffs are in possession of 5/6ths of the suit lands and a declaratory suit can lie ?

(2) Whether the plaintiffs came to know of the alleged incorrect entries during the partition proceedings and so their claim is within time ?

(3) To what relief are the plaintiffs entitled ?

He held that the revenue entries were correct and were dictated by the ancestors of the plaintiffs and that the latter have been all along cognisant of them. He further held that the possession of the parties was in accordance with the recorded shares and that the limitation and estoppel barred the plaintiffs' claim.

In this appeal by the plaintiffs the crucial point, upon which the decision of the case turns, is whether the entries in the revenue papers according to which the estate

of Mir passed to the sons of Nathu, are correct or whether they were wrongly made and the plaintiffs are entitled to the property according to ancestral shares. We have heard the point argued at considerable length on both sides and propose to decide first the question of title.

It is clear, and indeed it is not disputed by the learned Counsel for the appellants, that the Revenue Records of the two Settlements and the entries in the *jamabandis* have for the last 40 years been uniformly in favour of the defendants. There being a statutory presumption in favour of their correctness, the onus lies on the plaintiffs to satisfy us that they are incorrect. In reply to this case of the defendants, the learned Counsel for the plaintiffs has contended that his clients are entitled to 5/6ths of the property in dispute according to the rule of ancestral shares which must be followed and that they have been in possession of the property to which they are entitled. According to him, his clients were ignorant of the entries and as the holding was joint and possession held in accordance with ancestral shares, importance should not be attached to what he called "paper entries." We intend to deal with the question of possession later on, but the point which we want to settle at present is whether on the death of Mir his estate passed to all his reversioners or only to Nathu's sons. In this connection we have got an important document, D. 18, which is printed at pages 29-30 of the paper-book. It is a statement as to partition of the land of Dadan made by the proprietors at the Settlement of 1871 and appended to the pedigree-table prepared at that time. From this document we gather the following facts :—

(1) Mir's son Salehon or Saleh died sonless in the life-time of his father.

(2) Mir being sonless and of advanced age joined Nathu, son of Amir, with himself and made him his *Sarbarah*.

(3) Salehon's wife *Musammat* Fateh Bibi married Nathu, and Qasim and Rahman were the result of the union.

(4) In 1857, Nathu being a rebel was transported for life and his minor sons continued to live with Mir.

(5) Eleven years before the Settlement, *i.e.*, about 1860, Mir died and his entire property was mutated in favour of the minor sons of Nathu, and his other reversioners and the ancestors of the present plaintiffs did not get any share in his estate.

(6) While ownership in the other two *tarafs* of the village, namely, *taraf* Nawab and *taraf* Ziadat, is regulated by ancestral shares, the measure of ownership in *taraf* Mali is not ancestral shares but *rasmi hissa*. It is for this reason that the tenure of the village is *pattidari mukamil* (presumably in two *tarafs*) and *bhaichara* (presumably in *taraf* Mali).

This document bears, *inter alia*, the signature of Narang but is not signed by Farid and Hadait. The estate of Mir having thus passed to the sons of Nathu, the entries in the column of ownership with respect to the family land in *taraf* Mali were made in the following manner :—

1. Sons of Nathu, 4/9ths This was evidently made up of one-third which was the estate of Mir and one-ninth which was the share of Nathu as one of the sons of Amir ;

(2) Farid's branch, one-third ;
(3) Hadait, one-ninth; and
(4) Narang's branch, one-ninth ;

There are four other villages, namely Nathu Fatiana, Chah Khokhranwala, Bahawal Fatiana and Jalli Fatiana, in which the family has got lands, and we find that in all these villages the estate of Mir has been recorded in favour of Nathu's sons and the entries similar to those in Dadan village are made in the records of these villages.

It appears that in 1870, Hadait applied to be appointed guardian of the property of the minors Qasim and Rahman, and an order (*vide* page 26, as to the land in Nathu Fatiana) granting his application was passed by the Settlement Superintendent on the 16th March 1870. This order and that of the Tahsildar dated the 23rd March 1870, printed at page 27, clearly show that the share of Nathu's sons was four-ninths in that village and that Hadait as guardian accepted this specification of share as correct.

The next document to which reference should he made is D. I (page 28) which is an extract from the pedigree-table of village

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Chah Khokhranwala prepared in 1870. In this document the aforesaid shares of all the descendants of Mali are clearly specified and at page 29 is the declaration of the proprietors admitting the correctness of the particulars. The declaration bears the signatures of the ancestors of all the plaintiffs, *i.e.*, of the two sons of Farid, of Hadait and of the two sons of Narang. Similar entries as to the villages Bahawal Fatiana and Jalli Fatiana are found at pages 45 and 47, respectively.

These are the extracts from the Settlement Records of 1870-71 and, as stated above, the shares of the parties have continued to be recorded in the same manner in the second Settlement. After giving our best consideration to the documentary evidence furnished by the revenue papers and the criticism which the learned Counsel for the appellants urged against it, we entertain no doubt that all the members of the family agreed on the death of Mir that his property should be mutated in favour of Nathu's sons who were minors at that time. At this distance of time it is difficult to say what the exact reason for this arrangement was. It might be that Nathu, as alleged by the defendants, was appointed an heir by Mir or that the latter associated the former with himself in cultivation and gifted his land to his sons. Be that as it may, we are convinced that a family settlement was arrived at and that the predecessors-in-interest of the plaintiffs agreed to it. We are unable to accept the suggestion of Mr. Muhammad Shafi that the mutation of Mir's land in the names of Nathu's sons was due to the desire of their guardian, Hadait, to obtain possession of a larger area than the minors were entitled to and appropriate its produce during their minority. There is absolutely no evidence in support of this conjecture. On the other hand, as pointed out already, Hadait was appointed guardian in 1870 and Nathu's sons were recorded as owners of the property of Mir on the latter's death which took place in about 1860. Further, we fail to see why Hadait, in lieu of a temporary benefit of holding possession of the property during the minority of Nathu's sons, should permanently surrender his right of ownership in the estate of Mir and why Farid and Narang, who had nothing to gain by this arrangement, should give their consent to it.

Our conclusion on this part of the case is that in pursuance of the family settlement arrived at after the death of Mir, to which the defendants' ancestors were consenting parties, the title in his property passed to the sons of Nathu and that this settlement has been accepted by all the parties concerned during the last 40 years. We do not find any cogent reason for disturbing the existing state of things.

Turning now to the question of possession, we may say at once that there is not an iota of evidence to prove that Farid's branch was ever in possession of more than one-third share of *taraf* Mali which was its own property. Indeed Mr. Shafi was unable to point out any evidence on the record to show that Farid's descendants have ever been in possession of any part of Mir's lands. He, however, drew our attention to some oral and documentary evidence which need not be specified here but which certainly goes to show that the descendants of Hadait and Narang have held possession of, and paid revenue for, one-third of the total area of *taraf* Mali. This state of affairs fits in to some extent with the contention put forward on behalf of the plaintiffs that Mir's estate was inherited equally by his brothers' descendants, and that Farid's branch consequently became owner of one-half of *taraf* Mali and Amir's descendants got the other half, and hence the descendants of Hadait and Narang between themselves got two-thirds of one-half, *i.e.*, one-third of Mali's estate. On the other hand, there is the rival theory that Nathu's sons having got the whole of the estate of Mir allowed their cousins, *i.e.*, the descendants of Hadait and Narang, to occupy the entire one-third share which was owned by Amir, and that their possession was permissive and not intended to disturb the rights of ownership as recorded in the revenue papers. In support of this theory is the important fact that Farid's descendants have been in possession of only one-third of *taraf* Mali which is their ancestral share and have not possessed one-half of the *taraf*, to which they would be entitled if Mir's land was inherited by his brothers in equal shares.

The statement of Qasim at page 18. on

which the learned Counsel for the appellants has strongly relied, lends colour to his contention that the descendants of Hadait and Narang have been in possession of one-third share of the entire *taraf*, but in view of what has been said above we are inclined to think that the witness's statement does not advance the appellants' case. Qasim stated that he had been giving produce of one-third share which belonged to Amir (not Mir as the District Judge thinks) to Sarang and Shadad etc., and receiving the revenue for the years in which he gave produce. This, he said, he did because Sarang, etc., were his relatives. We are of opinion that this statement is consistent with the version of the defendants and cannot be invoked to support the plaintiffs' case.

The evidence on the record is insufficient to enable us to determine the exact length of the period, whether continuous or intermittent, during which the descendants of Hadait and Narang held possession of the total area of Amir's estate, but the possession in these circumstances cannot ripen into ownership. Indeed the learned Counsel for the appellants has contended, and we think rightly, that in a joint holding the possession of one co-sharer is the possession of all the co-sharers and in the absence of a clear and unequivocal overt act, the possession of a joint owner cannot be regarded as adverse to his co-owners.

We, therefore, hold that the defendants became owners of one-third share which belonged to Mir on the latter's death and have all along been in possession of it. They are also owners of one-ninth, the paternal estate of their father, Nathu, which appears to have been in possession of the descendants of Nathu's brothers for some years, but their possession was permissive and in their capacity as co-sharers. The defendants' right of ownership in one-ninth share has not, therefore, been extinguished. In view of these findings, it is unnecessary to decide the questions of estoppel and limitation.

The result is that we maintain the decree of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 146 OF 1913.

July 27, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

RAM GOPAL SEN—DEFENDANT—APPELLANT

versus

ABHOYA CHARAN GHOSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement—Easement of necessity—Use of way, absolutely necessary, whether constitutes—Obstructing right of way for boats—Non-user for two years—Suit, if barred—Limitation Act (IX of 1908), *s.* 26.

The fact that it is absolutely necessary for a person to have the use of a way, does not constitute an easement of necessity.

Where a plaintiff sues for obstructing the right of way for boats in the rainy season, the non-user of the way within two years previous to the institution of the suit is no bar under section 26 of the Limitation Act.

Koylash Chunder Ghose v. *Sonatun Chung Barooie*, 8 C. 132; 4 Shome L. R. 144; 8 C. L. R. 281; 5 Ind. Jur. 642, followed.

Chuni Lal v. *Ram Kishen Sahu*, 15 C. 460, referred to

Appeal against the decree of the Subordinate Judge, third Court, Tipperah, dated the 29th June 1912, affirming that of the Munsif, 5th Court at Comilla, dated the 30th May 1911.

Babus *Kritanta Kumar Bose* and *Bepin Chandra Bose*, for the Appellant.

Babu *Jatindra Mohan Ghose*, for the Repondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for removal of a certain obstruction in a temporay water-course, which flows over the defendant's land in the rainy season and enables passengers in small boats to pass and catch fish which are the common property of the tenants who live on the bank, and occasionally large boats of 200 to 250 maunds bearing merchandise come up to the plaintiff's house and to the house of the defendants and possibly of some other persons, though no other persons are mentioned in the suit. The learned Munsif found that there was a right of way by prescription and he also, as frequently happens in the Courts in this country, stated that it was absolutely necessary for the plaintiff to have use of this way and although he does not say so, as the learned Judge does, he seems to have erroneously supposed that this constitutes an easement of necessity. Of course it does nothing of the kind, but his finding of easement by prescription is quite sufficient and this finding has been upheld by the

learned District Judge in appeal, although the learned Judge has indulged in some erroneous views of law on the question of easement of necessity.

The principal point raised by the defendant in this appeal is that the suit was barred by two years' limitation, by reason of the fact that in the year 1314 the defendant so far narrowed the water-course as to make it 2 or 3 cubits instead of 5 cubits, which had the effect of preventing large boats laden with merchandise from coming up to the plaintiff's house. But it is found as a fact that until the year 1316 the water-course was not altogether blocked and the right of the plaintiff continued to go himself and to bring such boats as he could. The suit having been brought in 1317 the lower Courts appear to be right in holding that the right of bringing boats and going up the water-course and catching fish is clearly not barred.

But it is urged that at any rate the passage of big boats laden with merchandise is barred by reason of the partial obstruction in 1314. That this is not so is clear from the explanation to section 26 of the Limitation Act which says, "Nothing is an interruption within the meaning of this section unless where there is an actual discontinuance of possession or enjoyment by reason of an obstruction by the act of some person other than the claimant;" and it was pointed out by Garth, C. J., in the case of *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1) that where the plaintiff sued for obstructing the right of way for boats in the rainy season, the non-user of the way within two years previous to the institution of the suit was no bar, and the learned Chief Justice pointed out that illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the section in its ordinary sense would confer. There is nothing in the Full Bench ruling in *Chuni Lal* v. *Ram Kishen Sahu* (2), which is the leading case on the subject of easements, which in any way traverses the finding in that case. That case was not cited before the Full Bench, nor had the question before the Full Bench anything to do with it. It is a particular form of easement which is as far as we know only dealt with by Garth, C. J., in this particular ruling; and it is clear on that authority which is binding upon us, that the two years' rule in section 26 does not apply to this case; although we have held that even if it did apply, it would have no force having regard to the fact that the enjoyment was not discontinued till within one year of the suit. As we have found that both the Courts have found as a fact that the prescription of 20 years is fully established, the appeal must be dismissed with costs.

Appeal dismissed.

(1) 7 C. 132; 4 Shome L. R. 144; 8 C. L. R. 281; Ind. Jur. 642.

(2) 15 C. 460.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 116 OF 1912.

April 27, 1914.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

MED SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat KABIR-UN-NISSA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Appeal by several persons—Death of one of them—Failure to bring on record his representatives within limitation—Partial abatement, effect of.

Where an appeal is preferred by several persons against a decree passed against them on grounds common to all and one of them dies, the failure to bring on record his legal representatives within the period of limitation causes the appeal to abate so far as the deceased is concerned, but this partial abatement does not prejudice the appeal of the other appellants, as under Order XLI, rule 4, of the Civil Procedure Code any one of the appellants is empowered under the circumstance to appeal against the whole decree.

Second appeal from the decree of the Divisional Judge, Hissar Division, dated the 23rd November 1911, reversing that of the District Judge, Rohtak, dated the 21st May 1910, dismissing plaintiff's claim.

Bakhshi *Gokal Chand*, for the Appellants.

Mr. *Sundar Das*, for the Respondent.

JUDGMENT.—The plaintiff, who is recorded in the revenue papers an occupancy tenant of the land in dispute, has brought the present suit against the recorded proprietors for a declaration that she is owner of land and that the entry in the revenue papers giving her the

status of occupancy tenant is incorrect. The Court of first instance dismissed the suit, but it was decreed on appeal by the Divisional Judge. The defendants who are more than thirteen in number have preferred a further appeal to this Court and Mr. Sundar Das, on behalf of the respondent, has raised a preliminary objection to the hearing of the appeal that as the application to bring on the record the representatives of Hira was made after the expiry of six months from the date of his death, the appeal has abated. It appears from the copy of an extract from the death register that Hira died on the 4th April 1912, and the application to implead his heirs was not made till the 30th May 1913. On these facts, it is clear that the appeal abates so far as the deceased Hira is concerned, and the question arises whether this partial abatement involves the dismissal of the appeal of the remaining appellants. Now, Order XLI, rule 4, provides that when the decree appealed from proceeds upon a ground common to several plaintiffs or defendants, any one of them may appeal from the whole decree and the Appellate Court may, thereupon, reverse or vary the decree in favour of all the plaintiffs or the defendants. The decree in the present case undoubtedly proceeds upon a ground common to all the defendants, and it was, therefore, open to any one of them to appeal against it, and this Court would have been empowered to reverse or modify the decree in favour of all the defendants. The fact that all the defendants preferred a joint appeal does not, in our opinion, make any difference. If each of the surviving appellants could have appealed separately and asked this Court to interfere with the entire decree of the lower Court, we fail to see why the fact that he chose to join with others in filing one appeal should put him in a worse position. The partial abatement does not, therefore, produce any prejudicial effect and the appeal can proceed as if Hira had not been an appellant from the very beginning. This view of the law is in accordance with the judgments of the Bombay and Allahabad High Courts in *Chandarsang Verabhai* v. *Khimabhai Raghabai* (1); *Chintaman Nilkant* v. *Gangabhai* (2); *Ram Sewak* v. *Lambar Pande* (3). We, therefore, have no hesitation in overruling the preliminary objection.

The history of the land in dispute as gathered from the Revenue Records and other documents may be briefly stated. In 1851 the Nawab of Dadri and Bahadurgarh made a grant of the land to one Ilahi Bakhsh, the ancestor of the plaintiff, for the maintenance of a tomb. But the *sanad* does not clearly show whether the grant was of proprietary rights or of occupancy rights. The point is, however, immaterial, because in 1858 the estate was confiscated by the British Government and all rights in existence before the date of confiscation were extinguished. On the 17th March 1860, Ilahi Bakhsh put in an application praying that the settlement for the payment of land revenue be made with him, and this prayer was granted. But it is significant that in this application he described himself as *muzara maurusi*. In the Settlement of 1863 he was entered as an occupancy tenant and the village community were recorded as proprietors and in the Settlement of 1879, the entry was repeated and he was declared to be an occupancy tenant under section 5 in the *Naqshah tankih-i-haquq muzarian*. During the course of that Settlement the proprietors applied for enhancement of rent and *Musammat* Nasib-un-Nisa, the daughter and heir of Ilahi Bakhsh, applied for the correction of the revenue entry. The enhancement was disallowed on the ground that it could not be granted during the pendency of the Settlement and *Musammat* Nasib-un-Nisa was required by an order, dated the 23rd July 1875, to have her right declared by a Civil Court. No suit was, however, filed in pursuance of this order. During the last Settlement, the proprietors again applied for the enhancement of rent and succeeded in obtaining an order, on the 30th January 1909, enhancing the rent to four annas in the rupee in addition to the land revenue and the cesses. This order has led to the present suit.

The Courts below have disagreed on the points arising in the suit, namely, whether the suit is within limitation and whether the plaintiff has established her claim to ownership. We consider it unnecessary to give a finding upon the point of limitation because we are of opinion that the plaintiff's suit must fail on the merits. It will be observed that the entries in the Revenue

(1) 22 B. 718.
(2) 27 B. 284; 5 Bom. L. R. 90.
(3) 25 A. 27; A. W. N. (1902) 171.

BATEMAN v. BATEMAN.

Records of the three Settlements are against the plaintiff and there being a statutory presumption in favour of their correctness, the onus lies heavily on her to prove that they are wrong. The learned Divisional Judge seems to have been of opinion that the fact that the Settlement as to the payment of land revenue was made with Ilahi Bakhsh, proved that he was owner of the land. But we do not think that this circumstance is in any way inconsistent with his status as an occupancy tenant which, as already stated, he described himself to be in his own application of 1859. It appears that the plaintiff has not so far paid any rent beyond the land revenue and cesses, but there *are* occupancy tenants who do not pay any *malikana* to the landlord beyond the above-mentioned dues and they do not, on account of that fact, acquire the status of a proprietor. These two facts are, in our opinion, wholly insufficient to rebut the strong evidence afforded by the entries in the Revenue Records which have remained unaltered during the last fifty years.

There is another fact which we think goes against the contention of the plaintiff. We find from a copy of the mutation sanctioned on the 15th May 1893 that she executed on the 15th February 1896 a mortgage in favour of her agent, Syad Ali. This mortgage has not been placed on the record by Syad Ali or the plaintiff, but the mutation order clearly shows that the property mortgaged was the occupancy rights in the lands in dispute and that the plaintiff described herself therein as an occupancy tenant. This admission on her part and the omission to bring a regular suit to establish her title as directed by the order in 1875 go to show that she accepted the correctness of the entries in the revenue papers. Having regard to these facts we are of opinion that the Divisional Judge was wrong in holding that the plaintiff had established her case. We accordingly set aside the decree of the lower Appellate Court and restore that of the Court of first instance. Plaintiff must pay the costs of the appellants throughout the litigation.

Decree set aside.

CALCUTTA HIGH COURT.

MATRIMONIAL SUIT No. 21 OF 1913.

March 13, 1914.

Present:—Mr. Justice Chitty.

M. E. BATEMAN—PETITIONER

versus

G. E. BATEMAN AND ANOTHER—RESPONDENTS.

Divorce—Dissolution of marriage—Petition by husband—Parties of Indian domicile—Wife, security for costs of—Succession Act (X of 1865), s. 4.

In a case for the dissolution of marriage brought by a husband against his wife, where the parties are of Indian domicile and so subject to section 4 of the Indian Succession Act and where the wife has no separate property or means of her own, the Court can order the husband to give security for his wife's costs of the suit.

Proby v. *Proby*, 5 C. 357; 5 C. L.R. 1; 5 Ind. Jur. 248, *Young* v. *Young*, 23 C. 916 note, *Thomas* v. *Thomas*, 23 C. 913, *Thomson* v. *Thomson*, 14 C. 480, *Watling* v. *Watling*, (unreported), *William Parry Jahans* v. *Alexandria Louise Jahans*, 36 C. W. N. 414, *Mayhew* v *Mayhew*, 19 B. 293, referred.

Mr. *Langford James*, for the Respondent.

Mr. *P. L. Buckland*, for the Petitioner.

JUDGMENT.—In this case the petitioner, M. E. Bateman, prays for a dissolution of his marriage with the respondent, G. E. Bateman, on the ground of her adultery with the co-respondent, A. S. Nicachi. The present application is presented by the respondent, asking that the petitioner may be required to give security for a sum to meet her costs of suit. The parties are domiciled in this country, and it is conceded that the petitioner's income is Rs. 450 a month and that he is at present making his wife an allowance of Rs. 75 a month. It is not suggested that she has any separate property or means of her own. The application is resisted by the petitioner, and his Counsel relies on the case of *Proby* v. *Proby* (1). In that case it was held that such an order should be made under special circumstances only; but I do not read that judgment as altogether debarring this Court from the exercise of the discretion which it must undoubtedly exercise in deciding applications of this nature. The principle in *Proby* v. *Proby* (1) was followed, though not without some hesitation and reservation, by Pigot, J., in *Young* v. *Young* (2) and by Ameer Ali, J., without comment in *Thomas* v. *Thomas* (3). It was distinguished by Trevelyan, J., in *Thomson* v. *Thomson* (4) and was accepted by

(1) 5 C 357; 5 C. L. R. 1; 5 Ind. Jur 248.
(2) 23 C. 916 note.
(3) 23 C. 913.
(4) 14 C. 580.

Pugh, J., in the case of *Watling* v. *Watling*, unreported, but that was a petition by the wife against the husband, in which somewhat different considerations might arise. The case of *William Parry Jahans* v. *Alexandria Louise Jahans* (5) is no authority for either contention, as the learned Judge expressed no opinion on the point. It is noteworthy that by the passing of the Married Women's Property Act, 1882, the reason underlying the decision in *Proby* v. *Proby* (1) has been removed. Notwithstanding the passing of that Act, the rule still obtains in England that, generally speaking, the husband will be required to provide for the wife's costs. This was pointed out by Farran, J., in *Mayhew* v. *Mayhew* (6). From inquiries I find that security has been ordered in a very large number of cases in this Court notwithstanding the ruling in *Proby* v. *Proby* (1). Indeed it would appear that such orders are still rather the rule than the exception. It is true that in many of such cases there may have been no contest. This appears to me to be eminently a case in which such an order should be passed. To withhold it might be equivalent to shutting out the wife's defence altogether. I accordingly order that within a fortnight from this date the petitioner do furnish security to the satisfaction of the Registrar for a sum of Rs. 400 to meet the costs of the respondent. The petitioner must pay the respondent's costs of this application.

Attorneys for the Petitioner:—Messrs. *Watkins & Co.*

Attorneys for the Respondent:—Messrs. *Leslie & Hinds.*

(5) 6 C. W. N. 414.

(6) 19 B. 293.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1574 OF 1912.

October 21, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

RUKMANI SUNDARAMMAL—PLAINTIFF—APPELLANT

versus

MUTHAMMAL AND OTHERS—DEFENDANTS Nos. 1 TO 4—RESPONDENTS.

Minor's property—Sale by guardian—Consideration partly for legal necessity partly not—Suit to set aside sale, when to be decreed—Conditions—Partition, if allowed between alienee and minor.

If in a suit by a minor to recover possession of the properties alienated by his guardian, it is proved that a substantial portion of the purchase-money was not required for the minor's interests or benefit, the whole sale should be set aside on condition of the minor paying to the purchaser the remaining portion, but if a very substantial portion of the purchase-money was utilised for purposes binding on the minor, the sale should be upheld and the minor given a decree for recovery of the small portion of the purchase-money not utilised for his benefit.

Kaliappa Gounden v. *Deivasigamani Pillai*, 18 Ind. Cas. 27; (1913) M. W. N. 795, *Thalagara Rammanne* v. *Kalagare Gangayya*, 26 Ind. Cas. 178; 27 M L. J. 132, followed.

In such a case there can be no decree for partition between an alienee and a minor who has attained full age in respect of land sold by the guardian of the minor.

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 225 of 1909, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 368 of 1907.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *T. R. Krishnaswamy Aiyar*, for Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is a widow who was still a minor when this suit was brought by her next friend in the year 1907. Her father as guardian sold certain properties for Rs. 1,425 about $3\frac{1}{2}$ months before this suit was brought, that is on the 25th January 1907. The sale was made to the 3rd defendant. The suit was for the recovery of possession of the properties so sold to the 3rd defendant as well as certain other properties. In this second appeal, we are only concerned with the properties sold to the 3rd defendant. The plaintiff is the appellant in this second appeal.

The lower Appellate Court found that the plaintiff's father had no necessity to sell the entire properties, *i. e.*, 4 acres of wet land and 4 acres of dry land, and that the sale of the said properties was not beneficial to the minor's interests. The District Judge's findings are (*a*) that only Rs. 680 was required to discharge the antecedent debts left by the minor's husband and to meet the plaintiff's husband's sister's marriage expenses, (*b*) that a sale of one-half of the properties mentioned in Exhibit I would have

been sufficient to meet those necessities. On the above findings the sale under Exhibit I was set aside as regards one-half of the properties sold under it. The learned District Judge gave the following directions in his decree in addition to the provisions in the decree of the District Munsif: (*a*) The plaintiff do recover from the defendants one-half of the lands sold by the plaintiff's father to the 3rd defendant under Exhibit I (excluding item I of the B schedule which, though included in the sale-deed, was stated by the 3rd defendant to have been included in his sale-deed by mistake and which was decreed wholly to the plaintiff by the District Munsif); (*b*) that the plaintiff be declared liable to pay maintenance to the 1st defendant; (*c*) that the division of the lands into two shares do take effect in June and July 1907, and (*d*) that the mesne profits be determined at the time of execution.

The contentions urged before us by Mr. L. A. Govindaraghava Aiyar for the plaintiff are (1) that the lower Court erred in its declaration as regards the plaintiff's liability to grant maintenance to the 1st defendant as the question did not arise for consideration in the present suit, (2) that on the view of the lower Appellate Court that only a portion of the consideration for Exhibit I was required in the interest of the minor plaintiff, the lower Appellate Court ought to have only directed the re-payment of the same to the 3rd defendant but ought not to have upheld the sale as regards one-half of the properties.

The first contention is clearly right, as the questions whether the 1st defendant was entitled to claim maintenance from the plaintiff, the extent of that claim and whether it has been already satisfied either wholly or in part—these questions have nothing to do with the present suit which was brought by the plaintiff as her husband's heir for possession of the properties illegally enjoyed by the defendants.

As regards the other contention, the respondent's learned Vakil has been unable to refer us to any precedent in support of the course taken by the District Judge, namely, the setting aside of a sale-deed executed by a minor's guardian so far as a portion of the properties contained in such sale-deed is concerned, upholding the sale as regards the other portion contained in the same sale-deed. In *Kaliappa Gounden* v. *Deivasigamani Pillai* (1) Benson and Sundara Aiyar, JJ., held that, where a minor whose lands were sold for Rs. 850 benefited only to the extent of Rs. 300 by the sale, the sale should be set aside in its entirety and the minor should be decreed possession of the property conditionally on his paying the Rs. 300 to the purchaser. In *Thalagara Rammanne* v. *Kalagare Gangayya* (2), Miller and Tyabji, JJ., held that where a sale effected under two conveyances for Rs. 1,300 by a Hindu widow was supported by necessity to the extent of Rs. 1,022, the purchaser was entitled to retain the lands conveyed under both sale-deeds, directing him however to pay the reversioners the balance of Rs. 278 with interest at 6 per cent. per annum from the date of the death of the widow. It will be seen from these and similar precedents that according to the circumstances, the relief granted to the plaintiff takes either of two shapes, namely, either the whole sale complained of is set aside, on condition of the plaintiff's paying to the purchaser that portion of the purchase-money which was utilised for purposes binding on the plaintiff, or the plaintiff, while refused the relief of setting aside the sale, is given a decree for that portion of the purchase-money which was not utilised for his benefit. Where a substantial portion of the purchase-money was not required for the plaintiff's interests or benefit, the whole sale is set aside on condition of the plaintiff's paying to the purchaser the remaining portion. Where, however, a very substantial portion of the purchase-money was utilised for purposes binding on the plaintiff, the sale is upheld, but the plaintiff is given a decree for recovery of the small portion of the purchase-money not utilised for his benefit.

In the present case, the learned District Judge finds that only Rs. 680 of the Rs. 1,425 mentioned in Exhibit I as the purchase-money was required and utilised for purposes beneficial to or binding on the plaintiff. In arriving at the figure Rs. 680, the District Judge seems to have committed a slight arithmetical error, into which he was apparently led by the admission of the plaintiff's own Vakil who argued the case

(1) 18 Ind. Cas. 27; (1913) M. W. N. 795.
(2) 26 Ind. Cas. 178, 27 M. L. J. 132.

before the District Judge. In paragraph 3 of his judgment the learned District Judge says that Rs. 1,425 is made up of (1) a debt of Rs. 160 to the Town Bank, (2) a debt of Rs. 125 to one Venkatarama Sastri, (3) Rs. 220 for the expenses of the forthcoming marriage of the sister of the plaintiff's husband and (4) Rs. 415 said to be due on accounts to the 2nd defendant, and he professes to take these four figures from the consideration portion of the sale-deed Exhibit I (besides a sum of Rs. 525 for which a pro-note was executed). But turning to that consideration portion, I find that it is not Rs. 220, but only Rs. 200, which is mentioned as required for the expenses of the forthcoming marriage of the sister of the plaintiff's husband. The lower Appellate Court makes up this Rs. 680 evidently thus: (1) due to the Town Bank Rs. 160, (2) due to one Venkatarama Sastri Rs. 125, (3) required for marriage expenses Rs. 220 and (4) due to 2nd defendant on accounts (Rs. 415 the figure arrived at on the accounts *minus* Rs. 231 barred) Rs. 184. Total Rs. 689 or roughly Rs. 680. If we substitute Rs. 200 for Rs. 220, the correct figure is Rs. 669. The 1st to 3rd respondents in their memorandum of objections contend that the lower Appellate Court's finding that only Rs. 184 of the sum of Rs. 415 was not barred by limitation is erroneous.

I think this contention is sound. Rupees 415 is the sum due on the accounts only after deducting Rs. 93 given up by the 2nd defendant, husband of the 3rd defendant. The arbitrator's award shows that Rs. 508 is the real sum due on the accounts and that Rs. 415 is arrived at after deducting the Rs. 93 given up by the 2nd defendant. The Rs. 231 barred by limitation is a part of this total sum of Rs. 508 and not merely a part of the balance of Rs. 415 arrived at by deducting Rs. 93 out of Rs. 508. The plaintiff gave up Rs. 93, therefore, out of the whole Rs. 508 and hence the sum due to him on the accounts excluding what is barred by limitation, is Rs. 508 *minus* Rs. 231 or Rs. 277, and not Rs. 415 *minus* Rs. 231 or Rs. 184 only. Hence the correct amount is Rs. 160 *plus* Rs. 125 *plus* Rs. 277 or Rs. 762 and not merely Rs. 680 or Rs. 669.

It appears from the evidence that the balance of the purchase-money (Rs. 1,425 *minus* 762 *i. e.*, Rs. 663) was not even paid in cash by the 2nd and 3rd defendants to the plaintiff's guardian, but a pro-note seems to have been executed for Rs. 525 to him. I do not think that in these circumstances the purchaser is entitled to have the sale confirmed. But I think that the sale should be wholly set aside on condition of plaintiff's paying Rs. 762 within three months (to be paid to the 2nd and 3rd defendants).

As regards the memorandum of objections, it embodies three conditions: (1) that the whole sale to the 3rd defendant should be upheld in its entirety, (2) that not only Rs. 184 but Rs. 277 should be held to be the sum due under the accounts even excluding the Rs. 231 barred, (3) that as an arbitrator has held that Rs. 415 was due on the accounts, the lower Courts should have held that Rs. 415 was so due even though Rs. 142 (Rs. 231 *minus* Rs. 93) out of the said Rs. 415 was barred by limitation.

For the reasons already given, I think that the whole sale should be set aside and hence the first contention could not be allowed. The second contention must be upheld. As regards the third contention, the only matter referred to arbitration was what sum was due on the accounts *as they stood* and not what sum was *legally* due by the plaintiff to the 3rd defendant on the accounts. The arbitrator refused to go into the question of the bar of limitation and he deducted Rs. 93 out of Rs. 508, not because it was part of the sum of Rs. 231 barred by limitation, but because the 2nd defendant gave it up at the time of Exhibit I.

In the result, in supersession of the lower Court's decree the plaintiff will be given a decree (1) for possession unconditionally of item I in the B schedule, (2) for possession of the other items in the B schedule on condition that she pays into Court within three months from this date the sum of Rs. 762 to be paid to the defendants Nos. 2 and 4, (3) that on her becoming so entitled to possession she be also given a supplemental decree for mesne profits, after due inquiry from the date of payment of Rs. 762 into Court till delivery in execution, from the defendants Nos. 2 and 3 as regards lands other than item 1, (4) that she get mesne profits from the

5th defendant on item 1 for the period claimed in the plaint to be determined by a supplemental decree, (5) that the 5th defendant do pay proportionate costs in the District Munsif's Court to the plaintiff as found in the District Munsif's decree and (6) that plaintiff do bear her own costs in other respects as also defendants Nos. 2 and 3. It is declared that in the pro-note for Rs. 525 standing in plaintiff's father's name, plaintiff has no interest whatever.

NAPIER, J.—I entirely concur in my learned brother's view that there can be no decree for partition between an alienee and a minor who has attained full age, in respect of land sold by the guardian of the minor. There is not a trace of the exercise of such a jurisdiction by the Court of Chancery nor in the two decisions of the Privy Council *Hanoomanpersaud Panday* v. *Musammat Babooee Munraj Koomwaree* (3) and *Lalla Bunseedhur* v. *Kunwar Bindeseree Dutt Singh* (4). In the latter case the Board laid down that where there is an innocent purchaser, the Court exercising equitable jurisdiction may withhold its hand (in which case, of course, the remedy of the minor would be against the guardian), but "where the alienee has failed to relieve himself of the burden which the law casts upon him of showing that he had good grounds for supposing that the transaction was for the benefit of the estate, then the instrument cannot be supported." The only remaining question is, on what terms is the Court to intervene in the minor's favour? In the case above quoted the Board decided that restoring the property to the respondent on the terms of paying to the appellant what may be justly due to him was a more equitable course than what was proposed in that case on behalf of the alienee. I take that in the view of the Board that is the proper method. In this case it is obvious that an alienee who in respect of part of the purchase-money gave personal security instead of cash cannot have thought that the transaction was for the benefit of the estate. The lower Appellate Court has found that Rs. 680 out of the Rs. 1,425 was required and utilised for purposes binding on the minor. There is no finding that any larger sum could be allowed on the ground that the alienee had good reason for believing it to be required, and in fact not much more could be claimed as Rs. 680 added to Rs. 525, the amount of the promissory-note, is Rs. 1,205 as against the total consideration of Rs. 1,425. Speaking for myself I should accept the figure of Rs. 680, but my learned brother has seen his way to go into the question of the correctness of the figures and though I have doubts whether we have any jurisdiction to do anything of the sort [*vide* the decision of the Privy Council in *Ravi Veeraraghavulu* v. *Sri Raja Bomma Devara Venkata Narasimha Naidu Bahadur* (5)] I will not differ from him and I, therefore, concur in the decree set out in the judgment just delivered.

Appeal allowed.

(3) 6 M. I. A 393; 18 W. R. 81; 19 E. R. 147; Sevestre 253 *n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552.

(4) 10 M I.A. 454; 19 E. R. 1044; 2 Sar. P. C. J. 167.

(5) 25 Ind. Cas. 305; (1914) M. W. N. 695; 16 M. L. T 262; 1 L. W. 779; 27 M. L. J. 451; 20 C. L. J. 375; 37 M. 443; 19 C. W. N. 97; 16 Bom. L. R 853.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1330 OF 1912.

October 31, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

ATA MUHAMMAD KHAN—PLAINTIFF—APPELLANT

versus

Musammat JIWANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession - Presumption — Onus — Barki Sayads of Basti *Pirdad Khan, Jullundur District—Daughters, whether exclude nephews.*

The presumption according to Customary Law being in favour of the exclusion of a daughter by a near collateral, the onus is on the daughter to prove an exception to this rule.

Among Barki Sayads of *Basti* Pirdad Khan, Jullundhur District, a daughter succeeds to the ancestral estate of the father to the exclusion of his nephews.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 1st May 1911, affirming that of the Subordinate Judge, first Class, Jullundur, dated the 3rd October 1910, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Sheikh *Umar Bakhsh*, for the Appellant.

ATA MUHAMMAD KHAN *v.* JIWANI.

Mr. *Fazl-i Hussian*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to succession to the estate of one Alaf Khan, a Barki Sayad of *Basti* Pirdad Khan, one of the several *bastis* in the neighbourhood of the town of Jullundur. The property, which is the subject-matter of the litigation, is a house and the contest is between Alaf Khan's daughters, who are in possession thereof, and his nephew, Ata Muhammad, whose suit for possession has been dismissed by both the Courts. The learned Divisional Judge has found, and the finding has not been challenged before us, that the property is ancestral *qua* the plaintiffs, and both the Courts have concurred in holding that in the tribe of the parties a custom by which a nephew is excluded by a daughter from succession to the ancestral immoveable property of a deceased proprietor, has been established. The Courts below have, therefore, dismissed the plaintiff's suit.

From the decree dismissing his suit, the plaintiff has preferred a further appeal to this Court, and we have heard the case argued at length by Mr. Muhammad Shafi for the appellant and Mr. Fazl-i-Hussain for the respondents, and have arrived at the conclusion that the judgments and decrees of the lower Courts are correct and that this appeal must be dismissed.

The parties are admittedly governed by custom and the sole question, which requires determination in this appeal, is whether by custom obtaining among Barki Sayads of *Basti* Pirdad Khan a daughter is entitled to succeed to her father's ancestral property to the exclusion of her father's nephew. According to the rule of the Customary Law generally applicable to agricultural tribes in this province, the presumption, at the outset, is in favour of the exclusion of a daughter by a near collateral and the onus is on the daughter to prove an exception to this rule. We have carefully examined the evidence, both oral and documentary, and are of opinion that there is ample material on the record to justify an affirmative finding in favour of the custom set up by the respondents.

To start with, the *Riwaj-i-am* is in favour of the defendants-respondents. According to this document (1) in two tribes, *i.e.*, Arains and Sheikh Ansaris, daughters, in the absence of the sons, can succeed under written authority of their father and without such written authority, daughters are only to be excluded by collaterals up to the 5th degree, but (2) in the two tribes—Afghan Lodhi and Sayad Barki (*i.e.*, the tribe of the present parties), daughters succeed in the absence of male issue to the exclusion of all collaterals without written authority from their father. Judging from the manner in which the customs of the different tribes are stated and differentiated, we are inclined to attach very great weight to this record of custom. This entry in the *Riwaj-i-am* has, moreover, a special value as it gives expression *ante litem motam* to the opinion of males in favour of the rights of females; *vide* the observations of a Division Bench of this Court in *Achhar Singh* v. *Mehtab Singh* (1). Further, it is to be borne in mind that the tribe is an endogamous one and though the record does not clearly show whether the defendants in the present case are married in the family, the fact that two of them are married in this *Basti*, the Sayads of which are descended from a common ancestor, lends support to the allegation that their husbands are collaterals of their father.

In these circumstances, we are inclined to take the view that, in accordance with the principle enunciated in several judgments of this Court [vide, *inter alia*, *Hem Raj* v. *Sabiba* (2); *Sheran* v. *Sharman* (3)], the entry in the *Riwaj-i-am*, standing by itself, would be quite sufficient to shift the onus on to the plaintiff. But in the present case, the defendants have also adduced several instances in support of their right of succession which have been set out *in extenso* in the judgment of the Court of first instance. Without going outside the family of the parties, we find there are five clear instances in this family in which daughters have succeeded to the property of their fathers to the exclusion of the nephews. They are as follows :—(1) *Musammat* Daulat Bibi, the grandmother of the plaintiff and

(1) 81 P. R. 1907; 134 P. L. R. 1908.
(2) 116 P. R. 1901; 178 P. L. R. 1901.
(3) 117 P. R. 1901; 182 P. L. R. 1901.

the mother of the deceased Alaf Khan, inherited the estate of her father, Kadar Dad Khan, in the presence of the latter's nephews. (2) *Musammat* Piar Bano, her first cousin, succeeded to her father to the exclusion of the nephews, Hayat Khan and Sher Dad. (3) *Musammat* Piar Bano's daughter, *Musammat* Umran, succeeded after her in the presence of near collaterals. (4) *Musammats* Chanan and Sahib Bibi succeeded to the property of their father, Mirza Ali Khan, in the presence of his nephew, Abas Ali Khan. (5) *Musammat* Gul Bibi and her two sisters inherited the estate of their father, Mohkam-ud-Din to the exclusion of his nephews. The extracts from the pedigree-tables set out in the judgment of the learned Divisional Judge and other oral and documentary evidence clearly established the fact that in the above cases daughters succeeded in preference to nephews.

The *Riwaj-i-am*, supported by these instances in the plaintiff's family, is, in our opinion, quite sufficient to prove the case of the defendants, and we do not think it necessary to labour the point by noticing other instances which have occurred among Barki Sayads of other *Bastis* and which have been detailed in the judgment of the learned Subordinate Judge. We must, however, mention here an unreported judgment of this Court which was not cited before us by the learned Counsel for the parties, but which has an important bearing on the present case. In the case of *Azmat Ali and others* v. *Musammats Abdan and Umra* (Case No. 906 of 1866) the plaintiffs, who were nephews and grand-nephews of a deceased proprietor, contested the right of his widow to make a gift of his estate to his daughter's son. It was held by the Commissioner of Jullundur, after an inquiry on remand and by this Court on appeal, that the gift was valid. This judgment is cited with approval in *Bunyad Ali* v. *Faiz Muhammad* (4) and seems to support the case set up by the defendants.

The defendants have thus made out a very strong case and there is absolutely no rebuttal thereof by the plaintiff. A few instances were, it seems, relied upon by him before the lower Courts, but they were, on examination, found to have no bearing on the issue between the parties. In this Court, the learned Counsel for the appellant has not even referred to them and we must, therefore, assume that they do not support his contention. We accordingly find that the defendants have satisfactorily proved that, in the tribe of Barki Sayads of *Basti* Pirdad Khan, a daughter succeeds to the ancestral estate of her father to the exclusion of his nephews. We, therefore, affirm the decree of the Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

(4) 173 P. R. 1889.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 256 OF 1912.

May 7, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

DURGA PRASAD PANDE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FATEH BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Custom—A share of a mahal *confiscated by Government—Custom already prevailing in the* mahal, *whether affected by confiscation*—"Karibi wa khandani," *whether a widow related through a female is.*

The confiscation of a share in a *mahal* by the Government does not affect the custom of pre-emption which was in existence prior to the confiscation, and the grantee of the confiscated share has a right of pre-emption as against a stranger.

Where there is a preferential claim of pre-emption on the ground of the pre-emptor being both "*karibi wa khandani*" with the vendor, a Hindu widow whose relationship with the vendor is through a female and who is 12 degrees removed from the vendor, is not *karibi wa khandani* and has no preferential right.

First appeal from a decree of the Additional Judge of Gorakhpur, dated 11th April 1912.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Jang Bahadur Lal*, for the Respondents.

JUDGMENT.—This and the connected Appeal No. 257 of 1912 arise out of two pre-emption suits brought by rival pre-emptors to secure property in the village of Khartam Sarai, which was transferred by the defendant, Fateh Bahadur Singh, on the

8th of November 1910, to the second defendant, Pandit Govind Prasad.

The appellants in the present appeal are the plaintiffs, Durga Prasad Pande and Ganga Prasad Pande. Their case is that there is a custom of pre-emption prevailing in the village under which they have a right to pre-empt the property sold as against the vendee, Pandit Govind Prasad, who is an entire stranger to the village community. *Musammat* Adhar Kunwari, the plaintiff in the connected suit, is a co-sharer also in the *mahal*. She also pleaded the existence of a custom of pre-emption and claimed that she had a right preferential to that of the other plaintiffs, Durga Prasad and Ganga Prasad. Each set of plaintiffs was made a defendant to the other parties' suit.

The Court below has dismissed the suit of Durga Prasad Pande and Ganga Prasad Pande, on the ground that though there is a custom of pre-emption existing in the village, it is a custom which is enforcible only among the co-sharers owning 12 annas out of 16 annas in the *mahal*, that, therefore, these plaintiffs have no right whatever. as they own the other 4-annas share and that *Musammat* Adhar Kunwari has a right to pre-empt the whole. It came to a conclusion as to the true sale consideration and gave *Musammat* Adhar Kunwari a decree for possession conditional on the payment of the amount fixed within a certain period. Durga Prasad Pande and Ganga Prasad Pande have appealed in both cases. The vendee, Pandit Govind Prasad, has not appealed against the decree passed in favour of *Musammat* Adhar Kunwari. It is pleaded on behalf of the present appellants that the finding of the Court below that a custom of pre-emption does not extend to the owners of the 4 annas owned by these two appellants is incorrect, and that the evidence clearly shows that the custom applies to the whole village. They accept the amount of consideration found to be correct by the Court below, and they plead that *Musammat* Adhar Kunwari has no right to pre-emption in preference to their own; but they as co-sharers in the same *thok* with the vendor have a right preferential to her.

In the year 1833 when a settlement was made in the village, the whole village was owned by two branches of a family of Kayasthas. In the *Wajib-ul-arz* drawn up that year in clause 10 it was clearly set forth that a custom of pre-emption existed in the village under which no co-sharer could transfer to an outsider without first offering the property to the co-sharers of the village. The village consisted of two *thoks*. each of 8 annas. One *thok* was owned by Bhia Chitan Baksh and the other *thok* (Bakht Rai) by other members of the family, whose property was in the hands of mortgagees, Sarabjit Rai and others. At the time of the Mutiny, owing to rebellion on the part of Banke Behari Lal and another (two of the co-sharers owning a 4-annas share in one of the *thoks*) Government confiscated their 4-annas *undivided share*. The *Wajib-ul-arz* of the Settlement of 1860 shows that prior to that Settlement Government had bestowed this confiscated 4-annas share upon one Ram Prokash Pande. In the *Wajib-ul-arz*, at the commencement, are entered the names of the four co-sharers who were members of the Kayastha family, but in the opening preamble there is also mention made of Ram Prokash Tande and the fact of the grant to him by the Government. In paragraph 7 the co-sharers set forth that " We Kunj Behari, Ram Prokash and Bhia Suraj Bali Singh have been appointed *lambardars* by common consent." In paragraph 16 the co-sharers set forth the manner in which they collected the rents of the village. In clause 6 is set forth the custom of pre-emption. Under it if a co-sharer wishes to transfer his share, he was bound to offer it first of all to the co-sharers of the village before making any such transfer. The custom, it would seem, is exactly the same as set forth in the *Wajib-ul-arz* of 1833. There cannot be any doubt whatsoever that Ram Prokash Pande was a co-sharer at the time of that Settlement and that he was a party to the Settlement.

We next come to what is known as the *zamima khewat* drawn up in the year 1884 (at the last Settlement of the district). The 4-annas share which had been granted to Ram Prokash Pande was at that time in the hands of his descendants. In clause 2 of the *zamima khewat* is set forth a custom of pre-emption giving every co-sharer a right to transfer his share, subject to the condition that the first right of purchase will vest in one who is a near co-sharer and belongs to the family of the vendor; that the next right would vest in the co-sharer in the *patti* and the third, in the co-sharers in other *pattis*. It will be

noticed that this custom is an amplification of the simple custom which was set out at the two former Settlements. It will also be noticed that it gives a prior right to a co-sharer who is a member of the same family as the vendor. At this Settlement the co-parcenary body consisted of the Brahmans who owned a 4-annas share and the Kayastha who owned the remaining 12-annas share. The village still consists of two *thoks* of 8-annas each. The property which is the subject-matter of this suit is in that 8-annas *thok* in which the Brahmans own a 4-annas share. The share owned by *Musammat* Adhar Kunwari is in the other 8-annas *thok* in which the vendor has no share. The Court below has held, and, the same plea has been maintained before us, that by reason of the confiscation of the property of Chail Behari Lal and Banke Behari Lal the custom of pre-emption which was in existence prior to the confiscation, no longer applied to the ownership of the 4-annas share, and, therefore, when the Government granted this property to Ram Prokash Pande, Ram Prokash had no right of pre-emption whatsoever under the custom in any portion of the remaining 12-annas share. In the circumstances of the present case we do not think there is any force in this contention. In the year 1860 when Ram Prokash was a co-sharer in the village, the custom was set forth in exactly the same manner as it had been in the year 1833. In the year 1884 when the custom was again set forth but with considerably more detail, the Brahmans were still co-sharers in the village and the fact that the prior right of pre-emption was given to the co-sharers of the same family, is a strong indication that when that *zamima khewat* was dictated by the co-sharers, the latter contemplated that property owned by members of the Brahman family ought to be transferred, and should go primarily, to another member of that family. In the present case the vendor was a member of the Kayastha family whose property had never been confiscated and whose property was still within the custom. The Brahman pre-emptors are co-sharers in the village and they come well within the custom as set out in the *Wajib-ul-arz*. In this view, in our opinion, the plaintiffs' claim as against the vendee, who admittedly is an entire stranger, ought to have been decreed subject to the right of the rival pre-emptor.

In regard to the contest between the rival pre-emptors, the question is which, if either of them, has a prior right to pre-empt. Ganga Prasad Pande and Durga Prasad Pande are co-sharers in the same *thok* as the vendor. *Musammat* Adhar Kunwari as noted already is a co-sharer in the other *thok*. She claims preference on the ground that she is both "*karibi wa khandani*" with the vendor. She put forth her own pedigree which is printed at page 20 of the respondents' book. Assuming it to be correct, on her own showing she is 12 degrees removed from the vendor, and such relationship as exists between them is through a female, the daughter of Lalji, the son of the common ancestor Kesri Singh. As ordinarily understood she could hardly be called a *khandani*, but even assuming that the word has been used loosely, it would be impossible to say that she was *karibi*, being at least 12 degrees removed from the vendor. In our opinion she has failed to show that she has a preferential right, and as she is a co-sharer in another *thok* her rights are inferior to those of the appellants, Durga Prasad and Ganga Prasad.

The result of the appeal will, therefore, be that the claim of Durga Prasad and Ganga Prasad Pande for possession of the property sold is decreed conditional on their paying the sum of Rs. 6,066-7-0 into Court within a period of three months from to-day's date. If they so deposit the money they will recover their costs in all Courts. On the other hand if they fail to fulfil the condition, their suit will stand dismissed with costs in all Courts and in case of their default, *Musammat* Adhar Kunwari will have a further period of one month from the end of the period allowed to Ganga Parsad and Durga Prasad within which to deposit the sum of Rs. 6,200, which sum she had offered to pay to the vendee, if she wishes to take the property. If she fails to pay within the time allowed, her suit will stand dismissed with costs in all Courts. If she deposits the amount, then she will get her costs in the Court below from the vendee.

Decree varied.

CHARAGH DIN *v.* AHMAD DIN.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 416 OF 1910.

October 15, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

CHARAGH DIN—PLAINTIFF—APPELLANT

versus

AHMAD DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific performance—Agreement to sell—Subsequent sale to third party—Notice.

Where *A* and *B* agreed to sell a house to the plaintiff, receiving a certain sum as earnest money, and subsequently sold their respective shares in the house to *C*, who was proved to have notice of the agreement:

Held, that the plaintiff was entitled to a decree for possession and for registration of the sale-deed

First appeal from the decree of the District Judge, Lahore, dated the 6th January 1910, decreeing claim in part.

Pandit *Rambhaj Datta*, for the Appellant.

Mr. *Fazl-i-Hussain* and Moulvi *Ahmad Din*, for Charagh Din, Malak *Muhammad Hussain*, for Ahmad Din, and Lala *Tirath Ram*, for Mehr Din, Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are given clearly in the judgment of the lower Court. Briefly they are as follows. Ahmad Din and Mehr Din, defendants Nos. 1 and 2, agreed to sell a certain house to the plaintiff under written agreements, dated the 16th January and 15th June 1906. When the first agreement was written they received Rs. 700 as earnest money and agreed to take the balance, Rs. 5,300, within ten months. A penalty of Rs. 500 was provided for non-performance of the contract of sale. When the second agreement was written, a further advance of Rs. 300 was received by defendants Nos. 1 and 2, and they agreed to sell the house within two months and the penalty for non-performance was raised to Rs. 1,000. At the time when the agreements were executed, defendants Nos. 1 and 2 had a suit pending in regard to the house with one *Musammat* Mohlan, and the result of the suit was that she got one-third of the house and the defendants Nos. 1 and 2 the remaining two-thirds in equal shares. On the 15th of July 1908 Mehr Din sold his share to Charagh Din, defendant No. 3, for Rs. 3,000, and on the 22nd of August 1908 Ahmad Din sold his share to one Mehraj Din for Rs. 2,500. On the 7th of September 1908 Meharj Din sold this share also to Charagh Din, defendant No. 3. In this way Charagh Din became vendee of two-thirds of the house, and Charagh Din, plaintiff, has now brought this suit against Mehr Din, Ahmad Din and Charagh Din for possession after specific performance of his agreements with the two first named. He asked that he should be given this relief on payment of Rs. 4,000, but at the same time he expressed his willingness to pay Rs. 6,000 if so ordered by the Court.

The lower Court has held that Charagh Din, defendant No. 3, was a *bona fide* purchaser without notice of the agreement to sell to the plaintiff, and gave plaintiff a decree against Ahmad Din and Mehr Din for Rs. 1,000, earnest money, and Rs. 500, compensation for non-performance of their agreements to sell. Plaintiff has now appealed to this Court and has again asked for the specific performance of the agreements and for possession as against all the defendants.

Plaintiff produced a good deal of evidence upon the third issue, which dealt with the question whether the defendant No. 3 had notice of the agreement to sell to the plaintiff when he bought the shares of defendants Nos. 1 and 2. This is the only point which has been argued before us. Admad Din, defendant No. 1, gave evidence in support of the plaintiff and so did Bassu, Haji Allah Bakhsh, Muhammad Sadiq, Muhammad Bakhsh and Mahtab. The lower Court has brushed aside their evidence in a somewhat summary manner. It mentions one slight discrepancy between the statement of Haji Allah Bakhsh and that of Muhammad Sadiq and then says, "On consideration of this evidence I am of opinion that it is most unreliable." We have perused the evidence carefully and we can find no reason for disbelieving Ahmad Din, Bassu and Haji Allah Bakhsh. Bassu and Haji Allah Bakhsh agree as to the time of the conversation to which they depose. If their evidence be true, it shows that Charagh Din, defendant No. 3, knew perfectly well that defendants Nos. 1 and 2 had agreed to sell the house to the plaintiff. There is nothing in the evidence of Bassu and Haji Allah Bakhsh to

show that they were interested in the plaintiff, or hostile to the defendants, and we can find no reason for rejecting their evidence.

The learned District Judge has not stated on what grounds he considers their evidence unreliable. In regard to Ahmad Din also we cannot find any reason for disbelieving his evidence. He has all along admitted executing the agreements on behalf of the plaintiff, whereas Mehr Din has lied in saying that he did not execute them. We do not at all believe Mehr Din's statement that he put his thumb-mark on the agreement of the 16th of January 1906 under the impression that it was a simple bond for Rs. 700.

The lower Court is of opinion that the sale-deed by Ahmad Din to Mehraj Din seems to show that Meharj Din had knowledge of the agreement to sell to the plaintiff, but the sale-deeds by Mehr Din and Mehraj Din in favour of Charagh Din bear the opposite indication, if any. In regard to the sale-deed of Mehr Din in favour of Charagh Din, printed at page 6 of the paper-book, we find that the details of the consideration are suspicious. It was recited in the deed that Rs. 300 had been previously received as earnestmoney, that Rs. 2,000 had been received before the Registering Officer in currency notes, and that the remaining Rs. 700 had been left with the vendee by way of deposit for settlement with the creditors. The names of these creditors are not given and it has not been explained in any way why such a sum was left with the vendee for payment to the creditors. It is certainly unusual when a person sells property to leave part of the price in deposit with the vendee for payment of unsecured debts due to third parties. We could understand such a sum being left for payment to prior encumbrancers, if any. If Charagh Din, vendee, were aware of the agreement of Mehr Din and Ahmad Din to sell to the plaintiff and also of the fact that they had received from him Rs. 1,000 by way of earnest money, then it is easy to understand why this Rs. 700 was left in deposit with him. It is quite possible that the other Rs. 300 said to have been received as earnest money was never paid and this sum and the other sum of Rs. 700 may well have been retained by the vendee in order to meet any claim which might be made by the plaintiff. The oral evidence as to Charagh Din, defendant No. 3's conversations with certain witnesses and his attempts to get the other defendants to sell the house to him instead of the plaintiff appears to us quite natural and probable. We do not think it at all likely that Mehr Din and Ahmad Din sold the property to Charagh Din, defendant No. 3, without the latter being fully aware of their agreement to sell to the plaintiff.

We hold, therefore, that it is proved that Charagh Din, defendant No. 3, had notice of the agreement to sell to the plaintiff. We, therefore, accept the appeal and setting aside the decree of the lower Court we give plaintiff a decree for possession of two-thirds of the house as claimed on payment of Rs. 4,000, less Rs. 1,000, previously paid, and for registration of the sale-deed in his favour by defendants Nos. 1 and 2. The Rs. 3,000 will be paid to defendants Nos. 1 and 2 who will themselves settle with defendant No. 3. Plaintiff's costs in both the Courts will be borne by all three defendants.

Appeal accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1123 OF 1912.

August 5, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

KANAI LAL GHOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

BESIR PRAMANIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 93, 94, 95, 99—Common manager, appointment of, for part of estate, whether legal—Common manager, whether can be appointed without complying with formalities of the Act—Illegal appointment, effect of—Permanent lease granted by common manager without sanction of Judge, whether valid.

The Bengal Tenancy Act does not authorize the appointment of a common manager of a part of an estate.

An order of the District Judge making the appointment of a common manager is illegal if the formalities provided by section 95 of the Bengal Tenancy Act are not complied with and, therefore, a common manager so appointed does not acquire the statutory

KANAI LAL GHOSE *v.* BESIR PRAMANIK.

powers conferred on a common manager duly appointed under the Act.

A permanent lease granted by a common manager without the sanction of the District Judge is invalid

Second appeal from a decision of the District Judge of Pabna and Bogra, dated 5th February 1912, affirming that of the Sub-Judge, first Court at Pabna, dated 10th May 1911.

Babus *Brojolal Chackerbutty* and *Jotindra Nath Lahiri*, for the Appellants.

Babu *Soroshi Charan Mitra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment of the defendants, on the ground that they had been holding the disputed lands under a *chakran* tenure and that they had refused to render the services on the performance of which the continuance of this tenure depended. The defendants, amongst other things, contended that the suit was incompetent on the ground that it had been brought by the common manager who had not been appointed in accordance with law. Both the lower Courts have decreed the suit. In second appeal before us, it is contended by the learned Vakil for the appellants that the suit is incompetent and ought to be dismissed. Their principal grounds before us: The *first* ground is that the common manager who was the first plaintiff in this case was appointed in respect of a part of an estate and, therefore, was not competently appointed under the Bengal Tenancy Act. *Secondly*, he contends that the appointment was not in accordance with law, because all the formalities required by the law for the appointment of a common manager under section 95 of the Bengal Tenancy Act had not been observed. *Thirdly*, it is contended that the permanent lease granted, for the common manager in favour of the plaintiffs Nos. 2 to 11 was illegally granted in that it was not with the sanction of the District Judge. There are also other grounds taken but it is not necessary to go into them. We think it is sufficient for the disposal of this appeal to consider any one of these three grounds. On the first ground it is provided by section 93 of the Bengal Tenancy Act that when any dispute exists between the co-owners of an estate or tenure as to the management thereof, the District Judge may direct a notice to be served on all the co-owners etc., etc. Then section 95 also in clause (*a*) seems to indicate that the appointment is in respect of the estate. Section 99 also seems to contemplate that the appointment must be in respect of an estate or tenure. It is contended by the learned Vakil for the respondent that if the appointment may be made in respect of the whole of an estate, it may also be in respect of a part of an estate. The word "estate", however, is defined in the Act. Section 3, sub-section 1, says that the word "estate" means "land included under one entry in any of the general registers of revenue-paying lands and revenue-free lands prepared and maintained under the law for the time being in force by the Collector of a district etc., etc." It is admitted that in this case the appointment was in respect of a part only of estate No. 30. It appears that the co-sharers were in separate and peaceful possession of certain villages with regard to which there was no dispute. The dispute was confined to what was called the *ijmali* portion of the estate. There was a prayer for the appointment of a common manager in respect of the *ijmali* portion of the estate and the appointment was made accordingly. We think that the Bengal Tenancy Act does not authorize the appointment of a common manager of a part of an estate and we are supported in this view by the judgment of Rampini and Mookerjee, JJ., in the case of *Indu Bhusan Bose* v. *Annapurna Mitra* (1). With regard to the second ground, the application for the appointment of a common manager was made under section 93 of the Bengal Tenancy Act. The notices required by that section were served, but no order seems to have been made under section 94 *i.e.*, no order was made by the District Judge directing the co-owners to appoint a common manager. It is contended, however, that the order of the 21st of March 1907 does comply with this part of section 94. The order is, "I find the appointment of a common manager is necessary in this case. I order accordingly, that a common manager be appointed to supervise the works of the estate to which this petition relates." Now if this had been an order under section 94, there would have been a direction to the co-owners to make an appointment, which there is not in this

(1) 6 C. L. J. 216.

order, and nextly, if this had been an order under section 94, the next order would not have been and could not have been on the next day, *i.e.*, on the 22nd of March. Section 95 provides that "if the co-owners do not, within such period, not being less than one month after the making of an order under the last foregoing section, as the District Judge may fix in this behalf * * * *, the District Judge may, unless it is shown to his satisfaction that there is a prospect of a satisfactory arrangement being made within a reasonable time, direct that the estate or tenure be managed by the Court of Wards in any case in which the Court of Wards consents to undertake the management thereof; or in any case appoint a manager." There was no interval more than that of one day between the two orders and, therefore, there was no compliance with section 95 of the Bengal Tenancy Act. These formalities not having been complied with, we think that the order of the learned Judge making the appointment of the common manager was illegal and we are supported in this view of the case by the case of *Ganoda Kanta Roy* v. *Probhabati Dasi* (2). That was a case of an appointment by consent of parties and the learned Judges are reported to have said: "It is apparent that that was an order by consent of parties; in other words, it was an appointment by consent of parties, its validity, as it seems to us, resting entirely upon the consent of the parties, and upon nothing else, and not upon the statutory powers given to the District Judge by the Act, because the Act only gives the District Judge power where the formalities prescribed by the Act have been gone through, notices have been given and the periods fixed have elapsed, and the parties have not appointed a common manager." We think, therefore, that the appointment made in this case not being after the formalities required by the Act had been observed, was not competent and would not give the common manager so appointed the statutory power under the Act. Coming to the third ground, we find that in the order appointing the common manager it was provided in clause 6 that "he will not settle lands in *Kaimi Patni* or otherwise without the permission and instruction of the managing proprietors who will be appointed annually at a meeting of the owners to be held at Demra." It seems that such an appointment was made although we do not find much discussion on the point. It appears, however, that upon the proposal being made for the permanent settlement of the disputed land, an objection was made by some of the co-sharers and at the same time the manager applied for the sanction of the learned Judge. The learned Judge, however, thought that no sanction was necessary and that the permission of the managing committee was sufficient. Rule 3 of the High Court Rules framed under section 100 of the Bengal Tenancy Act provides that "no Manager shall have the power to sell or mortgage any property nor shall he grant or renew a lease for any period exceeding three years without the express sanction of the District Judge." The present lease, however, was granted without the express sanction of the District Judge and was, therefore, invalid. On these grounds, therefore, we think that the present suit was incompetent and ought to have been dismissed and it is, therefore, dismissed with costs in all the Courts.

Appeal allowed; Suit dismissed.

(2) 20 C. 881.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 64 OF 1913.

November 13, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BADRI PRASHAD—PLAINTIFF—APPELLANT

versus

Thakurain GAMBHIR KUNWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Evidence Act (I of 1872), ss 68, 71—Proof of document—Only living attesting witness denying execution—*Pardanashin *lady, dealings with, how conducted.*

Where the only living attesting witness of a document was illiterate and on being examined denied its execution:

Held, that the document could be proved by other evidence.

In case of dealings with the *pardanashin* ladies, it is very important to see that such ladies understand

what they are doing. It is also most important to see whether there was real consideration. It is not necessary that a lady should have actually signed a bond with her own hand. If she was illiterate she could not sign it. It is sufficient to find that the bond was executed in her name by some one whom she permitted to do so.

First appeal from the decision of the Subordinate Judge of Mainpuri, dated the 7th October 1912.

The Hon'ble Dr. *Sunder Lal* (with him Dr. *S. N. Sen*), for the Appellant.

Mr. *Sahwny*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought for foreclosure of a mortgage by way of conditional sale. The sum alleged to be due on foot of the mortgage is Rs. 12,557 and the mortgage is dated the 7th of January 1896. The principal defendant was one Thakurain Gambhir Kunwar, the alleged mortgagor. The other defendants were the representatives of a person who was alleged to be a prior mortgagee of the said property. The principal defendant pleaded that she did not execute the document sued on, that she received no consideration, that she was a *pardanashin* lady and that if any document had been executed on her behalf, she was not bound by it. The other defendants did not appear. The Court below has dismissed the plaintiff's suit. Hence the present appeal.

The alleged mortgage will be found printed at page 20 of the appellant's book. It commences by a recital of the ownership of *Musammat* Gambhir Kunwar, and states that the property was already mortgaged to one Ganpat Gopal to secure a sum of Rs. 1,500 with interest at 14½ annas per cent. per mensem and that it would be desirable to pay off that debt as the rate of interest was high. It further recites that Government revenue and irrigation charges were due. The property then purports to have been hypothecated to secure Rs. 3,625. Rs. 3,000 were left in the hands of the mortgagee for payment of the debt due to Ganpat Gopal, Rs. 580 were left to pay the revenue and irrigation charges, Rs. 45 was taken in cash to pay the expenses of the mortgage and the stamp paper, fee, etc. Six names appear as marginal witnesses. There is an endorsement on the document which shows that it was presented for registration on the 8th of January 1896, but stating that the document had not been signed by the *Musammat*. The Sub-Registrar himself evidently went to the house of the mortgagor, for there is a further endorsement, dated the 8th of January 1896, from which it appears that he had gone to the house but there being no identifying witnesses, he could not register the document and returned it to the plaintiff. A third endorsement shows that on the 16th of January 1896 the *Musammat* came to the Tahsil (which was the Registration Office) in a *dooli*, that she was there identified by her own brother, one Thakur Prasad, and by another person of the name of Khaman Singh who was her *karinda*, both of whom were known to Kampta Prasad, a petition-writer, and to Shib Dayal, the *patwari*, who were known to the Sub-Registrar. According to the endorsement the *Musammat* admitted the execution and completion of the document and acknowledged that she had received the amount. The sum of Rs. 579-7-3 in cash was received by her in the presence of the Sub-Registrar. It further appears from the endorsement (which is by no means unusual) that the money was thereupon deposited for the purpose of paying the Government charges. The latter document which is recited in the mortgage, is dated the 21st of May 1889. This document has been abundantly proved by a number of witnesses including a witness who was very hostile to the plaintiff, namely, Chaudhri Raghbir Singh, a marginal witness. It is produced by the plaintiff with an endorsement upon it, dated the 21st of January 1896, showing that the full amount due upon it had been paid by the plaintiff to one Ram Kishore, whose son-in-law the nominal mortgagee was. Evidently it was because it was not the nominal mortgagee who had given the endorsement that the defendants of the second party were added as parties. The learned Subordinate Judge in his judgment says: "It is clear from the evidence on the record that Thakurain Gambhir Kunwar is a *pardanashin* lady and at the time of the execution of the bond in suit she was only 26 or 27 years of age and her brother Thakur Prasad is three or four years younger to her. Under these circumstances it is for the plaintiff to prove by satisfactory evidence that the lady

had independent advice, that she fully understood the bond and was perfectly aware of what she was undertaking and that she actually executed the bond and got the consideration." No doubt in the case of dealings with *pardanashin* ladies, it is very important to see that such ladies understand what they are doing. It is also most important to see whether there was real consideration. It was not necessary, in our opinion, that the lady should actually sign the bond with her own hand. If she was illiterate she could not sign it. It is sufficient for the Court to find that the bond was executed in her name by some one whom she permitted to do so. In the present case her name is affixed to the bond in the handwriting of her brother, Thakur Prasad. With regard to "independent advice" and to the lady understanding the bond, if we were to come to the conclusion that there was an outstanding debt due on the earlier bond and that that debt was discharged and that the revenue and irrigation charges were due and paid, we think that the transaction was of a very simple nature which could be easily understood by the lady.

A consideration of the evidence leaves in our mind no doubt whatever that the earlier bond of the 21st of May 1889 was outstanding, that it was a genuine bond and that it was duly discharged by the plaintiff. We have no doubt further that the revenue and irrigation charges were due and discharged. The learned Subordinate Judge has come to no conclusion inconsistent with this view.

The endorsement in the bond clearly shows that on the 16th of January 1896 some woman, who was identified to the Sub-Registrar in a satisfactory way as the defendant, admitted the execution of the bond and the receipt of consideration. Thakur Prasad, the brother of the lady, was called as a witness by the plaintiff. It was impossible to avoid this. It is clear that he was a hostile witness, but he had to admit that he signed the bond in no less than four places. He gives a lame excuse that he did not understand what he was doing and the learned Subordinate Judge says: "I do not think this version of his is true. There must have been something else." If we are right in the conclusion that the prior mortgage was oustanding and was discharged by the plaintiff, the probability of the *Musammat* having executed the bond in suit is great. Five out of the six marginal witnesses are dead and the plaintiff was obliged to call the only surviving witness, namely Subol Singh. He said that he was illiterate, that he did not know *Musammat* Gambhir Kunwar, that he did not attest any document executed by her. It is true that his name in the document is not in his hand—writing; it could not be, because he is illiterate. His statement that he did not know the *Musammat* is clearly false, because he himself later on admits that she was his paternal aunt. It, of course, lay on the plaintiff to prove the execution of the document. It must be borne in mind, however that no defence was specially pleaded that the document was not attested in accordance with the provisions of the Transfer of Property Act. Section 68 of of the Evidence Act provides:—"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence." Section 71 further provides that "if the attesting witness denies...the execution of the document, its execution may be proved by other evidence." Badri Prasad complied with the law in this respect. He called the only surviving witness, who denied that he had been a witness to the document. He proved himself that the *Musammat* executed the document in his presence and in the presence of the marginal witnesses whose names appear in it. There is no doubt some little confusion as to the place where the document was signed on behalf of the lady. This is not altogether surprising after the lapse of time. It must also be borne in mind that the lady herself has never thought fit to go into the witness-box or give evidence on commission and deny the execution of the document, nor has any other evidence been given to show that there was any legal defect in the execution of the document. We have not the smallest doubt on the evidence that the *Musammat* knew all about the bond, that the bond was intended to wipe out the debt on the prior bond and to pay the Government charges that were due. We have not the least

doubt that her brother signed the document on her behalf (she being illitarate) with her consent and approval. We have not the least doubt that the transaction was a *bona fide* transaction. The only matter about which we have any hesitation is the question whether or not the provisions of section 59 of the Transfer of Property Act were complied with. On this question we again point out that there was no special defence of th s nature set up in the Court below and that while the evidence of the plaintiff may not be absolutely satisfactory, no rebutting evidence was given on behalf of the defendant. We think that it would not be just that we should decide against the plaintiff on this technical ground, which was not pleaded nor proved and was not a ground upon which the learned Subordinate Judge decided against the plaintiff. As we have said before, Badri Prasad proved *prima facie* the due execution and attestation of the bond in suit. He also produced two witnesses who proved the execution of the document by the lady at the Registration Office. As we have said above, a woman appeared before the Sub-Registrar who was identified by Thakur Prasad, the brother of Gambhir Kunwar. Thakur Prasad admitted his signature below the endorsement as to identification. It is most unlikely that he would have identified the woman unless she was in fact his sister, Gambhir Kunwar.

We allow the appeal, set aside the decree of the Court below and decree the plaintiff's claim with costs and direct that unless the amount claimed is paid with costs in this Court and in the Court below and interest at the stipulated rate within six months from this date, the right of redemption of the defendant will be foreclosed and the plaintiff will be entitled to possession. The costs of this Court will include fees on the higher scale. The decree will be drawn up in the usual form.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 103 OF 1913.

July 1, 1914.

Present:—Mr. Kendall, A. J. C.

SHEO DAT SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat SIDHAU KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, r. 14—Documents filed with plaint or written statement, party filing not permitted to resile therefrom—Bona fide *mistake.*

If a party to a suit files a document making it a part of the plaint or written statement with the object of relying on it, he cannot be permitted to resile therefrom afterwards, without at least proving that it was filed owing to a *bona fide* mistake and that he had not intended to use it.

Chandra Kunwar v. *Chaudhri Narpat Singh*, 29 A. 184; 11 C. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L R. 267 (P. C.); 34 I. A. 27, referred to,

Appeal against the decree of the District Judge, Rae Bareli, dated 10th December 1912, upholding that of the Subordinate Judge, Sultanpur, dated 12th September 1912.

Mr. *M. Wasim*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The plaintiffs, as reversioners to the estate of the deceased Sital Singh, brought this suit against the widows of Sital Singh and his brother for a declaration that the deed of gift executed by Sital Singh's widow (Sidhao Kuar) along with Sirtaj Kuar would be null and void as against them after her death. They filed a pedigree which, in paragraph 1 of the plaint they stated, should be deemed to be a part of that plaint. They included some transferees also as defendants. The defendants denied the pedigre which was set up by the plaintiffs, and denied that the plaintiffs were the reversionary heirs of Sital Singh. The plaint was filed on the 29th April 1912; and the 22nd of May was fixed for issues. On that date the defendants filed a written statement recording denials as above. On the same date the defendants filed certain documents on which they intended to rely, under Order XIII, rule 1, of the Code of Civil Procedure. Among them was a paper which purported to be a copy of a pedigree filed in the Settlement Court in 1866. That document the plaintiffs denied. Issues were duly fixed on that date. On the 6th June the plaintiffs filed an application to the effect that

the pedigree which they had filed as part of the plaint was incorrect, and asked for permission to correct it in the manner they set out in the application. This was treated as an application for leave to amend the plaint, and notice was issued to the other party for the 19th June. On the 18th June, the plaintiffs filed an application to the effect that they now admitted the previously denied pedigree, which had been filed by the defendants and which they now adopted as their own. The Court noted that that pedigree was only up to 1866. On the 19th June, therefore, the plaintiffs, having brought the pedigree up to date, filed it in Court; and the question of permission being granted to them to amend their plaint, was considered; and on the 4th July, permission was granted. On the 1st August, the defendants filed an application to the effect that the *mukhtar-am* had filed that pedigree by mistake and asked for leave to withdraw it, and objecting that it was not signed by any one and was of no value. The case procedeeed; and the plaintiffs eventually failed to prove that they were reversioners, much less that they were the nearest reversioners. The suit was dismissed, and their appeal has also been dismissed.

Appeal is laid in this Court, on the grounds that the defendants-respondents are estopped from denying the pedigree filed by their own *mukhtar*; and that they could not deny the pedigree, as it had been filed during the time of Settlement between the predecessors of the parties in the suit; and that it was not necessary for a party to prove its case by filing another copy of a document which had been already filed by the opposite party. On the above grounds it was argued that it ought to have been held that by virtue of the pedigree filed by the defendants on the 22nd of May, the plaintiffs had succeeded in proving that they were the nearest reversioners to the estate of Sital Singh deceased. Reliance is had in this Court on a Privy Council ruling in *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1), or rather on English precedents there quoted. There is no doubt that it has been repeatedly held in England that *express admissions* of a party to a suit, or admissions implied by his conduct, are evidence, and strong evidence against him. Their Lordships quoted from the leading English precedents at pages 194-195 of the ruling under review. The question is not free from difficulty. Had the defendants included this pedigree in their written statement or filed one in the manner adopted by the plaintiffs, desiring it to be taken as part of their written statement, I do not think they could have been permitted afterwards to resile therefrom, without at least proving that the pedigree they quoted was filed owing to a *bona fide* mistake and that they had not intended to use it. But the pedigree in question was not filed with the written statement; nor in the written statement is there any reference whatever to any such pedigree. The burden of proof was not upon the defendants at that time to prove Sital Singh's pedigree, but upon the plaintiffs to prove the pedigree on which they relied; and so it cannot be confidently presumed that the defendants had filed the pedigree, intending to rely upon it in proof of their case. The plaintiffs at once denied the accuracy of that pedigree, so that that document, unless the defendants set out to prove it, would not have remained upon the record but would have been returned to the person presenting it under Order XIII, rule 7. It was in fact a superfluous document which it was not necessary for the defendants to produce and which, the burden of proof not being on them, they would not be setting out to prove. According to the rules of this Court, this document and the other documents were attached to a fly-list; but there is not set out in that fly-list, or elsewhere, the object with which the document is given in evidence, and it is quite fair to say that that document was quite possibly simply handed in, not to show its own accuracy, but to show that it differed from the pedigree which the plaintiffs were setting out to prove, and in order to render more difficult the plaintiffs' task of substantiating their pedigree. In the particular circumstances of the case I am of opinion that the filing of this pedigree cannot at all be taken as an express admission of the defendants of its accuracy nor can any such admission be confidently implied. It is objected that it is hard on the plaintiffs to put them to proof of the pedigree, which the opposite party filed. The plaintiffs, however, to my mind are not

(7) 29 A. 184; 11 C. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.); 34 I. A. 27.

entitled to much sympathy. They filed a pedigree with their plaint, and that plaint, which included the pedigree, they duly verified as laid down in the Code of Civil Procedure. They in effect swore to its accuracy. They made efforts later on to alter this pedigree by the substitution of other names, and then finally they threw overboard the pedigree, which they had in this manner duly authenti ated, in favour of the paper which they found upon the record, which had been filed by the defendants, the accuracy of which they had themselves denied and the purpose of whose filing is not unequivocally clear. In the circumstances the lower Courts acted properly in putting them to proof of this pedigree on which they proposed to rely. As to the procedure adopted by the Courts below, the plaintiffs were not in the least taken by surprise; for they did set out to prove their relationship to Sital Singh by oral evidence; and in this I agree with the lower Courts that they entirely failed. To enable them to succeed in this suit, it was necessary not only that they should prove that they were reversioners to the estate of Sital Singh, but that they were the nearest reversioners. The oral evidence as to relationships to several generations back was perfectly worthless.

The appeal is, therefore, dismissed. In the circumstances let the parties bear their own costs in this Court.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 78 OF 1913.

December 7, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, and Justice Sir Henry Hartnoll, KT.

AHMED MOOLA DAWOOD AND ANOTHER —DEFENDANTS—APPELLANTS

versus

Musammat FATIMA BEE BEE—PLAINTIFF—RESPONDENT.

Probate and Adminisiration Act (V of 1881), *s.* 78 *—Administration bond—Surety's liability, suit to enforce—Limitation—Limitation Act (IX of* 1908), *Sch. I, Art.* 68.

A suit to enforce the liability of a surety under an administration bond is barred under Article 68 of the Limitation Act, 1908, if not brought within three years of the breach of a condition contained in the bond.

Messrs. *Coltman* and *Alexander*, for the Appellants.

Mr. *Das*, for the Respondent.

JUDGMENT.—One Ebrahim Sahib Khateeb died intestate at Mecca in or before 1880, leaving property in Rangoon. His widow and children continued to live at Mecca after his death. In January 1899 his eldest son Mohamed applied to the Court of the Recorder of Rangoon for Letters of Administration to his father's estate, and letters were granted to him. He signed an administration bond as required by section 78 of the Probate and Administration Act, 1881, for Rs. 80,000. Ahmed Moola Dawood and Mohamed Ebrahim Hoosein Munsoor signed it as his sureties. The latter has since been declared an insolvent and is represented in this appeal by the Official Assignee. Two days after the date of letters, Mohamed filed a petition representing that the only assets of the estate consisted of some house property in Rangoon and that he was unable to administer the estate without selling or mortgaging this property. He asked for leave to be granted to him under section 90 of the Act to sell or mortgage it. This application was granted without any inquiry. The result shows what may happen when such applications are granted without very careful and full inquiry as to the necessity for selling the immoveable property which has devolved upon members of a family. The property had apparently been for many years the chief source of income of the family, and Mohamed could have carried out duties as Administrator by executing a conveyance of the property to the heirs. If that had been done, there would have been less opportunity for Mohamed to commit the fraud he subsequently committed. In 1903 he sold for nearly three lakhs of rupees property which in his application for Letters of Administration was valued at Rs. 40,000 only. It was plainly his duty to distribute the purchase-money among the heirs within a reasonable time, but he did not do so. The plaintiff, who is one of his sisters, came from Mecca to Rangoon and in 1910 instituted a suit against Mohamed for an account and an administration of the father's estate. In that suit Mohamed was held

liable to pay the other heirs over three lakhs rupees, of which over fifty-six thousand rupees was payable to the plaintiff. This amount not having been paid, she applied to the Court to assign to her the administration bond with a view to proceeding against the sureties under it. It was assigned to her on the 22nd March 1912.

She filed the suit out of which this appeal arises on the 4th September 1912 and in it she sought to recover from the sureties the amount mentioned in the bond. The plaint states that the cause of action arose on the 11th September 1911, which is the date of the decree in the suit she brought against Mohamed. The case has been disposed of on the point of limitation, which the original Court decided in favour of the plaintiff. The solvent surety and the Official Assignee appeal against the decision.

The question of whether the suit was barred by limitation, must depend upon what Article of the Indian Limitation Act applies to it. The bond follows a well-known English form in which the obligors first bind themselves to pay a certain amount of money to the obligee, but the latter portion says that in certain events the obligation to pay the amount shall be void. The latter portion of the bond now in question is as follows :—

"The engagement of this bond is such that if Mohamed Ebrahim Sahib Khateeb, the person appointed by the Court of the Recorder of Rangoon, under the Probate and Administration Act V of 1881, to be the Administrator of the estate of Ebrahim Sahib Khateeb deceased, who died at Mecca in Arabia on or about the 9th May 1880, intestate do make a true inventory of all the estate of the said deceased which has or shall come to his possession, power or knowledge and do exhibit the same unto the said Court on or before the 18th January 1900, and the same estate and all the other estate of the said deceased at the time of his decease, which at any time after shall come into possession of the said Mohamed Ebrahim Sahib Khateeb, do administer according to law, that is to say, do pay the debts which he owed at his decease and further do render a true account of his said administration whenever by law required to do, and the residue of the said estate do pay unto such person or persons as shall be entitled thereto under the said Act * * * *, then this obligation to be void or else to remain in full force."

The last seven words contemplate that the bond shall remain in force for ever if the Administrator does not do the acts previously mentioned as relieving him and the securities from the obligation to pay the amount of the bond, but the Limitation Act makes no special provision for administration bonds and consequently, one of the Articles of it must apply to a suit on it. Articles 68 and 80 of the first division of the first Schedule to the Act have been referred to, but as Article 68 exactly meets the case of such a bond no other Article need be considered. Under Article 68 three years is the limitation period for a suit on a bond subject to a condition, the period begins to run from the time when the condition is broken.

It is clear from the explanation of the word "bond" in section 2 of the Act that the bond in the present case is a bond subject to a condition provided for in Article 68.

The first of the conditions of the bond which was broken by Mohamed, the Administrator, was that contemplating his filing an inventory within a year of the grant of Letters of Administration, so that the first breach was on the 19th January 1900, another breach was in 1903 when he had in his hands moneys of the estate which he could and should have distributed amongst the heirs, but did not do so. Consequently the suit of the plaintiff was long time-barred when brought. The application of Article 68 to administration bonds may be attended with results which the Legislature could scarcely have contemplated, but in the absence of any special provision for such bonds remaining in force for as long as an administrator does not do his duty, the plain provision of the law as it stands must be applied to them. The appeal is allowed and the plaintiff's suit is dismissed with costs. She is also ordered to pay the appellants' costs of this appeal—one set only.

Appeal allowed.

MUTHU PILLAI *v.* MARIA SANDANAM PILLAI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 36 OF 1914.

October 23, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

MUTHU PILLAI—DEFENDANT No. 1—PETITIONER

versus

MARIA SANDANAM PILLAI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Payment of principal—Handwriting of person making payment necessary—Payment of interest need not be in handwriting of person making payment.

A part payment of the principal of a debt should be in the handwriting of the person making the payment, but this rule does not apply to payments of interest.

Santishwar Mahanta v. *Lakhikanta Mahanta*, 35 C. 813, 13 C.W.N. 177, *Lodd Govindass* v. *Rukmani Bhai*, 21 Ind. Cas. 302; 14 M. L. T. 310; 1 L. W. 529, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Kumbakonam, in Summary Case No. 948 of 1913, dated the 30th September, 1913.

Mr. *M. Patanjali Sastri*, for Mr. *K. V. Krishnasawmy Iyer*, for the Petitioner.

Mr. *S. E. Sankara Iyer*, for the Respondents.

JUDGMENT.—It is clear from the case of *Santishwar Mahanta* v. *Lakhikanta Mahanta* (1) and the case of *Lodd Govindass* v. *Rukmani Bhai* (2) that so far as principal is concerned, the writing should be in the hand of the debtor. This does not apply to payments of interest.

The endorsements recite that sums were paid on account of principal and interest due on the promissory note. They show clearly that sums were paid from time to time on account of interest and there is no reason to suppose that the recital is not correct.

The suit is not barred.

The petition is dismissed with costs.

Petition dismissed.

(1) 35 C. 813; 13 C. W. N. 177.
(2) 21 Ind. Cas. 302; 14 M. L. T. 310; 1 L. W. 529.

PARMESHWAR DAT *v.* ANARDAN DAT.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1652 OF 1913.

November 26, 1914.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

PARMESHWAR DAT—PLAINTIFF—APPELLANT

versus

ANARDAN DAT—DEFENDANT—RESPONDENT.

Mortgage—Benamidar, *whether can sue.*

A person who is named in a mortgage-deed as mortgagee is entitled to sue upon the bond, even if he is a *benamidar*.

Yad Ram v. *Umrao Singh*, 21 A. 380; A. W. N. (1899) 130, followed.

Second appeal from the decision of the District Judge of Cawnpore, dated the 15th of September 1913.

FACTS.—This was a suit on a mortgage bond, dated 22nd March 1900, for recovery of the amount due under it. Among the many defences, raised in the suit, there was a defence that the plaintiff could not sue as he was not the owner, but one Bhaiyalal was the owner. The Subordinate Judge decreed the suit, holding that it was immaterial as to who was the real owner of the bond and that the rights of third persons could not be adjudicated upon in that suit. On appeal, the District Judge held that the plaintiff could not sue as he was not the owner.

The plaintiff appealed to the High Court.

Mr. *D. R. Sawhny*, for the Appellant:—The lower Court is wrong in its view that a *benamidar* cannot sue in his own name. It was so held in *Nand Kishore Lal* v. *Ahmad Ata* (1); *Yad Ram* v. *Umrao Singh* (2).

The mortgage-deed is in the name of the plaintiff. The question as to whether the plaintiff is the owner or Bhaiyalal is the owner or as to the person who advanced the money, is a question which does not concern the defendants. Moreover, Bhaiyalal appeared as a witness for the plaintiff and raised no objection to the decree being passed in the plaintiff's favour.

Mr. *Damodar Das*, for the Respondent:—The question to be considered is as to whether the suit was brought on behalf of the original owner or for the benefit of the real owner. The *benamidar* can sue, but he

(1) 18 A. 69; A. W. N. (1895) 160.
(2) 21 A. 380; A. W. N. (1899) 130.

can sue only with the consent of the beneficial owner. This is a point which has not been yet decided.

[RICHARDS, C. J.—The original owner was a witness and was present in Court. The sole question is, "would it be a good discharge to the defendant?"]

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage, dated the 22nd of March 1900. Various pleas were taken, but the Court of first instance decided in favour of the plaintiff and granted a decree. On appeal the learned District Judge reversed the decree of the Court of first instance and dismissed the plaintiff's suit, on the sole ground that one Bhaiyalal was the real owner of the bond and that the plaintiff was merely a *benamidar* for him. It seems to us that the view of the District Judge was not correct. The alleged beneficial owner, Bhaiyayal, was actually produced as a witness for the plaintiff. He raised no objection whatever to the decree being made in favour of the plaintiff. The defendant never alleged that Bhaiyalal had made any claim, or raised any objection, to the amount of the bond being paid to the plaintiff. The plaintiff is the person named in the mortgage and was clearly entitled to sue even if he was the *benamidar*. This was held in the case of *Yad Ram* v *Umrao Singh* (2). There cannot be the least doubt that the plaintiff could have given a perfectly valid discharge to the defendant if he had paid up the amount of the bond; and if the Court grants a decree to the plaintiff it is quite clear that Bhaiyalal could never sue again, even if we assume the finding of the lower Appellate Court to be correct that Bhaiyalal was in fact the real owner of the bond. We think that the view taken by the Court of first instance on this point, namely that the question of the ownership of the bond did not arise under the circumstances of the present case, was correct. We accordingly allow the appeal, set aside the decree of the Court below and remand the case to the lower Appellate Court with directions to re-admit the appeal upon its original number on the file and to proceed to hear and determine the same according to law. The costs of both sides will be costs in the cause. The deficiency in the Court-fee in the lower Appellate Court of Rs. 5 due by the defendant must be made good before the appeal is heard. If that amount is not paid within a time to be fixed by the Court, the appeal to that Court by the defendant ought to be dismissed.

Appeal allowed.

MADRAS HIGH COURT.

REFERRED CASE No. 2 OF 1914.

April 30, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

CHULLILE PEETIKAYIL NAMMAD—JUDGMENT-CREDITOR

versus

E. OTHENAM NAMBIAR—JUDGMENT-DEBTOR.

E. CHEELA—CLAIMANT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 46—Attachment—Simple mortgage-debt—Mortgagee in possession—Mode of attachment.

A debt secured by a simple mortgage should be attached under Order XXI, rule 46, Civil Procedure Code. The fact of the mortgagee being in possession, actual or constructive, of the mortgaged property makes no difference.

Case stated under Order XLVI, rule 1, Civil Procedure Code, 1908, by the District Munsif, Cannanore, whether attachment of mortgage debts for decrees in Small Cause suits should be made under Order XXI, rule 46, Civil Procedure Code, or under Order XXI, rule 54, Civil Procedure Code.

FACTS appear from the following reference made by the Munsif:—

* * * * *

"2. In execution (Second Civil Execution Petition No. 1068 of 1912) of the decree in Small Cause Suit No. 1650 of 1912 on the file of this Court, the decree-holder has attached and seeks to sell what he has described as the judgment-debtor's right to the mortgage amount and interest due under a *panayom*. It is admitted that the real right of the judgment-debtor is *kanom*, there being a lease back to the mortgagor. The term of the lease has expired, but

the mortgagor is still holding over. The attachment was made under Order XXI, rule 46, as a debt not secured by a negotiable instrument. The decree has not been transferred to the original side for execution. Under these circumstances the question arises, and a co-mortgagee as claimant in Second Civil Miscellaneous Petition No. 38 of 1913 raises it, whether the mortgage right has been rightly attached under Order XXI, rule 46, or ought to have been attached as immoveable property under rule 54. *Nataraja Aiyar* v. *South India Bank, Limited* (1) is an authority for the proposition that a debt secured by a hypothecation bond or a simple mortgage should be attached under rule 46 as "a debt not secured by a negotiable instrument." The principal authorities on the point have been referred to there. But in none of these [except in the case reported as *Baldeo Dhanrup Marvadi* v. *Ramchandra Balwant Kulkarni* (2)from the report of which it does not appear in what right the mortgagor continued in possession] the question appears to have arisen as to the mode of attachment of mortgages with possession and any observations as to such mortgages were only *obiter*. In the present case though the mortgagee is not in actual possession, he is in constructive possession through his tenant; the mortgagor, and is now entitled to actual possession.

"3. For our purpose mortgages may be divided into two classes :—

(*i*) Mortgages which do not give to the mortgagee a right to possession.

(*ii*) Mortgages which give such right

(*a*) and the mortgagee is put in actual possession, or

(*b*) the mortgagor takes back the property on lease from the mortgagee and thus continues in possession (1) whether the term of the lease has expired, or (2) not.

"4. The case under consideration falls under II (*b*) (1). To allow the decree-holder to attach the mortgage-debt would only result in benefit to the mortgagor and as has been observed by Sir Lawrence Jenkins, Chief Justice, in a case in which it was necessary to decide whether purchase in Court auction of the mortgage debt would carry with it the mortgage security, "to benefit him is no part of any one's scheme." *Taravadi Bholanath* v. *Bai Kashi* (3).

"5. After the decision of the Madras High Court the practice as to attachment and sale of hypothecation debts does not matter. I understand that the practice has been uniform in this Court to attach and sell *kanom* rights as immoveable property. I am of opinion that this practice is correct, but in view of the *obiter dicta* in the cases referred to in the Madras cases above quoted and the absence of an express decision of the Madras High Court upon the point, I have reasonable doubts in the matter and beg to submit the following question for the opinion of the Hon'ble High Court :—

'Whether under the circumstances aforesaid the decree-holder was right in attaching the mortgage-debt as one not secured by a negotiable instrument under Order XXI, rule 46, Civil Procedure Code, 1908, or whether he ought to have attached it as immoveable property under Order XXI, rule 54, after getting the decree transferred to the original side."

* * * * *

* * * * *

JUDGMENT.—We are not prepared to differ from the decision in *Nataraja Aiyar* v. *South India Bank, Limited* (1) where all the authorities are considered, and are of opinion that the fact of the mortgagee being in possession, actual or constructive, of the mortgaged property makes no difference. The answer to the first question is in the affirmative.

Reference answered accordingly.

(1) 13 Ind. Cas. 91; 37 M. 51; 22 M. L. J. 105; 10 M. L T. 503; (1911) 2 M. W. N. 590.

(2) 19 B. 121.

(3) 26 B. 305; 4 Bom. L. R. 18.

KANTI VENKANNA *v.* CHELIKANI RAMA ROW GARU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 323 OF 1313.

August 26, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

KANTI VENKANNA—DEFENDANT—APPELLANT

versus

Sri Rajah CHELIKANI RAMA ROW GARU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), *s.* 3 (5)—*Alienee of part of* melvaram *interest, whether landholder—Tenants under such alienee, whether* ryots *—Ejectment, suit for—Jurisdiction.*

An alienee in perpetuity of a portion of a *zemindar's melvaram* interest in land, becomes a "landholder" within the meaning of section 3 (5) of the Estates Land Act and the tenants under him "*ryots*" though the land itself may not be an "estate" within the meaning of section 3 (2) of the Estates Land Act.

Proceedings to eject tenants from such land lies only in a Revenue Court.

Sivini Appalanarasimhulu v. *Murada Sanyasi*, 17 Ind. Cas. 120; *Sri Brindavana Chandra Harischandra* v. *Ramayya*, 25 Ind. Cas. 664; 26 M. L. J. 600; 1 L. W. 486; *Tungala Mallanna* v. *Gottumukkala Ramaraju*, 23 Ind. Cas. 531; (1914) M. W. N. 345; 15 M. L. T. 401; *Baptis Missionary Society* v. *Ratnakaro; Patro*, 12 Ind. Cas. 777; (1911) 2 M. W. N 517, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry, in Appeal Suit No. 178 of 1912, preferred against that of the District Munsif of Peddapur, in Original Suit No. 606 of 1909.

Messrs. *M. O. Parthasarathi Aiyangar* and *V. Ramesam*, for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—We are of opinion that in construing Exhibit B as granting only the *kudivaram* interest in the lands to the plaintiff's ancestor, the lower Courts misconstrued that document.

That document clearly alienates in perpetuity Rs. 125 of the annual *melvaram* income in favour of the grantee under it and that grantee had thereafter, not to pay the Rs. 300 which was "the rent legally due upon it" (see definition of *ryot* in section 3, clause 15, of the Estates Land Act), but had to pay only the favourable *kattubadi kist* of Rs. 175. Being the owner of a part of the *melvaram* right in the lands which formed part of the estate *ryoti* lands, he became owner of part of the estate, though the part owned by him did not itself come under the definition of "estate" in section 3, clause (2). The ratio of the decisions in Civil Revision Petition No. 895 of 1910; Second Appeal No. 168 of 1912; *Sivini Appalanarasimhulu* v. *Murada Sanyasi* (1); *Sri Brindavanachandra Harischandra* v. *Ramayya* (2); *Tungala Mallanna* v. *Gottumukkala Ramaraju* (3) is that a person may not be the owner of an "estate" owing to the lands, of which he is the owner, not coming under the definition of the word "estate", but he may yet be a landholder within the definition of section 3, clause (5), as owning the *melvaram* of a portion of an estate. In the case of *Baptis Missionary Society* v. *Ratnakaro Patro* (4) the definition of landholder is not referred to and considered in the judgment.

The plaintiffs being thus landholders, tenants holding *ryoti* lands under them for purposes of agriculture are *ryots* and cannot be ejected except by proceedings in a Revenue Court under the Estates Land Act (sections 151 to 153).

The lower Court's decisions are reversed and the plaint will be returned to be presented to the proper Court. The plaintiffs must pay defendant's costs in all Courts.

SPENCER, J.—It is clear from the grant, Exhibit B, and from the facts found by the lower Courts, that the land in the enjoyment of the plaintiffs is not an estate falling under section 3 (2) of the Estates Land Act, as the grant had not been recognised by the British Government and as it did not comprise one or more whole villages. It further, did not fall under the definition in clause (*e*).

But it was undeniably a part of a permanently settled estate and, therefore, if plaintiffs come within the definition of "landholder" in section 3 (5), the jurisdiction of the Revenue Court over a suit to eject a *ryot* was not ousted. Following *Sri Brindavana Chandra Harischandra Raja* v. *Ramayya*(2) to which I was a party, I agree with the order proposed by my learned brother.

Appeal allowed.

(1) 17 Ind. Cas. 120.

(2) 25 Ind. Cas. 664; 26 M. L. J. 600; 1 L. W. 486.

(3) 23 Ind. Cas. 531; (1914) M. W. N. 345; 15 M. L. T. 401.

(4) 12 Ind. Cas. 777; (1911) 2 M. W. N. 517.

BAIKUNTA GUI *v.* LAL CHAND SAMANTA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1619 OF 1913.

July 17, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

BAIKUNTA GUI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAL CHAND SAMANTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), *s.* 19 *Mortgage by all members of joint Hindu family—Acknowledgment by* karta *alone, whether sufficient to keep alive debt—Civil Procedure Code (Act V of* 1908), *O. XXXIV, r.* 6.

Where a joint Hindu family property was mortgaged jointly by all members of the family not for a family purpose but only to secure a particular sum of money, the mere fact that one of the joint mortgagors had made an acknowledgment, if it turns out that he happens to be the *karta* of the joint Hindu family, would not be sufficient to keep alive the debt. *Narayana Ayyar* v. *Venkataramana Ayyar*, 25 M. 220 (F. B.), followed.

Appeal from the decree of the Subordinate Judge, Second Court, Midnapore, dated the 22nd February 1913, modifying that of the Munsif of Ghatal, dated 30th April 1912.

Dr. *Rash Behary Ghose* and Babu *Bepin Behary Ghose*, for the Appellants.

Babu *Atul Krishna Roy*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from the decision of the learned Subordinate Judge of the second Court of Midnapore, dated the 22nd February 1913, modifying the decision of the Munsif of Ghatal.

The plaintiffs who are the appellants before us got a mortgage from the defendants. The property having been brought to sale, as I understand, the plaintiffs applied for an order under Order XXXIV, rule 6, to enable them to recover the balance due on the mortgage from the defendants. The defendants set up a plea of limitation. The plaintiffs relied, in reply to that, on certain payments which had been made on the mortgage by one Gobardhan, who is said to be the *karta* of the joint Hindu family which the defendants are said to have composed. The judgment of the lower Appellate Court is, in some respects, not very clear. But so far as I can gather, what the learned Judge finds is this: *first* of all, he is not satisfied whether the parties did in fact form a joint Hindu family, *secondly*, he is not satisfied that Gobardhan made the payments as *karta* of the joint Hindu family, so as to bind the other members of the family. The money, he considers according to the case set up by Sukhoda, the *gomasta* of the plaintiff, had come out of the so-called *ejmali* paddy business. Whether the *ejmali* paddy business formed the part of the ancestral or joint estate of the defendants we do not know; and the learned Judge seems to have doubted whether the money did, in fact, come out of the joint family property.

The case has been argued before us on the fact that the *karta* is, from the very nature of his position, the authorised agent of each and every member of the joint Hindu family, so as to be able to make a payment of the interest to keep the debts alive. Whether that is so or not, if it were found that the borrowing had been made in respect of the joint family estate, that would be one case. In the present case, although the probabilities point to the fact that the borrowing was made for family purposes, there is nothing to show that the execution of the mortgage by all the members was, in fact, a mortgage of the property for purposes of the family. All we can say is that it was a mortgage by these various joint contractors to secure a particular sum of money. If that is so, as pointed out by the Full Bench in the case of *Narayana Ayyar* v. *Venkataramana Ayyar* (1), the mere fact that one of the joint contractors had made an acknowledgment, if it turns out that he happens to be the *karta* of the joint Hindu family, would not be sufficient to keep alive the debt. I think, on the whole, that the findings of fact in this case are too strong for the appellants. I am not satisfied, in my own mind, however, that the plaintiffs had not originally the right on their side. This being a second appeal, we are bound by the findings of fact, and the findings, although not so clearly expressed as one might wish them to be, seem to me fatal to the case of the plaintiffs.

The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

(1) 25 M. 220 (F. B.).

JAI RAM *v.* SARDAR SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 802 OF 1911.

May 20, 1913.

Present:—Mr. Justice Shah Din.

JAI RAM—PLAINTIFF—APPELLANT

versus

SARDAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Hindu Law—Brahmins *of* Dheriala Saigan *village, Gujar Khan Tahsil, Rawalpindi District—Burden of proof—Ordinary test—Shifting of onus.*

To determine whether Brahmins living in a village are governed by custom or Hindu Law, ordinarily one most important test is whether the Brahmins in question are a compact village community or at least a compact section of the village community. In such cases there is a strong presumption in favour of custom.

Bishen Das v. *Ram Dhan*, 7 Ind. Cas. 483; 63 P. R. 1910; 100 P. W. R. 1910; 112 P. L. R. 1910, concurred.

A village was founded a very long time ago by the ancestors of Brahmins, *got* Saigan, that from the date of its foundation the majority of the proprietors had been Brahmins of this *got*, that the Brahmins had from the very beginning constituted a compact village community, that out of 800 or 900 persons living in the village some 600 or 700 were Brahmins, that there was no *birt* in this village, that Brahmins did not perform any priestly functions, though a good many of them had taken to service, that such of the Brahmins who were not in service depended for their livelihood entirely upon agriculture, that the income of those who were in service was supplemented by their income as land owners, and that so far as regards succession they were not governed by Hindu Law, as among them daughters were excluded:

Held, that in view of these facts the initial presumption that the Brahmins in this village were governed in matters of alienation of ancestral landed property by Hindu Law and not by custom, was sufficiently rebutted and the onus was shifted on to the party who asserted that in matters of alienations they were governed by their personal law and that their powers of alienation were not restricted as those of agricultural tribes.

Ram Chand v. *Thakar Das*, 94 P. R. 1907; 29 P. L. R 1908, *Hira Nand* v. *Hari Chand*, 4 Ind. Cas. 687; 125 P. R 1908; 10 P. L. R. 1909; 182 P. W. R. 1908; *Devi Ditta Singh* v. *Dropti*, 2 Ind. Cas. 940; 56 P. R. 1909; 129 P. L. R. 1909; 96 P. W. R. 1909; *Dalo* v. *Mohlu*, 3 Ind. Cas. 593; 87 P. R. 1909; 131 P. L. R. 1909; 105 P. W. R. 1909; *Daswandi* v. *Mahant Krishen Dev*, 9 Ind. Cas. 841; 34 P R 1911; 109 P. L. R. 1911; 119 P. W. R. 1911; *Musammat Maya* v. *Gurdit Singh*, 4 Ind. Cas. 947; 1 P. R. 1910; 145 P. L. R. 1909; 128 P. W. R. 1909; *Fakir Chand* v. *Ram Chand*, 13 Ind. Cas. 709; 128 P. L. R. 1912; 62 P. W. R. 1912, referred to.

Second appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 25th April 1911.

Bhagat *Gobind Das*, for the Appellant.

Bava *Sewa Ram Singh*, for Rai Bahadur Lala *Sukh Dial*, for the Respondents.

JUDGMENT.—A preliminary objection has been urged in this case by the Pleader for the respondents that since the Divisional Judge has dismissed the plaintiff's suit and the value of the suit calculated at thirty times the *jama* is below Rs. 250, no further appeal lay to this Court under the unamended Punjab Courts Act. As the Munsif passed a decree in favour of the plaintiff for possession of part of the land on payment of Rs. 600, I hold, following *Kishan Chand* v. *Taj-ud-Din* (1), that a further appeal was competent to this Court. The preliminary objection is, therefore, overruled.

The sole question for decision in this appeal is whether the parties to this suit, who are Brahmin proprietors of *Mauza* Dheriala Saigan, Tahsil Gujar Khan, District Rawalpindi, are governed in matters of alienation of ancestral landed property by Hindu Law or by custom. The Subordinate Judge held that they were governed by custom and not by their personal law, while the Divisional Judge has come to a contrary conclusion. After hearing the Pleaders on both sides and carefully considering the evidence on the record, I think that the view of the Subordinate Judge is correct. A reference to the history and constitution of *Mauza* Dheriala Saigan, in which the parties reside and in which the land in dispute is situate, shows that this village was founded a very long time ago by the ancestors of the Brahmins, *got* Saigan, that from the date of its foundation the majority of the proprietors have been Brahmins of this *got*, that since the first Regular Settlement the village has consisted of two *tarafs*, *taraf* Brahminan and *taraf* Zamindaran, and that the Brahmins have from the very beginning constituted a compact village community. The evidence of the *Patwari* shows that of the total area of the village, 1268 *ghumaons*, *taraf* Brahminan contains 707 *ghumaos* and *taraf* Zamindaran 543 *ghumaons*. There are four *Lambardars* of the village, of whom three are Brahmins and one a Muhammadan, the latter being

(1) 1 Ind. Cas. 870; 23 P. R. 1909; 197 P. L. R. 1908; 37 P. W. R. 1909.

Lambardar of *taraf* Zemindaran. The *Patwari* also says that the population is about 800 or 900 souls, of whom 600 or 700 are Brahmins. It is also in evidence that there is no *birt* in this village and that the Brahmins do not perform any priestly functions, though a good many of them have taken to service. It appears that such of the Brahmin proprietors as are not in service depend for their livelihood entirely upon agriculture, and that the income of those who are in service is supplemented by their income as land-owners. It is further shown that so far as regards the rules of succession, the Brahmins of this village are not governed by Hindu Law, as among them admittedly daughters are excluded by collaterals from inheritance.

In view of the facts stated above, it seems to me that the initial presumption that the parties in this case being Brahmins were governed by Hindu Law and not by custom, has been sufficiently rebutted, and that the onus has been shifted on to the party who asserts that in matters of alienation the Brahmins of this village are governed by their personal law. The appellant's Pleader has cited *Ram Chand* v. *Thakar Das* (2); *Hira Nand* v. *Hari Chand* (3); *Devi Ditta Singh* v. *Dropti* (4) *Dalo* v. *Mohlu* (5); *Bishen Dass* v. *Ram Dhan* (6) and *Daswandi* v. *Mahant Krishen Dev* (7). On the other hand, the respondents' Pleader has relied mainly on *Hira Nand* v. *Hari Chand* (3); *Musammat Maya* v. *Gurdit Singh* (8) and Second Appeal No. 926 of 1910 [*Fakir Chand* v. *Ram Chand* (9)] decided by this Court on the 9th February 1912. I have carefully considered all these rulings, and it seems to me that the facts which have been proved in the present case fully justify the conclusion that the Brahmins of *Mauza* Dheriala Saigan are governed by custom and not by Hindu Law, and that in matters of alienation their powers are subject to the same restrictions as those of agricultural tribes in other parts of the Rawalpindi District. In regard to cases relating to agricultural land owned by Brahmins in this Province, I agree with the observations of Johnstone, J., in *Bishen Dass* v. *Ram Dhan* (6) that "ordinarily one most important test is whether the Brahmins in question are a compact village community or at least a compact section of the village community. In such cases there is a strong presumption in favour of custom".

For the reasons given above I hold that the parties in this case are governed by custom and not by Hindu Law, and that the sale in dispute, so far as it relates to ancestral land, must be held to be invalid unless it is shown to have been made for consideration and legal necessity. Both the Courts below have found that full consideration passed under the sale in question; but whereas the Subordinate Judge has held that of the consideration money only Rs. 600 was raised for legal necessity, the Divisional Judge has not dealt with this point because upon his view of the case, the question of legal necessity for the sale did not arise at all. Holding as I do that legal necessity for the sale of the ancestral land must be proved, I must accept this appeal and setting aside the decree of the Divisional Judge, I send the case back under Order XLI, rule 23, Civil Procedure Code, for a decision of the question as to how much of the sale consideration was covered by legal necessity in this case. The appellant will get his costs in this Court against the contesting respondents.

Appeal accepted; Case returned.

(2) 94 P. R. 1907; 29 P. L. R. 1908.

(3) 4 Ind. Cas. 687; 125 P. R. 1908; 10 P. L.R. 1909; 182 P. L. R. 1908.

(4) 2 Ind. Cas. 940; 56 P. R. 1909; 129 P. L. R. 1909; 96 P. W. R. 1909.

(5) 3 Ind. Cas. 593; 87 P. R. 1909; 131 P. L.R. 1909; 105 P. W. R. 1909.

(6) 7 Ind. Cas. 483; 63 P. R. 1910; 100 P. W. R. 1910; 112 P. L. R. 1909.

(7) 9 Ind. Cas. 841; 34 P. R. 1911; 109 L.P. R. 1911; 119 P. W. R. 1911.

(8) 4 Ind. Cas. 947; 1 P. R. 1910; 145 P. L. R. 1909; 128 P. W. R. 1909.

(9) 13 Ind. Cas. 709; 62 P. W. R. 1912; 128 P. L. R. 1912.

SUNDARAMMA *v.* KAMAKOTIAH.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 855 OF 1912.

August 27, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

SUNDARAMMA—PLAINTIFF—APPELLANT

versus

KAMAKOTIAH AND ANOTHER—DEFENDANTS Nos. 3 AND 4—RESPONDENTS.

Hindu Law—Joint family—Partition—Presumption—Certain properties left joint, whether co-parcenary right retained in those properties.

When there is a partition in a joint Hindu family, the presumption is that it is a complete partition in status and of all the properties. If certain properties were left undivided, there is no presumption that the co-parcenary right is retained in those properties.

Gaurishankar Parabhuram v. *Atmaram Rajaram*, 18 B. 611, *Vaidyanatha Aiyar* v. *Aiyasami Aiyar*, 1 Ind. Cas. 408; 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49, followed.

Second appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Appeal Suit No. 185 of 1911, preferred against that of the District Munsif of Chittoor, in Original Suit No. 618 of 1909.

Messrs. *L. A. Govindaraghava Aiyar* and *R. Rangasami Aiyangar*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

This second appeal and Civil Miscellaneous Petition No. 2594 of 1912 to admit in evidence a partition list coming on for hearing on the 4th April 1913, the Court delivered the following

JUDGMENT.—The District Munsif should have decided whether the partition list tendered was admissible in evidence or not. He is directed to return a finding whether this document is admissible. He may receive fresh evidence on this question.

The finding will be submitted within six weeks from this date, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Munsif of Chittoor submitted the following

FINDING.—The case has been remanded by the High Court for a finding on the following question:—

Whether the partition list tendered is admissible in evidence.

2. The partition deed is badly torn. A translation thereof is printed at pages 13 to 20 of the printed papers (documents). It appears from the list that the partition was commenced on 25th July 1871 and that it was completed on 17th August 1871. The last paragraph at page 20 shows that the document is a partition deed, though it is signed only by three of the four members of the family and a share is allotted to Subbayyar's son, Munusami Iyer, who has not signed the document.

3. The plaintiff has further examined the plaintiff's sixth witness, Viraraghava Aiyar, mainly to show that the family had no other land in Chinna Thottalam, that it was *punja* land at the time of division and that the land was included in the document now in question. The witness says that he signed the list but this does not seem to be correct. No other oral evidence has been adduced.

4. The document in question is governed by Article 39 of the General Stamp Act XVIII of 1869 and is subject to a stamp duty of Rs. 16 and a penalty of Rs. 160-0-0. It is not clear why the Deputy Collector, to whom the document was sent impounded, has not collected the stamp duty leviable thereon and such penalty as he may think fit to levy. It has been argued that the partition was completed before the lists were prepared and that the lists need not, therefore, be stamped, relying on the case reported as *Nihal Chand* v. *David Sassoon & Co.* (1). But the document is clearly a partition deed and further, the lists were drawn up in the present case on the dates on which the properties were divided.

5. Further, the document requires registration under section 17 of the Indian Registration Act VIII of 1871; for, from Exhibits D, E, F, G and H filed in the suit, it is clear that the value of each share exceeded Rs. 100. I find, therefore, that the document is not admissble in evidence as it has not been registered.

This second appeal and Civil Miscellanous Petition No. 2594 of 1912 coming on for hearing on the 12th January 1914, after the receipt of the above finding, the Court made the following

ORDER.—The partition deed which we

(1) 15 Ind. Cas. 28; 231 P. W. R. 1912; 229 P. L. R. 1912.

mark for identification (M) is not inadmissible for want of registration, Act II of 1884. It is admissible in evidence on payment of penalty, which the appellant undertakes to pay if the Subordinate Judge finds the document genuine and requires to be stamped. If it is admitted, then the finding that if Ramiah was in possession it was the possession of a co-parcener on behalf of himself and defendants Nos. 3 and 4, cannot be supported. We will, therefore, direct the Subordinate Judge to submit a revised finding on the question whether the plaintiff's husband had been in possession for the statutory period and whether he had acquired title by such possession, after receiving the document in evidence, if genuine, and on payment of the penalty if required. Fresh evidence may be received.

The finding should be submitted within six weeks from the date of this order, and seven days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge of North Arcot submitted the following

FINDING.— * * * * *

So, there had not been adverse possession on plaintiff's husband's part in my opinion, *i.e.*, possessien adverse to defendants Nos. 3 and 4, for the statutory period for him to have acquired a valid title thereby. I accordingly find the point in the negative.

This second appeal coming on again for hearing after receipt of the above finding, the Court delivered the following

JUDGMENT.—We accept the finding that the plaintiff's husband Ramayya did not acquire the property by exclusive possession.

It is argued by the appellant's Pleader that the plaintiff is entitled to a decree for joint possession to the extent of her deceased husband's interest in the property. Mr. Venkatachari contends that, as the property was left joint property when the rest of the properties were divided, the husband's interest survived to the respondents by survivorship, and he relies upon *Gavrishankar Parabhuram* v. *Atmaram Rajaram* (2). When there is a partition, the presumption is that it is a complete partition in status and of all the properties. If certain properties were left undivided, there is no presumption that the co-parcenary right is retained in those properties. See *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (3). Moreover in this case the Judge finds that there was a division in interest and the husband and his brothers were co-owners, though in another place he casually refers to one of them as a co-parcener.

We, therefore, declare that the plaintiff is entitled to the interest in the property to which her husband was entitled and decree that she be restored to joint possession. The parties will bear their own costs in this Court.

Appeal allowed.

(2) 18 B. 6.1,

(3) 1 Ind. Cas. 408; 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 786 OF 1913.

December 4, 1914.

Present:—Mr. Justice Tudball.

RAGHUBAR CHARAN—DEFENDANT—APPELLANT

versus

KRISHEN BALDEO—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), *s.* 164 (2)—*Suit for profits—Liability of* lambardar *to account—Burden of proof.*

It is the duty of a *lambardar* to maintain accounts of collection and disbursement. The fact that the village *patwari* maintains accounts does not exonerate the *lambardar* or free him from his duty of maintaining his accounts.

In a suit for profits against a *lambardar*, once the liability to account has been admitted by the defendant or held proved against him, it is the duty of the Court trying the suit to call upon the defendant to file his accounts and to produce his books and prove his accounts.

The initial burden on the plaintiff is to prove that the defendant *lambardar* is liable to account. This shifts the burden on to the *lambardar* to prove the accounts. When this has been done, it is open to the plaintiff to prove that there are uncollected items which would not have remained uncollected

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but for the negligence or misconduct of the defendant.

Second appeal from the decision of the District Judge of Cawnpore, dated 4th April 1913.

Mr. *A. P. Dube*, for the Appellant.

Mr. *Harendra Krishna Mukerji*, for the Respondent.

JUDGMENT.—This is a simple suit for profits. When this appeal came before a learned Judge of this Court, he decided one issue and remitted another for a finding by the Court below. That Court has now found that the plaintiffs have failed to prove that any items of the income remained uncollected by the *lambardar*.

The first Court granted a decree for profits calculated on the collections *as recorded in the patwari's papers*.

The following table shows the demand and the collections recorded by the *patwari* :—

Year.	Demand.	Collections
1315	141 15 8	47 14 3
1316	624 2 0	132 2 0
1317	624 10 0	390 0 0

The lower Appellate Court calculated profits on the figures in the demand column and decreed accordingly.

This Court then remitted the issue noted above.

Now this is a suit against a *lambardar* who acts as the agent of the co-sharers in the management of the village. It is his duty as *lambardar* to maintain accounts. In a suit of this nature once the liability to account has been admitted by the defendant or held proved against him, it is the duty of the Court trying the suit to call upon the defendant to file his accounts and to produce his books and prove his accounts.

The fact that the village *patwari* maintains accounts does not exonerate the *lambardar* or free him from his duty of maintaining his accounts. He, no doubt, is bound to furnish true information to the *patwari* to enable the latter to maintain his books, but the *patwari* is not and cannot be always present when the *lambardar* makes collections and it is a mistake to look upon the *patwari's* accounts as the *lambardar's* own accounts.

To proceed, when the *lambardar* has furnished accounts, it is open to the other side to challenge them. The Court then goes into the matter and settles the accounts and should then calculate the profits on what it considers to be on the evidence, the correct figures showing actual receipts and disbursements.

There is an exception to this. In section 164 (2) it is laid down that the Court may not only award a share of the profits *actually collected*, but also a share in such sum as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the *lambardar*.

It must be noted that this refers only to such sum as may remain *actually uncollected*.

This section does not throw on the plaintiff the burden of proving the accounts. The initial burden on the plaintiff is to prove that the defendant *lambardar* is liable to account. This shifts the burden then on the *lambardar* to prove the accounts. When this has been done, it is open to the plaintiff to prove that there are uncollected items which would not have remained uncollected but for the negligence or misconduct of the defendant.

Now in the present case, it was the plaintiff's plea in the beginning (*vide* the plaint) and all through the suit that the accounts in the *patwari's* books were untrue or incorrect, that the defendant who is his brother and on bad terms with him, has intentionally not had recorded in the *patwari's* books the sums which he has actually collected.

Now the figures quoted above as recorded in the *patwari's* books rouse the greatest suspicion that this charge is correct. The year 1315 *Fasli* was, no doubt, a famine year and this explains the low demand and low collections, though the Cawnpore District was not a famine district and is canal-irrigated. But in regard to the years 1316 and 1317 *Faslis* there is no explanation offered for the low collections recorded in the *patwari's* books. It has been alleged by

the *patwari* that the defendant neither sued nor distrained for any rents in these years. The burden is, therefore, heavy on the defendant *lambardar* to produce and prove his accounts.

I see that he has not attempted to do anything of the sort, but neither of the Courts below called on him to produce his accounts and prove them and the *patwari's* evidence is practically the only evidence.

In my opinion the case should go back to the Court of first instance for re-trial. The Court should call upon the defendant to produce and prove his accounts and allow the plaintiff an opportunity of challenging them. It may be necessary to appoint a Commissioner to make a local inquiry from the tenantry if either party demands it. If the defendant refuses or fails to produce his accounts, then the Court may be justified in presuming that the *lambardar* has collected the whole of the income and decreeing accordingly; but the circumstances of each case must receive due consideration and weight. If accounts are furnished and the Court comes to a decision as to the amount actually collected, then it may have to consider those items which have remained uncollected by reason of the negligence or misconduct of the *lambardar*, if the plaintiff raises the plea and gives evidence thereon.

I, therefore, allow this appeal. I set aside the decrees of the Courts below and remand the suit to the Court of first instance through the lower Appellate Court, with direction to re-admit the suit on its original number and to proceed to hear and determine it according to law in view of the remarks made above. Costs here and heretofore will be costs in the cause and will abide the result.

Costs in this Court will include fees on the higher scale.

Appeal allowed; Suit remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 494 OF 1912.

October 23, 1914.

Present:—Mr. Stuart, A. J. C.

BAKKHA SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GAYA DIN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 9, cl. (2)—Pre-emption, right of—Sharer in mahal *being related to vendor, preferential right of, over sharer not so related.*

Where certain lands held in under-proprietary tenure, situate in a village consisting of only one *mahal*, within the meaning of section 9 of Act XVIII of 1876, were sold to persons who owned a proprietary share in the village but were not related to the vendor, and a suit for pre-emption was instituted by the appellants who not only owned a proprietary share in the village but were also related to the vendors:

Held, that the appellants could claim pre-emption as co-sharers in the *mahal* under clause (2) and as they were related to the vendors while the vendees were not so related the appellants had a right preferential to that possessed by the vendees.

Second appeal against the decree of the Additional District Judge, Lucknow, dated 22nd August 1912, upholding that of the Munsif of South Lucknow, dated 19th May 1912.

Mr. *Manmohan Nath Chak*, for the Appellants.

Babus *Gokul Parshad* and *Lachman Parshad Varma*, for the Respondents.

JUDGMENT.—Bhago Singh owned a 4-pies 16-*krants* share in Sathwara. He sold this share to Sardar Singh in 1873 transferring to the vendee a complete proprietary title in the share with the exception of an area of 5 *bighas* 6 *biswas*. He transferred to the vendee the rights of a superior proprietor over the latter area, and retained the rights of an under-proprietor with regard to the same. The under-proprietary rights in this area were subsequently inherited by Lau Singh, who transferred them by sale to Gaya Din Singh, son of Sardar Singh, and Mata Din Singh. The two latter have a share of 9 pies and 12 *krants* in the village. This share includes the share of 4 pies and 16 *krants* already mentioned as having been purchased by Sardar Singh. Gaya Din Singh and Mata Din Singh are not related to Lau Singh. Bakkha Singh and Ghisyawan Singh who own a share of 1 anna 7 pies and

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4 *krants* in the village, claim to exercise a right of pre emption over the 5 *bighas* and 6 *biswas* in question. They are related to Lau Singh. I find that in Sathwara there is only one *mahal* within the meaning of section 9, Act XVIII of 1876, and that there are no sub-divisions of the village within the meaning of the same section. The learned District Judge rejected the appellants' claim on the grounds that, as the property was an under-proprietary tenure, the right of pre-emption went in the first place to co-sharers in the under-proprietary tenure, and in their absence to its superior proprietor, and, inasmuch as the plaintiffs were neither co-sharers in the under-proprietary tenure nor its superior proprietors, they had no right of pre-emption. The present appeal is preferred.

The learned District Judge based his finding mainly upon the decision of *Ashraf-un-nissa* v. *Parbhu Narain* (1) in which Young, J. C., interpreted section 9 of Act XVIII of 1876 to mean that the right of pre-emption existed in favour, *firstly*, of co-sharers of the *patti* of the tenure (*i.e.*, proprietary or under-proprietary as the case may be) in which the property in dispute is comprised, *secondly*, of co-sharers of the whole *mahal*, and, *thirdly*, of members of the proprietary body (if the community is a proprietary body) and of members of the under-proprietary body (if the community is an under-proprietary body). He decided that in the case of an under-proprietary tenure the under-proprietary body was to be held to be an entity absolutely separate from and unconnected with the body of superior proprietors and that membership of the one body gave no claim to pre-empt the property of the other body, except in so far as was permitted by the provisions of clause 4 of the section.

The general principle of that decision supports the view taken by the learned District Judge. But the learned District Judge omitted to note that the view taken by Mr. Young was dissented from in the later case of *Drigbijae Singh* v. *Court of Wards, Ramnagar Estate, District Gonda and Rup Ram* (2) after reference to the Hon'ble High Court of Allahabad. The latter decision does not, it is true, deal explicitly with clauses 1 and 2, but it differs definitely from the view taken by Mr. Young in certain other previous cases, and accepts the principle that in case of the existence of an under-proprietary body the persons composing that body form together with the persons composing the proprietary body one entity, of which the under-proprietary body is a part, and that the two bodies are not separate entities. The final determination of this principle renders the decision of the particular point in this appeal less difficult. The provisions of clause 1 have, of course, no application, but, as the co-sharers in the village, which in this instance consists of one *mahal*, include co-sharers in the proprietary-body the appellants can claim pre-emption as co-sharers in the *mahal* under clause 2, and, as they are related to the vendors and the vendees are not related to the vendors, the appellants have a right preferential to that possessed by the vendees. The fact that the vendees are not strangers does not help them [*Mahabir Prasad* v. *Ram Jiwan Lal* (3)]. The parties have in the course of argument agreed that the sum of Rs. 500 should be fixed as the amount to be paid for exercise of the right of pre-emption in the event of the Court finding that such a right exists.

I, therefore, decree this appeal and direct that the appellants be awarded possession of the 5 *bighas* and 6 *biswas* in question, conditional on their paying Rs. 500 into the Court of the Munsif, South Lucknow, within three months from the date of this decree. If this payment be made, the contesting respondents shall pay their own costs and those of the appellants in all Courts. If this payment be not made within the period fixed, the suit will stand dismissed, and the appellants will pay their own costs and those of the contesting respondents in all Courts.

Appeal decreed.

(1) Select Case No. 140.
(2) 5 O. C. 266.
(3) 8 Ind. Cas. 272; 13 O. C. 260.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1835 OF 1912.

October 17, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

TIRATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM CHAND—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XLI, r.* 23, *O. XLIII, r.* 1 (u)—*Rejection of plaint by first Court—Order of Appellate Court setting aside order of rejection and remanding case for trial on merits, appeal from, whether competent.*

An order of an Appellate Court setting aside an order of the Court of first instance rejecting a plaint and directing it to proceed with the trial of the suit on the merits, is not an order under Order XLI, rule 23, and is not appealable under Order XLIII, rule 1 (*u*).

Second appeal from the order of the Divisional Judge, Shahpur Division, dated the 4th October 1912, reversing that of the District Judge, Jhang, dated the 21st June 1912, and remanding the case to the first Court.

Mr. *Kirkpatrick*, for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

ORDER.—(1*st August* 1914).—The hearing of this appeal was concluded on the 22nd July 1914 and the judgment was reserved. We subsequently discovered that there was a judgment of the Calcutta High Court reported as *Braja Lal Mitra* v. *Upendra Krishna Mitra*(1), which laid down that the order of the Appellate Court setting aside the order of the Court of first instance rejecting the plaint and directing it to proceed with the trial of the suit on the merits does not come under Order XLI, rule 23, and that no appeal lies therefrom. This ruling is on all fours with the present case and as it was not cited by the Advocate for the respondent, Mr. Kirkpatrick had no opportunity to meet it. We, therefore, brought it to the notice of the learned gentlemen engaged in the appeal and intimated to them that we would like to hear further arguments on the question whether an appeal in this case is competent.

No suitable date before the vacation could be fixed. We, therefore, adjourn the hearing to Saturday the 17th October 1914 when the case will come up before us as a Special Bench.

JUDGMENT.—Our order of the 1st August 1914 shall be read as part of this judgment. The learned Counsel for the appellants admits that the judgment in *Braja Lal Mitra* v. *Upendra Krishna Mitra* (1) is directly applicable to the facts of this case and that there is no point of distinction between the two cases. Following that judgment, we hold that the order of the Divisional Judge setting aside the order of the District Judge rejecting the plaint and directing him to proceed with the trial of the suit on the merits, is not an order under Order XLI, rule 23, and that it is not appealable under Order XLIII, rule 1 (*u*).

We accordingly dismiss the appeal but having regard to the fact that the judgment of the Calcutta High Court was not cited by the learned Advocate for the respondents and to the circumstances of the case, we direct the parties to bear their own costs in this Court.

Appeal dismissed.

(1) 6 C. L. J. 214.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 926 OF 1912.

February 24, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

M. SUBBAYYA—DEFENDANT—PETITIONER

versus

M. RACHAYYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 96—*Suit based on contract decreed by Civil Court having jurisdiction over place of formation of contract—Place of contract transferred after decree to another Civil Court—What Court authorised to hear appeal from decree—Jurisdiction.*

In a suit based on a contract, one day after a decree was passed by the Civil Court within whose jurisdiction the place of formation of the contract was situated, that place was added to the jurisdiction of another Civil Court:

Held, that an appeal against the decree would lie to the Appellate Court authorised to hear appeals from the latter Civil Court, and not to the Appellate Court authorised to hear appeals from the former Civil Court which had passed the decree.

Petition, under section 115, Civil Procedure Code, 1908, praying the High Court to revise the order in Appeal No. 72 of

SUBBAYYA *v.* RACHAYYA.

1902, preferred against that of the District Munsif of Madanapalle, in Original Suit No. 299 of 1910.

Dr. *S. Swaminadhan*, for the Petitioner.

ORDER.—The District Munsif of Madanapalle passed a decree in favour of the plaintiff in Original Suit No. 299 of 1910 on the 30th of March 1911. The contract which gave rise to the litigation was made in Kadiri, which was at the time of the suit within the jurisdiction of the Madanapalle District Munsif. The scheme for the re-distribution of districts came into force on the 1st of April 1911, by which Kadiri was added to the jurisdiction of the District Munsif of Penukonda. From Madanapalle appeals lie to the District Judge of Cuddapah; from Penukonda to the District Judge of Bellary. The defendant filed the appeal in the District Court of Bellary on the 26th of June 1911 against the decision in Original Suit No. 299 of 1910. The District Judge held that the appeal lay to the Cuddapah District Court, and returned it for presentation accordingly. The District Judge of Cuddapah on the appeal being presented to him came to the conclusion that he had no jurisdiction. This revision is against the said order.

There is no Madras decision directly bearing on the matter. Section 13 of the Madras Civil Courts Act gives no indication regarding the appellate forum; section 96 of the Code of Civil Procedure says that an appeal "shall lie to the Court authorised to hear appeals." The question is whether that Appellate Court is one which had jurisdiction when the suit was decided or at the time when the appeal came to be presented. Two cases relating to execution of decrees in which the question was whether the Court which passed the decree or the Court to which territorial jurisdiction was assigned subsequently should entertain applications, came up for consideration before the High Court. In *Subbiah Naicker* v. *Ramanathan Chettiar* (1), the learned Judges were of opinion that loss of territorial jurisdiction *ipso facto* effected a transfer of venue. This view derives support from the actual order that was made in *Alagappa Mudaliyar* v. *Thiyagaraja Mudaliyar* (2). There are only two cases in the other High Courts. The decision in *Allah Dei Begam* v. *Kesri Mal* (3), which is to the effect that appeals lie to the Court to which the territory is added is based on the construction of the language of section 17 of the North-Western Provinces Civil Courts Act. The learned Judges of the Calcutta High Court in *Harabati* v. *Satyabadi Behara* (4) came to a similar conclusion on the interpretation of the language of the special Statute and of the notification of the Government bearing on it. I do not find any direct English decision on the point. But in American Encyclopædia, Volume II, page 965, it is stated that the "jurisdiction of the cause is not transferred to the appellate tribunal until, under the particular laws prevailing, the appeal is perfected." The above discussion shows that the Legislature in India favours the view that the original Court should have no jurisdiction when the place where the contract was made is taken away from its limits. The law in America is in consonance with this principle. I must hold on the authorities referred to by me that the appeal lay to the District Court of Bellary. I am aware that the convenience of the litigants will not be advanced by this conclusion. In case the Appellate Court should either remand the case for fresh disposal or ask for a finding upon new issues, it is desirable that the case should go back to the Munsif who heard it originally. If the appeal is heard by the Bellary District Judge in this case, he will have no power to send the case down to the District Munsif of Madanapalle. But in matters of procedure uniformity is of the essence of the administration of justice and as it has been held already that in regard to applications for execution the Court which decided the suit ceases to have jurisdiction by the transfer of territory, the decision in this case should be that the appeal lies to the District Judge of Bellary as Kadiri is part of the Bellary District.

The appeal will be sent to that Court to be disposed of according to law.

Revision allowed.

(1) 22 Ind. Cas. 899; (1914) M. W. N. 205; 1 L. W. 251; 26 M. L. J. 189; 37 M. 462

(2) 7 Ind. Cas. 864; (1910) M. W. N. 477; 8 M. L. T. 299.

(3) 28 A. 93; A. W. N. (1905) 199; 2 A. L. J. 576.

(4) 34 C. 636; 5 C. L. J. 550.

RUPAN SINGH *v.* CHAMPA LAL.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1022 OF 1913.
November 19, 1914.
Present:—Mr. Justice Chamier and Mr. Justice Piggott.
RUPAN SINGH—DEFENDANT—APPELLANT
versus
CHAMPA LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transferof Property Act (IV of 1882), *ss.* 51, 63, 72—*Improvement—Mortgagor and mortgagee—Mortgage of* kacha *house*—Pacca *double-storied house built on* kacha *house falling down—Mortgagor, liability of.*

A *kacha* one-storied house was usufructuarily mortgaged for Rs. 400. The mortgagee built a *pacca* room in place of a *kacha* room that had fallen down and over the new room he built a second storey and put up a *pacca* staircase to communicate with the upper storey. The whole construction cost him about Rs. 300:

Held, that the mortgagee was entitled to recover from the mortgagor the cost of the new room on the ground floor, as its construction was covered by section 72 of the Transfer of Property Act.

Held, further that the mortgagee was not entitled to recover the cost of the upper storey and the staircase as they were built by him for his own convenience and comfort without any necessity and without the mortgagor's desire or consent.

Rahamatullah Beg v. *Yusuf Ali*, 16 Ind. Cas. 635; 10 A. L. J. 124, *Shepard* v. *Jones*, (1882) 21 Ch. D. 469; 47 L. T. 604; 21 W. R. 308, distinguished.

Arunachella Chetti v. *Sithayi Ammal*, 19 M. 327, *Sammo* v. *Abdul Wahid*, A. W. N (1883) 208, referred to.

Second appeal from the decision of the District Judge of Benares, dated 6th May 1913.

FACTS.—Champa Lal, a subsequent mortgagee, brought the suit for redemption against Rupan Singh, the defendant-appellant, claiming to be entitled to redeem on payment of the principal amount of the mortgage. The defendant refused to allow redemption without payment of a sum which he had spent on repairs and improvements and payment of taxes. The first Court disallowed these sums and decreed the suit. On appeal, the District Judge allowed an item spent on the re-building of a room and confirmed the first Court's decree in other respects. The defendant appealed to the High Court and the plaintiffs filed cross-objections.

Mr. *Harnandan Prasad*, for the Appellant:—The lower Appellate Court omitted to award interest on the amount allowed to us. We must get that, as the mortgage-deed provides for payment of interest and also because we are entitled under the general law as laid down in section 72, Transfer Property Act.

We must also get the amount spent on payment of taxes. We were occupying the house and were bound to pay the taxes under the Muncipality Rules.

We are also entitled to get the money which we spent on the staircase and the room in the upper story. The finding is that they are lasting and permanent. They must also increase the saleable value. They are also reasonable as the amount found to have been spent on them is Rs. 160 nearly, which would be about one-third of the mortgage-money. In deciding whether constructions are reasonable or not, the amount spent on the constructions and the customs and feelings of the parties must be looked at. Here the mortgagee is a Hindu and Hindus require privacy. As the room in the upper story was built for privacy, it must be held to be reasonable and necessary.

Money can be claimed for improvements and additions. I rely on *Rahamatullah Beg* v. *Yusuf Ali* (1); *Durga Singh* v. *Naurang Singh* (2); *Shepard* v. *Jones* (3); *Sandon* v. *Hooper* (4); Ghose on Mortgage (4th Edition), pages 546, 547; Coote on Mortgages (8th Edition), page 1232, paragraph 2324; Fisher on Mortgage (6th Edition), paragraph 1783.

Improvements are allowed on the ground that the mortgagor should not have the benefit of something which he does not pay for, and to enable the mortgagee to enjoy the property comfortably. I submit that the mortgagor has no right to retain and enjoy the improvements without paying for it.

The ruling reported as *Arunachella Chetti* v. *Sithayi Ammal* (5) was very wide in its terms, and was doubted in Ghosh's Mortgage, page 549. The ruling reported as *Sammo* v. *Abdul Wahid* (6). does not show whether it was under the Transfer of Property Act. In any case, we should be allowed to remove the materials.

(1) 16 Ind. Cas. 635; 10 A. L. J. 124.
(2) 17 A. 282; A. W. N. (1895) 69.
(3) (1882) 21 Ch. D. 469; 47 L.T. 604; 21 W. R. 308.
(4) (1843) 6 Beav. 246; 49 E. R. 820; 12 L. J. Ch. 309; 63 R. R 72; Affirmed on Appeal 14 L. J. Ch. 120
(5) 19 M. 327.
(6) A. W. N. (1883) 208.

RUPAN SINGH *v.* CHAMPA LAL.

Mr. *Lalit Mohan Banerjee*, for the Respondents:—The finding is that the constructions were unreasonable and were made without the mortgagor's consent. The mortgagee is, therefore, not entitled to be paid for such constructions. This view found fovour in *Sammo* v. *Abdul Wahid* (6) and *Arunachella Chetti* v. *Sethayi Ammal* (5).

The mortgagee had no right to make such constructions as to make it impossible for the mortgagor to redeem. He is in effect trying to "unprove the mortgagor out of his estate."

It has been laid down in all the rulings relied on by the other side that the expenses should be reasonable. The finding in this case is against the appellant. So he cannot recover these items.

The Transfer of Property Act is framed to meet all contingencies and the mortgagee cannot get any charges not allowed by the Transfer of Property Act.

The amount spent on re-building the room which had fallen down should also not have been allowed. The mortgagee should not have built a *pacca* room in place of the *kacha* room. He should have re-built it in the same way. Such a construction cannot come under section 72 (*b*), Transfer of Property Act.

Mr. *Harnandan Prasad* in reply:—The question as to whether construction allowed for comes under section 72 (*b*) is a finding of fact and cannot be questioned here.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage of a house in the city of Benares made to secure payment of a sum of Rs. 400. While in possession of the property, the mortgagee who is the appellant before us built a *pacca* room in place of a *kacha* room that had fallen down and over the new room he built a second story and he put up a *pacca* staircase to communicate with the upper story. The new ground floor room cost Rs. 147-6-0, the upper room cost Rs. 113 and the staircase cost Rs. 46-8-6. The mortgagee claims to be entitled to these three sums upon redemption of the mortgage, also to a small sum paid by him for taxes. The first Court disallowed the mortgagee's claim to these sums and gave the plaintiff-respondent a sum for redemption on payment of Rs. 400 only. On appeal the District Judge allowed the costs of the ground floor room but disallowed the other items. The mortgagee has appealed to this Court regarding the items disallowed and there is a cross-objection regarding the cost of the ground floor room.

Taking the cross-objection first, we think that the District Judge was clearly right in allowing the cost of the new room on the ground floor, the original room had fallen down and the mortgagee was entitled to re-build it otherwise the house would have become uninhabitable. We think that this item is covered by section 72 (*b*) of the Transfer of Property Act as an expense properly incurred for the preservation of the property. We cannot agree with the argument of the plaintiff-respondent that the mortgagee was bound to re-build the room with *kacha* materials. He was entitled to re-build it in a more substantial manner and so as to avoid constant expense over repairs, and we do not think that the sum spent on the work is excessive.

The upper story and staircase were built by the mortgagee for his own convenience and comfort without any necessity and without the mortgagor's desire or consent. They alter the whole character of the house and are certainly not covered by any of the provisions of section 72 of the Transfer of Property Act. If regarded as accessions to the property acquired at the expense of the mortgagee, they were not necessary to preserve the property from destruction or made with the consent of the mortgagor and as they cannot be separated from the rest of the property without detriment to it, the mortgagor is not bound to pay the cost of them under section 63 of the Act. The mortgagee contends that section 63 is inapplicable and that apart from section 72 or any other provision of the Act, he is entitled to be recouped the cost of the upper story and staircase on the ground that they are lasting improvements reasonably made for the benefit of the property which added to the selling value thereof. He relies upon the decision of Banerji, J., in *Rahamatullah Beg* v. *Yusuf Ali* (1) in which he followed and applied the decision of the Court of Appeal in *Shepard* v. *Jones* (3). That was not a suit for redemption at all, but a suit for an account from a mortgagee, who had exercised his power of sale, of the application

of the proceeds of that sale and what was allowed was a sum of Rs. 100 spent in deepening a well in premises used as a brewery and worth Rs. 5,000. What the Court actually held was that if the money was spent on what turned out on inquiry to be a lasting and permanent improvement and it was found that the value of the property had been enhanced to the extent of the money laid out, the mortgagor could not have the benefit of it without paying for the outlay. All the members of the Court lay stress on the consideration that not only must the improvement be lasting and permanent but the expenditure incurred must be reasonable. They throw no doubt whatever on the rule applied in many previous cases that a mortgagor must not be improved out of his property. Assuming for the moment that we are entitled to go outside section 72 of the Transfer of Property Act and apply the decision of *Shepard* v. *Jones* (3) to their case, we find nothing in that decision which in any way helps the appellant-mortgagee. We think that the mortgagee had no right whatever to add an upper story to the house for his own benefit and at the expense of the mortgagor and considering the value of the original house, we cannot hold that the expense incurred was reasonable. The principal sum secured was Rs. 400, but the mortgagee has claimed to be paid about Rs. 300 for additions, improvements etc., made without any reference to the mortgagor. Nothing in the decision of Banerji, J., or of the Court of Appeal in the cases cited above justifies such a claim as this.

Further, we are of opinion that the claim made by the mortgagee cannot be allowed unless it comes within section 72 of the Transfer of Property Act. That was the view taken by the Madras High Court in *Arunachella Chetti* v. *Sethayi Ammal* (5), and in *Sammo* v. *Abdul Wahid* (6) this Court refused to allow a mortgagee the cost of additions to the mortgage property made without the consent of the mortgagor. It is not, however, clear that the latter case was governed by the Transfer of Property Act. The case of *Shepard* v. *Jones* (3) had not been decided by the Court of Appeal when the Transfer of Property Act was passed, but there were many other published decisions on the subject including the case of *Sandon* v. *Hooper* (4) which is referred to by Banerji, J., in the course of his judgment. Nothing is said in the Act about compensation for improvements and we think that the Legislature advisedly refrained from including in the Act any provision which would enable a mortgagee without consent of the mortgagor to add to and improve or alter the property. Such a power in the hand of the ordinary mortgagee in this country would obviously lead to much litigation and the Legislature was, we think, well advised in restricting the powers of the mortgagee within narrow limits.

The Court below refused to allow interest on the sum of Rs. 147-6-0 and omitted to deal with the claim on account of taxes paid by the mortgagee. We allow interest at the rate of 1 per cent. per mensem from April 20th, 1911, up to the date of redemption on the sum of Rs. 147-6-0 and by consent of the plaintiff-respondent, we allow a sum of Rs. 8-9-0 on account of taxes paid by the mortgagee. To this extent and as regards costs the appeal is allowed. The cross-objection is dismissed. The plaintiff respondent and defendant-appellant will pay and receive proportionate costs throughout. Other parties will pay their own costs.

Appeal partly allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REVISION PETITION No. 32 OF 1912-13 OF BARA BANKI DISTRICT.

April 14, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Thakur SUBKARAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAGHUBANS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXII, r.* 4 (3)—*Abatement of appeal—Death of one of respondents—Legal representatives of deceased respondent not brought upon record—Respondent, deceased, abatement only as against.*

Where one of the respondents dies and his heirs are not made parties to the appeal, the appeal does not abate as a whole but simply as against the deceased respondent, and the decree passed in appeal

HAYAT KHATUN *v.* SHARM KHATUN.

holds good as against those respondents who are represented before the Appellate Court.

Raj Chunder Sen v. *Ganga Das Seal*, 31 C. 487; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A 71; 14 M. L. J. 147 (P. C.), distinguished from.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 2nd May, 1913, reversing that of the Deputy Commissioner, Bara Banki, dated 19th August 1912, reversing that of the Assistant Collector, Bara Banki, dated 5th October 1911.

Babu *Bisheshwar Nath*, for the Appellants.

Mr. *Babu Ram*, for the Respondents.

JUDGMENT.—The suit was for resumption of a *muafi* held by the respondent. The Commissioner held that section 107H applied and ordered that rent should be paid by the respondent as an under-proprietor. Two objections are taken in appeal. First, that inasmuch as one of the plaintiffs, Pirthi Singh, died after the decision of the Deputy Commissioner and before that of the Commissioner and as his heirs had not been made parties to the appeal before the Commissioner, the appeal had abated. I am referred to a Privy Council decision reported as *Raj Chunder Sen* v. *Ganga Das Seal* (1). The law however, in the present Civil Procedure Code is different from the provisions of the Civil Procedure Code as it stood when that decision was pronounced. The law now only provides that a suit abates as against the deceased party and there is nobody here to represent Pirthi Singh. If appearance had been made on his behalf, I should have directed that the lower Court should inquire whether there was not sufficient reason for extending the period of six months allowed for substitution of the representatives of the deceased; but as Pirthi Singh is not represented it is unnecessary to go into this question. The decree certainly holds good as against the persons who were represented in the Commissioner's Court.

The second objection is that it is not shown that there were two successors to the original grantee. The Commissioner relied on the record that Bhawani, the eldest brother of the respondent, is first shown as having held the holding. After him, the name of Basant was entered at the second Settlement and now the name of Raghubans was entered apparently as the result of the partition. It is claimed that all three were members of a joint Hindu family and that there was no succession at all, that all were from the beginning joint owners and took the shares of the deceased brothers by survivorship. This argument would prevail so far as the question of the succession of Basant to Bhawani and Raghubans to Basant is concerned, but there is no doubt whatsoever left in my mind that this is a pre-annexation *muafi* and, therefore, the question of succession is to my mind not one of importance.

The appeal is dismissed with costs on the appellant.

Appeal dismissed.

(1) 31 C. 487 (P. C.); 1 A. L. J. 145; 8 C. W. N 2 31 I. A. 71; 14 M. L. J. 147.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 282 OF 1914.

June 18, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge.

Musammat HAYAT KHATUN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SHARM KHATUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 8, 16—Application to be appointed guardian—Interference in family affairs—Court, duty of.

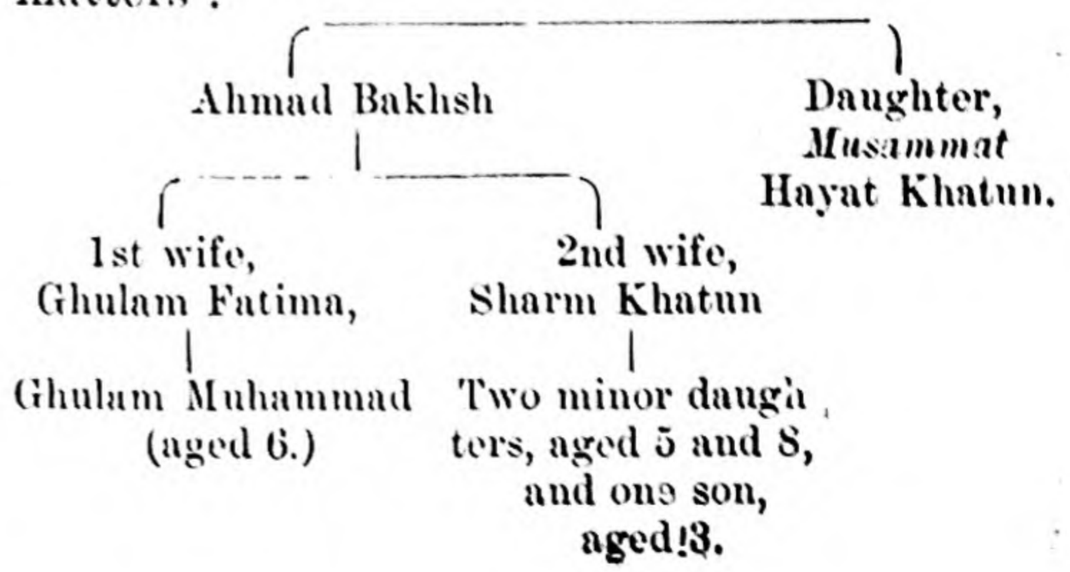
A Court should refuse to take proceedings under the Guardians and Wards Act when they involve an unnecessary interference with family arrangements which are quite satisfactory.

As a general rule far less harm is done by leaving people to manage the affairs of their children in their own way than by attempting to do it for them through the agency of a District Court.

Miscellaneous first appeal from the decree of the District Judge, Muzaffargarh, dated the 12th of January 1914.

Mr. *Kanwar Narain*, for the Appellants.

JUDGMENT.—This case is a good instance of the unnecessary trouble caused by the District Courts in many cases through uncalled-for interference with family affairs under the Guardians and Wards Act. The following pedigree explains matters :



Ahmad Bakhsh is said to have left some 200 *bighas* which have been recorded as owned half and half by the two sons by different wives.

These two women (both present) are apparently on good terms, notwithstanding the fact that the first wife, Ghulam Fatima, has re-married within the village.

There is apparently not the smallest reason why any one should interfere in the affairs of the family. Peasant women of this class, not observing any sort of *pardah*, are quite well able to look after the interests of their own children. The probability is that they will do so better than any one else.

However on the 1st November 1913 *Musammat* Hayat Khatun, sister of Ahmad Bakhsh, chose to apply for guardianship of the persons and property of all four of his children, as being her nephews and nieces. Seeing that the mothers of these children were alive, the Court should have at once rejected the application.

The result of taking action was, that on the 12th December 1913 a further application was made by Hassan Bakhsh (brother of *Musammat* Ghulam Fatima's second husband) asking that he should be appointed guardian of that woman's child, Ghulam Muhammad, as being his prospective father-in-law.

Then on the 12th January 1914 the District Judge passed the extraordinary order now under appeal. It professes to have been made by consent, but there is nothing on record to support this, and if the parties consented they can hardly have understood what they were doing. The arrangement made is that besides certain complicated orders about moveables which go much beyond the legitimate scope of the Court's authority, the management of the property is made over to a Hindu *lambardar* on certain indefinite terms as to remuneration.

From this order *Musammat* Hayat Khatun and Hassan Bakhsh have appealed, while the women Ghulam Fatima and Sharm Khatun are equally vehement against it as respondents. There can clearly have never been any real agreement of parties, and all unite in saying that the making over of the family property to a Hindu as a paid manager was the last thing they desired.

The whole arrangement is quite indefensible, both as to the land and as to certain arbitrary orders about the women's ornaments, some of which the Court ordered to be sold by auction and others to be held on security, and as to the sale of certain cattle left by Ahmad Bakhsh. There is no valid excuse for any sort of interference by the Court, even although *Musammat* Ghulam Fatima has done what is probably the best thing she could do by re-marrying the uncle of the girl to whom her son is betrothed.

Counsel for *Musammat* Hayat Khatun recognises that the best thing for all concerned is that proceedings under the Act should be dropped altogether. His own client no longer presses her application for guardianship and in this she is well advised, as the only possible result would be an endless series of family disputes. It is much to be regretted that she should have started the complication by an ill-considered application, and still more that a District Judge of experience should have taken the matter up under the Act. As a general rule far less harm is done by leaving people to manage the affairs of their children in their own way than by attempting to do it for them through the agency of a District Court. There was here not even a *prima facie* case for interference.

The appeal is accepted. The order of 12th January 1914 is set aside *in toto*. The applications for guardianship are dismissed in respect of both the persons and property of the minors. If any steps have been taken by the Court in pursuance of the order of 12th January they will be re-traced as far as possible, and all concerned will be relegated so far as can be done to the positions held by them before these proceedings were started.

Appeal accepted.

KAILASA v. RAGHUBAR.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 124 OF 1913.

July 8, 1914.

Present:—Mr. Kendall, A. J. C.

Musammat KAILASA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAGHUBAR—PLAINTIFF—RESPONDENT.

Declaratory suit, maintainability of, where paternity of an illegitimate son is denied—Criminal Procedure Code (Act V of 1898), s. 488—Order for maintenance of an illegitimate son.

Defendant No. 1 brought a claim for maintenance in the Magistrate's Court under section 488, Criminal Procedure Code, against the plaintiff whom she averred to be the father of her illegitimate son, defendant No. 2. She obtained an order for maintenance. Basing his cause of action upon that order, the plaintiff brought the present suit for a declaration that the defendant No. 2 is not his son and that he had never an illicit connection with the defendant No. 1:

Held, that the suit for a declaration that defendant No. 2 was not an illegitimate son of the plaintiff was maintainable.

Subhudra v. *Basdeo Dube*, 18 A. 29; A. W. N. (1895) 147, *Waryam Singh* v. *Musammat Premon*, 50 P.R. 1901, 158 P. L. R. 1901; *Musammat Bakhan* v. *Ala Bakhsh*, 26 P. R. 1903; 100 P. L. R. 1903, distinguished

Chinnasami Mudaliar v. *Ambalavana Mudaliar*, 29 M. 48; *Deraje Malinga Naika* v. *Marati Kaveri*, 30 M. 400; 2 M L. T. 344, referred to.

Appeal against the decree of the Subordinate Judge, Bara Banki, dated 27th February 1913, reversing that of the Munsif of Fatehpur, dated 12th November 1912.

Mr. *E. Mannel*, for the Appellants.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—Defendant No. 1 brought a claim for maintenance in the Magistrate's Court under section 488, Criminal Procedure Code, against the plaintiff whom she averred to be the father of her illegitimate son, defendant No. 2. She obtained an order for maintenance at Rs. 3 a month on the 11th of May 1912. Basing his cause of action upon that order, the plaintiff has brought this present suit for a declaration that the defendant No. 2 is not his son and that he had never an illicit connection with the defendant No. 1.

The Court of first instance held that the suit was cognizable by the Civil Court; but it found that the plaintiff had not proved his case and it dismissed the suit.

The plaintiff being the appellant, the question of jurisdiction was not raised in the lower Appellate Court. That Court found on the evidence that the plaintiff was entitled to a decree. It allowed the appeal and decreed the suit as brought.

The defendants have appealed to this Court on the ground that the relief prayed for could not be granted by a Civil Court and that the plaintiff was merely seeking to set aside the order of the Magistrate. It is also pleaded that a full and legal inference has not been drawn from the evidence of the appellants. This latter point has not been argued; and it is quite clear that the lower Appellate Court, presuming that it was properly raised in the appeal, was perfectly entitled upon the evidence which was before it to come to the finding at which it arrived.

As to the question of jurisdiction, the appellants rely upon the ruling of the Allahabad High Court reported as *Subhudra* v. *Basdeo Dube* (1), which professes to follow an old Calcutta ruling. In that case, too, the plaintiff had had an order passed against him under section 488 for maintenance to a certain woman and to her child, of whom he was found to be the father. The Court of first instance had found that it had no jurisdiction, and the lower Appellate Court had taken a contrary view and had remanded the suit. In the High Court it was said: "These reliefs are not reliefs which a Civil Court can grant, especially under the circumstances of this case;" and "what the respondent seeks to do is to set aside the maintenance orders as passed by the Magistrate who had full jurisdiction to pass them, and to declare that they are of no force." The suit was, therefore, dismissed. In *Subad Domni* v. *Katiram Dome* (2), the ruling on which the Allahabad Court relied, a Magistrate had made an order that a certain man should provide for two children, his sons. A suit was brought by that man before a Munsif, who passed an order to the effect that the plaintiff was not the father of the second child. On this the Judicial Commissioner of Assam referred the Magistrate's order to the High Court to be set aside. The High Court recorded its opinion that the decree of

(1) 18 A. 29; A. W. N. (1895) 147.
(2) 20 W. R. Cr. 58.

the Civil Court could not affect the order of the Magistrate, "*even if the Civil Court had jurisdiction, which it has not,* to make a declaratory order as to the paternity of the child in question." The appellants further rely upon the *obiter dictum* of the learned Judges who decided the case of *Ghana Kanta Mohanta* v. *Gereli* (3). In that case a Hindu woman had applied under section 488 for maintenance of her illegitimate minor son, but the Magistrate had refused her application. A civil suit was then brought for a declaration that the child was the child of the defendant and for a decree for maintenance at Rs. 15 per annum. The Civil Court had decreed the claim; and the High Court, in dismissing the appeal, said that if the Magistrate had made an order granting maintenance, the paternity of the child being established, possibly a suit would not lie in a Civil Court to set aside that order. The decisions of the Allahabad High Court and the *obiter dictum* of the learned Judges of the Calcutta High Court dealt with the question of a civil suit to set aside an order of maintenance passed by a competent Criminal Court. The present I hold not to be such a suit. It is argued for the appellants that if the plaintiff succeed in obtaining a declaration that defendant No. 2 is not his illegitimate son, he will go with that declaration to the Magistrate and will endeavour to get the order for maintenance cancelled. That is as it may be; but I cannot at all hold that a suit like the present must be held, because it is founded upon the Magistrate's order, to be directed in intention, though not in words, against that order. No person can come for a declaration in a Civil Court under the Specific Relief Act on mere speculative grounds. He will have no cause of action, on which a Court in its discretion will give him a decree, until there is some infringement or threatened infringement of some right; but if a cloud is cast upon that right he will be entitled to sue for a declaration to remove that cloud. In the present instance the plaintiff has been saddled, by the finding of the Magistrate, with an illegitimate child, of which he says he is not the father. Such a legal character necessarily carries with it rights and obligations above and beyond the one obligation, to provide the maintenance for that child which the Magistrate has ordered. It is by that order that the cloud has been cast upon his legal character; and it is for that reason that he must base his cause of action upon that order. He does not seek to set it aside. A case similar to the present one is reported in *Deraje Malinga Naika* v. *Marati Kaveri* (4). Reference was there made to the Allahabad case to which I have referred above; but the learned Judges differentiated that case on the same ground on which I have differentiated it above, namely, that the learned Judges had treated it as a suit in which the plaintiff sought to have the maintenance order set aside. In this case it was held that the suit would lie. The Judges say: "We see no reason why a suit claiming the declaration for which the plaintiff asks is not maintainable." In *Chinnasami Mudaliar* v. *Ambalavana Mudaliar* (5) the plaintiff was allowed to sue for and obtained a declaration that the defendant had not been adopted by him: while in the two cases reported as *Waryam Singh* v. *Musammat Premon* (6) and *Musammat Bakhan* v. *Ala Bakhsh* (7) the plaintiff was allowed to sue for and obtained a declaration that the defendant was not her husband.

I entirely fail to see why this suit for a declaration that defendant No. 2 is not an illegitimate son of the plaintiff is not maintainable. The other relief, namely, a declaration that the plaintiff never had any illicit connection with the defendant No. 1 is not a relief which ought to be granted.

I, therefore, allow the appeal thus far that only the declaration that defendant No. 2 is not the illegitimate son of the plaintiff will stand. In the circumstances of the case I order that the appellants do bear their own costs and pay the costs of the plaintiff-respondent throughout.

Appeal allowed.

(3) 2 Ind. Cas. 550; 32 C. 479; 13 C. W. N. 150.

(4) 30 M. 400; 2 M. L. T. 344.

(5) 29 M. 48.

(6) 50 P. R. 1901; 158 P. L. R. 1901.

(7) 26 P. R. 1903; 100 P. L. R. 1903.

LAKSHMINARAYANA AIYAR *v.* ULAGAMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1403 AND 1404 OF 1912.

December 2, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

LAKSHMINARAYANA AIYAR—PLAINTIFF AND DEFENDANT NO. 2—APPELLANT (IN BOTH)

versus

IN SECOND APPEAL NO. 1403 OF 1912.

ULAGAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

IN SECOND APPEAL NO. 1404 OF 1912.

PICHAI PILLAI, NOW A MAJOR, AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Redemption, right of—Equity of redemption sold in Court auction - Purchaser not getting symbolical delivery, effect of—Equity of redemption purchased by mortgagee, effect of—Adverse possession of interest in land—Hindu Law—Alienation by widow—Consent of next reversioner to alienation given in course of suit, effect of.

In 1873 the equity of redemption in an usufructuarily mortgaged property, which was in the possession of the mortgagee, was sold in execution of a money-decree against the mortgagor, but the auction-purchaser did not get symbolical delivery of the incorporeal right purchased by him. In 1893 the mortgagee purchased the equity of redemption from the heir of the auction-purchaser. In 1909 the plaintiff purchased the equity of redemption from the heir of the heir of the mortgagor and sued for redemption:

Held, that, by purchasing the equity of redemption from the auction-purchaser, the mortgagee became the full owner of the property and that the plaintiff had no right to claim redemption.

Held, also, that the fact that the auction-purchaser of the equity of redemption did not get symbolical delivery of the incorporeal right purchased by him, did not vest back that right in the mortgagor-judgment-debtor.

There can be no adverse possession of any interest in land by a person who is not deriving any benefit whatever during the period of the alleged adverse possession.

The consent of the next reversioner to a Hindu widow's alienation if given in the course of a suit, and not at the time of the alienation, is not sufficient to pass full title to the alienee.

Amirtolall Bose v. Rajoneekant Mitter, 2 I. A. 113; 15 B. L. R. 10; 23 W. R. 214, followed.

Second appeals against the decrees of the District Court of Tinnevelly, in Appeal Suits Nos. 301 and 302 of 1911, preferred against those of the District Munsif of Ambasamudram, in Original Suits Nos. 261 and 373 of 1910.

Mr. *S. Ramaswamy Aiyar*, for the Appellant.

Mr. *G. Kuppusawmy Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—These two second appeals have arisen out of two connected cross-suits. Lakshminarayana Aiyar is the plaintiff in the principal suit. His suit was for redemption of a mortgage (the deed being dated 15th November 1865) for Rs. 514. The suit was for the redemption, not of the entirety of the mortgaged properties, but only of a definite half share on payment of half of the mortgage amount, that is, Rs. 257 out of the Rs. 514. The facts are a little complicated, but for the purposes of this judgment it is only necessary to state the following.

Sivapiramanayagam Pillai was the owner of the half share in dispute. One Samikolathur Aiyar purchased Sivapiramanayagam Pillai's half share in the equity of redemption in Court auction in 1873 held in execution of a money-decree, after attaching the property subject to Ponnappa Pillai's mortgage of 1865. The mortgagee (Ponnappa Pillai) purchased the equity of redemption from Samikolathur Aiyar's son, Subbaiyar, in 1893. Now the plaintiff ignoring this purchase by the mortgagee, Ponnappa Pillai, of the equity of redemption (which purchase *prima facie* put an end to the mortgage and made Ponnappa Pillai the full owner of the plaint half share), brought this suit to redeem, basing his title on the fact that the heir of the heir of Sivapiramanayagam Pillai sold that equity of redemption in 1909 to the plaintiff's vendor. It is clear from the above statement of facts that Sivapiramanayagam Pillai's heir's heir had, *prima facie*, no right to claim any title in the equity of redemption after it had been sold away to Samikolathur Sami Aiyar in 1873 in Court auction. The ingenious contention put forward on behalf of the plaintiff is that, though Samikolathur Aiyar purchased the equity of redemption in 1873, he did not get symbolical delivery of that incorporeal right and hence the mortgagor, Sivapiramanayagam Pillai and his heirs got back the title to the equity of redemption on the lapse of twelve years from Samikolathur Aiyar's Court auction-purchase in the year 1873.

It should be remembered that the actual possession was in the mortgagee, Ponnappa Pillai, all along. The contention that a

judgment-debtor who had only an incorporeal right and had not actual possession of the land and whose incorporeal rights were sold away in Court-auction, gets back title to those incorporeal rights if the Court auction-purchaser does not get symbolical delivery, is a rather startling proposition and no authority was cited in support of it. If I understood the appellant's (plaintiff's) Vakil, Mr. S. Ramaswami Aiyar, aright, he seemed to contend that the incorporeal right which was vested in the judgment-debtor continued to remain in his possession owing to the Court auction-purchaser not getting symbolical delivery of it, that it so remained in his possession adversely to the Court auction-purchaser and that by twelve years' adverse possession, the judgment-debtor got back that incorporeal right. I can understand adverse possession of land by actual possession or by the receipt of rents. But adverse possession of any interest in land by a person who is not deriving any benefit whatever during the period of the alleged adverse possession is, I must confess, rather unintelligible to me. A purchaser in Court auction even of tangible immoveable property is not bound to take delivery of the property purchased, but if the judgment-debtor was in actual possession thereof and if the Court auction-purchaser allowed the judgment-debtor to remain in possession for twelve years, then he would be barred by limitation from afterwards claiming possession. If the judgment-debtor was not in actual possession but was receiving rent from his tenants and if the Court auction-purchaser allowed the judgment-debtor to be receiving rents from the tenants for twelve years after the purchase, then also the Court auction-purchaser would be ordinarily barred from getting possession under his title as Court auction-purchaser. He could, however, succeed in a suit for possession if brought within twelve years, though he has not applied under Order XXI, rule 95, and Order XXI, rule 96, for possession through Court. But if the judgment-debtor himself is neither in actual possession nor was receiving any benefit from the land, from a tenant or other person in actual possession, I am unable to see how the judgment-debtor could be enjoying any right in such cases adversely to the Court auction-purchaser. Even in the case of a tenant who was paying rent to the judgment-debtor, the Court auction-purchaser could persuade such tenant to attorn to him without obtaining symbolical delivery of the property under Order XXI, rule 96, and the judgment-debtor thereafter could have no opportunity to claim the enjoyment of any adverse right in the property against the Court auction-purchaser. Mr. Ramaswamy Aiyar's argument, if accepted, would run counter to Article 137 of the Limitation Act which gives twelve years to the purchaser of an incorporeal right, not from the date of the sale but from the date when the judgment-debtor becomes "first enabled to possession." In the present case, the Court auction-purchaser's not applying for symbolical delivery of the equity of redemption purchased by him cannot enable the judgment-debtor to put forward the claim that he continued in adverse possession of the intangible right as mortgagor, though he was not deriving the slightest tangible profit from the mortgaged lands which were in the possession of the usufructuary mortgagee. In the result, the second appeal fails and is dismissed with costs.

In the connected Second Appeal No. 1404 of 1912, the plaintiffs are the daughter's sons of the mortgagee, Ponnappa Pillai. It has been decided in the connected suit that Ponnappa Pillai, by purchase of the equity of redemption in 1893 from Samikolathur Aiyar's son Subbaiyar, became the full owner of the plaint property. The plaintiffs' suit is for a declaration of their title to the property as purchasers from Ponnappa Pillai's son's widow and heir. The 2nd defendant in this suit is the plaintiff Lakshminarayanier in the cross-suit. His defence based on the alleged loss by Samikolathur Aiyar of the title to the equity of redemption by adverse possession of the original mortgagor has been just now found against, and he is the appellant in the second appeal, the plaintiffs' suit for declaration having been decreed in the lower Courts. The 2nd defendant (appellant) having thus no legs of his own to stand upon, his learned Vakil, Mr. S. RamasamiAiyar, contended that the plaintiff's purchase from the 4th defendant (a qualified owner, who is the widow of Ponnappa Pillai's son), cannot entitle him to full ownership and that the plaintiffs' suit for declaration of title must, therefore, fail. The lower Courts

gave such a declaration because the plaintiffs were the next male reversioners of Ponnappa Pillai's son, the last male owner. But the learned Vakil argues that though they may be the next male reversioners, there is a female reversioner, the 3rd defendant's (Ponnappa Pillai's) widow, mother of the last owner (Ponnappa Pillai's son), still alive who intervenes between the 4th defendant and the plaintiffs. The lower Appellate Court held that though the 3rd defendant is the next reversioner, she gave her consent in the course of the trial of the cross-suit to the Court's treating the sale by her daughter-in-law, the 4th defendant, in favour of her (3rd defendant's) daughter's sons (the plaintiffs) as valid against the 3rd defendant also and hence that there was nothing in the 2nd defendant's objection. Having regard, however, to the Privy Council case in *Amritolal Bose* v. *Rajoneekant Mitter* (1), it is doubtful whether the 3rd defendant's consent given in the course of the suit will make the alienation by the 4th defendant pass. full title to the plaintiffs. But I think that the defendants Nos. 1 and 2 who have been found to have no title whatever, can have no legal interest in the plaint property which could enable them to contest the lower Appellate Court's decree in the plaintiffs' favour, even if that decree is too widely worded in favour of the plaintiffs. We would, therefore, dismiss this second appeal also.

HANNAY, J.—I agree.

Appeals dismissed.

(1) 2 I. A. 113; 15 B. L. R. 10; 23 W. R. 215.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 23 OF 1911.

October 26, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

BHIM SINGH—DEFENDANT No. 1—APPELLANT

versus

JOT RAM, MINOR, THROUGH NATHWA—PLAINTIFF AND NEKI, MORTGAGOR—DEFENDANT No. 2—RESPONDENTS.

Alienation—Legal necessity—Onus—*Just debts, payment of, by mortgagee—Mortgagee, right of, to recover.*

In a suit by a reversioner for a declaration that the mortgage-deeds executed by the plaintiff's brother in favour of a certain person, being without consideration and legal necessity, shall not affect his reversionary rights, the onus of proving legal necessity for the alienations lies upon the mortgagee and if the mortgagee fails to establish his position he is entitled to credit only in respect of such portion of the mortgage-money as was applied towards the liquidation of the mortgagor's "just debts" due to third parties.

Second appeal from the decree of the Additional Divisional Judge, Delhi Division, at Delhi, dated the 14th October 1910, varying that of the District Judge, Delhi, dated the 12th April 1910, dismissing the claim.

Mehta *Bahadar Chand*, for the Appellant.

Pandit *Ram Bhaj Datta*, for the Respondents.

JUDGMENT.—This Appeal No. 23 of 1911 and Civil Appeal No. 342 of 1911 are cross-appeals and they will both be dealt with in one judgment. The plaintiff, Jot Ram, and defendant No. 2, Neki, are real brothers. On the 20th July 1906 Neki executed two mortgage-deeds, one for Rs. 4,000 and the other for Rs. 1,000, in favour of defendant No. 1, Bhim Singh, in respect of 150 *bighas* of land situate in village Kurari Suleman Nagar, Tahsil Delhi. On the 18th October 1908 Jot Ram brought the present suit against Bhim Singh and Neki for a declaration that the said mortgages of 20th July 1906 had been made without consideration and legal necessity and that they shall not affect his rights of reversion in respect of the land mortgaged. The District Judge dismissed the suit, holding that the mortgages in question had been effected by Neki for consideration and legal necessity, but on appeal the Additional Divisional Judge held that legal necessity for the mortgages had been proved only to the extent of Rs. 3,200 out of the total consideration of Rs. 5,000 and he, therefore, granted the plaintiff a decree, declaring that his reversionary rights in the mortgaged property shall not be affected by the mortgagor's dispute except to the extent of Rs. 3,200.

Both the plaintiff, Jot Ram, and the mortgagee-defendant, Bhim Singh, have preferred cross-appeals to this Court. We have carefully gone through the evidence on the record and have heard the Pleaders for both parties; and the conclusion we

have come to is that legal necessity for the mortgages in dispute has been established only to the extent of Rs. 2,200 and that the rest of the consideration to the mortgages must be disallowed. Admittedly, the onus of proving legal necessity for the alienations in suit rests upon the mortgagee, Bhim Singh, and he has tried to discharge that onus by showing (1) that the whole sum of Rs. 5,000 advanced by him to Neki went towards the liquidation of his antecedent debts, and (2) that assuming that the whole of the said amount was not so applied, legal necessity must be held to have existed for raising that amount by mortgage, inasmuch as before advancing the money to Neki he had satisfied himself by proper inquiry that Neki owed to third parties debts amounting to upwards of Rs. 5,000 and had lent him the money for the liquidation of those debts, there being no obligation upon him to see to the application of the money.

In our opinion Bhim Singh has failed to establish this position. He has no doubt stated on oath that he made inquiries from certain creditors of Neki, whose names he has mentioned, as regards the debts that were due to them by Neki; but we cannot accept his statement on this point. He has not been able to give the amounts of the debts due to those creditors, nor has he stated the circumstances under which those debts had been incurred. Not a single one of the creditors of Neki who have been produced in Court as Bhim Singh's witnesses can say that any inquiry was made by Bhim Singh regarding the debts due by Neki; and we have no hesitation in holding that Bhim Singh made no inquiry whatever in respect of those debts.

It appears from the record that Neki began to borrow money in 1897, as deposed to by Sheo Ram, D. W. No. 5. In 1901 he entered upon a course of extravagance and commenced dealings with a number of money-lenders simultaneously, with the result that in five years he ran up large debts, the loans being advanced to him by about half a dozen professional money-lenders both in his own village and in neighbouring villages. The total amount of debts due by him in 1906 exceeded Rs. 5,000, but there is not the least doubt that the greater portion of the money borrowed by him was spent by him on non-necessary purposes and in leading a life of wasteful extravagance. In the deeds of mortgage executed by him in favour of Bhim Singh no antecedent debts are specified, and it is clear that Bhim Singh is entitled to credit only in respect of such portion of the mortgage-money as was applied towards the liquidation of Neki's "just debts" due to third parties. [*Devi Ditta Singh* v *Saudagar Singh* (1).]

The debts due by Neki to his antecedent creditors, Arjan, Sheo Ram, Kesho Ram, Udmi and Ram Gopal amounted roughly to Rs. 2,000; and upon careful consideration of their evidence and of the evidence produced by the plaintiff we are of opinion that half of that amount, Rs. 1,000, may reasonably be taken to represent the total amount of the just debts due to these creditors. The debt due to Harkishan Das, Rs. 1,200, has been admitted to have been a just debt; and, therefore, the aggregate amount of the just antecedent debts, which were paid off by Bhim Singh and which he was justified in paying, is Rs. 2,200 and no more. The mortgages in dispute were thus valid only to the extent of Rs. 2,200 and the rest of the consideration money must be disallowed as having been advanced without legal necessity.

For the foregoing reasons, we dismiss Bhim Singh's appeal (No. 23 of 1911), and accepting Jot Ram's cross-appeal (No. 342 of 1911) we reduce the amount allowed by the Additional Divisional Judge to the mortgagee from Rs. 3,200 to Rs. 2,200. We direct that the parties pay their own costs throughout.

Appeal dismissed; Cross-appeal accepted.

(1) 65 P. R. 1900; P. L. R. 1900 p. 322.

PONAKA BALARAMI REDDI *v.* HAZI MAHOMED ABDUL AZIZ.

MADRAS HIGH COURT.
CIVIL APPEAL No. 213 OF 1911.
March 11, 1914.
Present:—Mr. Justice Tyabji and
Mr. Justice Spencer.
PONAKA BALARAMI REDDI AND OTHERS
—PLAINTIFFS Nos. 1, 2, 4 AND 5—
APPELLANTS
versus
HAZI MAHOMED ABDUL AZIZ
BADSHAH SAHIB AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 278, 283—Attachment of property, objection to, by three claimants—Joint order setting aside attachment—Opinion adverse to one claimant, effect of—Claims to attachment, decision on, principle of.

The attachment of a property was objected to by three different objectors on different grounds. The first objector claimed to be a *bona fide* purchaser before attachment, the second claimed to be a mortgagee, while the third claimed that the property had devolved upon him by survivorship under Hindu Law. The Court accepted the contention of the third objector and held that the grounds relied upon by the first objector were not well-founded. But all the same it raised the attachment of the property by one joint order dealing with all objection petitions:

Held, that as the order raised the attachment, it was not against the first objector and that it could not be interpreted as against him simplybecause the Court had expressed an opinion that his grounds were not well founded.

Object of proceedings under section 283 etc., explained.

Appeal from the decree of the District Court of Nellore in Original Suit No. 25 of 1909.

Mr. *S. Srinivasa Aiyengar*, for the Appellants.

Mr. *S. Subramania Aiyar*, for the Respondents.

JUDGMENT.

TYABJI, J.—The plaintiffs and defendants are rival claimants for the ownership of the property which is referred to in the plaint. The plaintiffs claim that they are entitled to it under a sale dated 27th July 1901; the defendants claim to be purchasers in a Court sale in execution of a decree.

The learned District Judge has held that the plaintiffs are barred from suing on their title by the operation of section 283 of the Civil Procedure Code, 1882. He held that the plaintiffs were parties against whom an order (which is Exhibit II in the case) had been passed in previous execution proceedings in 1903 and that the suit not having been brought within one year from those proceedings, it is barred under Article 11 of the first Schedule to the Limitation Act.

Exhibit II was an order passed in Civil Miscellaneous Petitions Nos. 440 and 451 of 1903 by the District Judge of Nellore on the 22nd September 1903. The order was that the attachment sought to be raised by the petitioners should be raised. It would, therefore, appear that Exhibit II cannot be interpreted as being an order against the plaintiffs within the meaning of section 283. Exhibit II did that which the plaintiffs then desired to be done, namely, that the attachment should be raised. It is true that in the course of Exhibit II the learned Judge expressed an opinion adverse to the grounds on which the plaintiffs then relied, and he, no doubt, came to the conclusion that those grounds were not well-founded. That does not make the plaintiffs "the party against whom an order was passed under sections 280, 281 or 282", for as I have said the order was that the attachment should be raised. The order in Exhibit II must, on the face of it, be construed as one joint order dealing with the two petitions for the attachment being raised. It cannot be construed on the basis of its being three orders. It may be conceded that if the Judge had, in fact, desired to pass three distinct orders, one on the contention of each of the two petitioners, and a third on the contention of the then 4th defendant, in that case the order he would have passed on the plaintiffs' petition would have been against their claims. The contention on behalf of the defendants is that the interpretation of Exhibit II, to which I have first referred, is not correct. In this connection certain proceedings in the High Court of a later date are relied upon by the respondent. These proceedings were considered irrelevant by the lower Court but have been admitted by the consent of both sides before us. These proceedings, it is argued, preclude us from putting on Exhibit II the interpretation which I have just stated: alternatively it is said that other Judges of this Court have already interpreted Exhibit II with reference to points now arising and that we ought not to take a different view. Before I can deal with this argument, it will be necessary to state somewhat fully the facts out of which the present appeal arises. I shall as far as possible speak of the plaintiffs and defendants, meaning thereby the present plaintiffs and the present defendants, irrespective of

their designation in the previous proceedings.

The property in question belonged to four families, from whom the plaintiffs or their predecessors-in-title (to all of whom I shall refer as the plaintiffs) claim to have purchased under the sale-deed, dated 27th July 1901. The first and second defendants obtained a decree, it is alleged, against Narasa Reddy representing one of the four families to whom the property, according to the plaintiffs, originally belonged. In execution of that decree the property was attached in April 1903; and the plaintiffs then put in a claim petition, Miscellaneous Petition No. 451, objecting to that attachment and claiming that the property belonged to them and not to the judgment-debtor. There was another petition, Miscellaneous Petition No. 440, by persons claiming to be the mortgagees of the property and claiming that the attachment should be subject to their mortgage claims. Both those petitions were dealt with at the same time by the District Judge in Exhiblt II. At the hearing of those petitions one Ragava Reddy also objected to the attachment. He belonged to and apparently represented the other of the four families, and claimed that the attachment should be raised, because the property was joint family property and previous to the attachment it had, by the law of survivorship, passed out of the ownership of the judgment-debtor (then deceased) and devolved upon himself. This contention was accepted by the learned District Judge who disposed of the claim in Exhibit II. But from Exhibit II it also appears, as I have already had occasion to say, that the plaintiffs did not in the opinion of the learned Judge make out their claim to be considered as the *bona fide* purchasers of the property attached. In the order the opinion was also expressed on the other hand that the other petitioners were entitled to rely upon the mortgage put forward by them. In the result he passed one order, namely, that the attachment should be raised. Against that order an appeal was taken to the High Court, being Appeal against Order No. 3 of 1904. To that appeal neither of the two petitioners were parties, the learned Judges (Davies and Sankaran Nair, JJ.) after stating that fact said that the order raising the attachment was set aside "so far as the 4th defendant was concerned." This order cannot, therefore, be said to affect the rights of the present plaintiffs as they stood prior to the appeal. If I am right, therefore, in holding that the order under Exhibit II must be considered to be one joint order to the effect that the attachment should be raised, then that order, so far as the plaintiffs are concerned, was not affected by judgment in Appeal against Order No. 3 of 1904. That judgment is dated the 4th October 1904. After that judgment the execution was proceeded with. There was an application for a warrant of sale in pursuance of which finally the property was sold on the 5th of October 1909. But in the meantime the plaintiffs put in a petition, Miscellaneous Petition No. 441 of 1906, applying that the sale should be stopped. They relied upon Exhibit II which, they claimed, was final and conclusive as regards their rights, because the defendants had not within a year thereof instituted a suit for setting aside the order raising the attachment. This contention of the plaintiffs was, on the 18th of July 1906, accepted by the then District Judge and he decided that the defendants' application for sale must be dismissed. In other words, he held that the sale could not be proceeded with. Against that order of the District Judge, Civil Revision Petition No. 549 of 1906 was put in. The petition was dealt with in the first instance by Mr. Justice Wallis on the 12th February 1908. According to Mr. Justice Wallis's view, Exhibit II ought to be construed as three orders and it ought to be construed as including an order that the present plaintiffs had no claim to the property; in other words that they were parties against whom such an order was passed as is referred to in section 283 of the Civil Procedure Code. The logical result of Mr. Justice Wallis's interpretation of Exhibit II would be not only (1) that the sale could not then have been stopped by the plaintiffs, but (2) it might also imply that the plaintiffs' rights, if any, in the property were lost by the fact that they had not instituted a suit within a year of Exhibit II. If that interpretation of Exhibit II is correct and if both the results to which I have referred must follow from that interpretation, then, of course, the plaintiffs must fail in their present suit. Even on Wallis, J.'s construction of Exhibit II Mr. S. Sreenivasa Aiyengar argues that

the suit is not barred. For reasons which I shall indicate later, it is unnecessary in my view to deal with that construction of Exhibit II and with Mr. S. Sreenivasa Aiyengar's argument on this basis. There was an appeal from Mr. Justice Wallis's judgment and in that appeal Mr. Justice Miller and Mr. Justice Pinhey decided on the 7th September 1908, that the question whether or not the plaintiffs had lost their right to establish their claim to the property by a suit by their having failed to do so within a year of Exhibit II, was a question which it was unnecessary to decide in those proceedings. They held further that the defendants were not bound to institute a suit within a year of Exhibit II. On that point and so far as the further defendants in those proceedings were concerned, it seems to me that there could not be any question that the sale could proceed after the judgment of Davies and Sankaran Nair, JJ., allowing the appeal and permitting the sale to be proceeded with. However that be, the question whether the plaintiffs were barred from putting forward a claim on the basis of the sale-deed to them dated the 27th of July 1901 was expressly not decided by the Court of Appeal, and it is clear that the question was not before them which we have to decide, *viz.*, whether it was for the plaintiffs to institute a suit under section 283 of the Civil Procedure Code within a year after Exhibit II. All they had to consider was whether it was for the defendants to institute a suit. It is true that they agree with Wallis, J.'s view that the effect of Exhibit II was to disallow the claim of the plaintiffs. But that view was expressed in considering whether the effect of Exhibit II was to necessitate a suit by the defendants under section 283. On the other hand they expressly refer to the question whether the plaintiffs should put in a claim petition in the sale proceedings and decline to consider the appeal as such a claim. There is no doubt that the question is complicated by the fact that Exhibit II was one joint order dealing really with three claims, and by the further fact that in the appeal to the High Court against that order the plaintiffs were not parties and yet the order was reversed. Though the plaintiffs were interested in having it confirmed, yet the order was reversed and the plaintiffs were not bound by the reversal, as their rights would not be affected by proceedings to which they were not parties.

Before considering whether owing to these proceedings I ought to take a view different from that which I have expressed as appearing to me to be the *prima facie* interpretation of Exhibit II, or whether the effect of Exhibit II was modified by any of the proceedings to which I have referred, I think it necessary to consider some of the decisions to which we have been referred.

The general principle underlying those decisions, as I understand it, seems to be governed by the fact that the proceedings under section 278 and the following sections which are referred to in section 283, are primarily for the purpose of dealing with attachments in execution proceedings.

In so far as any decision on the claims of parties other than the judgment-debtor is necessary for the continuance of the execution proceedings, that decision has to be promptly given by the authorities entrusted with the execution proceedings in the exercise rather of administrative than judicial functions; and in so far as on their decision the execution proceedings are carried out, the parties who are affected by their decision have a short period of limitation within which that decision can be contested. The decisions during the course of the execution are necessary for the execution proceedings being carried through and it is necessary that such proceedings shall not be delayed, nor their effect kept in suspense, after they have been acted upon. If, however, for any reason the execution proceedings are not pursued to their end, and if the parties are, owing to the arrest of such proceedings, left in the same state in which they were prior to the attachment, then the whole of the proceedings arising out of the attachment and the claim petition are, so to say, wiped out, and the petitioner is not concerned with what may have been incidentally held with a view to that being effected which ultimately was not given effect to, though it may be cessation of the attachment and the execution proceedings following it was not brought about by circumstances controlled by the unsuccessful claimants.

This seems to me to be the principle on which *Ibrahimbhai* v. *Kabulabhai* (1); *Gopal Purshotam* v. *Bai Divali* (2); *Krishna Prasad Roy* v. *Bipin Behary Roy* (3) and *Kedar Nath* v. *Rakhal Das* (4) were decided. Thus in *Ibrahimbhai* v. *Kabulabhai* (1) the attachment was withdrawn though on the application not of the claimant but of another person, and it was held that the attachment being withdrawn it was unnecessary for the plaintiff to institute a suit : as the object of the suit would have been to get the property released from attachment and that object had already been effected, though through the agency of other parties. That decision was followed in *Gopal Purshotam* v. *Bai Divali* (2) and it was there laid down that the withdrawal of the attachment re-placed the parties in *status quo ante*. The principle on which the case of *Umesh Chunder Roy* v. *Raj Bullubh Sen*(5) proceeded seems to me to have been the same. In that case it is stated at page 281: " But it appears that no sale was held, because the judgment-debtor paid off the amount of the decree. The effect of that was that the attachment ceased; and any right which the plaintiff's mother acquired by purchase, even though pending the attachment, became valid, and nothing having occurred to injure her right, if any, she had no occasion to bring any suit. The Judge of the Court below says, that the fact that the decree in execution of which the property was attached was paid off by the judgment-debtor makes no difference whatever. In this view, we think that he is mistaken. The payment by the judgment-debtor of the decretal amount did away with the necessity for a sale, and the attachment being withdrawn, the purchased right of the plaintiff's mother stood good." See also *Kedar Nath* v. *Rakhal Das* (4).

In this connection I think it necessary to deal with a remark in *Koyyana Chittemma* v. *Doosy Gavaramma* (6), which may seem to be inconsistent with the principle that I consider to underlie the decisions. There in dealing with an argument which the Court did not accept, it was said at page 228: "The argument was that the decree having been eventually satisfied there was no reason for the plaintiffs to bring a suit, and the fact that it was not satisfied until after the expiration of a year from the date of the order was immaterial. The contention was that the order was only conclusive against the plaintiffs, if they failed to bring a suit so as to bar them from denying the right of the judgment-creditor to sell the land which he had attached and the right of a purchaser claiming under a sale in execution proceedings." And then later on at page 229 the Court deals with this contention in the following terms: " We are of opinion, however, that the payment off not having been made within a year after the date of the order, the order is conclusive as between the claimants (the plaintiffs) and the defendants. To hold otherwise would lead to uncertainty of title and would be inconsistent with the policy of the Legislature in prescribing a short period of limitation for suits by parties against whom an order has been made in claim proceedings. To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him, liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience. On the facts of the case we are of opinion that the order under section 283 was conclusive as between the plaintiffs and the defendants, and the order of the lower Appellate Court cannot be supported on the ground that it was not."

There, no doubt, it was held that, if a claim petition is decided against the petitioner and that decision is not questioned by a suit instituted within a year, then the petitioner's right to the property is barred notwithstanding that as a matter of fact the attachment may not be proceeded with. But in that case there was a decision directly against the claimant and the decision was that the attachment should continue and that the execution should proceed. In this state of circumstances it may well have seemed to the Court that it is not permitted to the unsuccessful claimant to wait and see

(1) 13 B. 72.
(2) 18 B. 241.
(3) 31 C. 228.
(4) 15 C. 674.
(5) 8 C. 279; 10 C. L. R. 204.
(6) 29 M. 225; 16 M. L. J. 136.

whether the execution is proceeded with: nor is the one year's period of limitation necessarily made subject to active steps being taken for proceeding with the execution by sale of the property or otherwise; and that, on the other hand, the attaching creditor and the other parties concerned may well think that the decision will not be questioned by the unsuccessful claimant after the lapse of a year following the decision that the claimant had no right to intervene and that the execution proceedings may continue irrespective of any hindrance on the part of the unsuccessful claimant. I need only say with regard to this decision that the main fact on which it proceeds, namely, a decision in the claim petition that the execution may proceed irrespective of the petitioner's alleged claim, does not exist in the present case. I do not think on the other hand that it was intended that the principle on which the cases to which I have referred were decided, should be disregarded. On the contrary those cases were carefully considered and distinguished and if I am right in extracting the principle that I have extracted from those cases, then it seems to me that the case of *Koyyana Chittemma* v. *Doosy Gavaramma* (6) does not apply to the circumstances with which we have to deal under Exhibit II in so far as the present question is concerned.

For these reasons I consider that on principle no less than on the construction of Exhibit II, it ought to be held that after execution proceedings were arrested by that order those parties, who were instrumental in getting the proceedings arrested, were not bound by reason of any opinion expressed in Exhibit II to institute a suit for the purpose of contesting the correctness of that opinion. I am also of opinion that the judgments of Davies and Sankaran Nair, JJ., and of Miller and Pinhey, JJ., do not affect the position of the plaintiffs as regards the present suit. There being no order against the plaintiffs in Exhibit II, the suit is not barred, and it must be remanded to the lower Court for being disposed of on the merits in accordance with law. The costs will be costs in the cause.

SPENCER, J.—I agree.

Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REVISION PETITION No. 41 OF 1912-13 OF BARA BANKI DISTRICT.

April 15, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. G. A. Tweedy, J. M.

BENI MADHO—DEFENDANT—APPELLANT

versus

KANHAIYA LAL—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 107G—Grove-holder, nature of, tenure of—Resumption—Groves not held as muafi *at Settlement—Assessment of rent—Certified copy of extract from Settlement Record, mistake in, allegation as to—Deputy Commissioner, duty of—Settlement Records to be referred to.*

The tenure of a grove-holder is liable to resumption on the expiry of the term during which the land remains grove.

Plots held at the time of the Settlement as groves, and not as *muafi*, ought to be assessed to rent under section 107G of the Oudh Rent Act when they are brought under cultivation.

Where it is alleged before a Deputy Commissioner that there is a mistake in a certified copy of an extract from the Settlement Records, he ought to refer to the original records in order to ascertain the truth in the allegation.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 2nd July 1913, upholding the order of the Deputy Commissioner, Bara Banki, dated 22nd January 1913, modifying that of the Assistant Collector, Bara Banki, dated 19th November 1912.

FACTS.—In a resumption suit, the defendant contended that he was under section 107H of the Oudh Rent Act entitled to under-proprietary rights in respect of three plots, *viz.*, Nos. 294, 295 and 579. Out of these Nos. 294 and 295 were entered at the time of the First Regular Settlement as groves in the possession of one Tulshi Das, who was alleged by the defendant to have been his predecessor; but the name of Tulshi Das was not entered in the *Wajib-ul-arz*, as were those of other persons, as *muafidar* or grantee. The lower Courts, therefore, presumed that these two plots were held on ordinary grove tenure at the time of the Settlement, and finding that they were now brought under cultivation, assessed them to rent under section 107G of the Oudh Rent Act. The remaining No. 579 was shown in a certified copy produced by the defendant as corresponding to old No. 522, and this No. 522 did not stand in the name of Tulshi Das at the time of the Settlement. The old No. 523, however, did so stand as part of his

muafi. Thus the defendant contended that there had been a mistake in the copy issued to him and that the new No. 579 really corresponded with the old No. 523. But his contention was disregarded and he was in respect of this plot also declared to be an ordinary tenant under the provisions of section 107G of the Oudh Rent Act. The defendant then brought his contention forward in appeal before the Board.

Mr. *P. N. Rozdon*, for the Appellant.

Mr. *S. N. Sinha*, for the Respondent.

JUDGMENT.

BAILLIE, S. M.—The appeal relates to three numbers. Two numbers, 294 and 295, were never included in the appellant's *muafi* and were held by him as grove. The tenure of a grove-holder is one which is liable to resumption on the expiry of the term during which the land remains grove and it cannot be inferred that the appellant had any rights other than those of an ordinary grove-holder. In regard to these numbers the lower Courts rightly assessed rent. There remains another number, No. 579, which in the copy produced before the Court of first instance is shown as corresponding to No. 522, which was not in the appellant's name at the First Regular Settlement. The appellant alleges that there has been a mistake in the copy and that it really corresponds with No. 523 which was at the First Settlement part of his *muafi*. He brought this matter to the notice of the Deputy Commissioner, but the Deputy Commissioner, recording that the areas did not exactly agree, said that the appellant had given no proof of the correspondence of old No. 523 with new No. 579. This order was upheld on appeal by the Commissioner. This is not the way in which a Deputy Commissioner in Oudh is expected to deal with this case. The Settlement Records were close to him and a brief reference to them would have shown whether there had been a mistake in the copy or not. I consider that the Deputy Commissioner should have referred to the Settlement Record to ascertain what the correct number corresponding to No. 579 was. The appellant, in this Court, produces his Settlement *parcha* which shows No. 523 as corresponding to No. 579 and there appears to be little or no doubt that No. 523 is the really corresponding number, but as the respondent wishes it, I agree to the matter being referred back to the district for a report.

TWEEDY, J. M.—I agree that the case should go back for further evidence and a report under rule 25.

Report called for.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 76 OF 1911.

January 23, 1914.

Present:—Mr. Justice Miller and Mr. Justice Tyabji.

SOWCAR SAHANADA GOVINDA DOSS AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJAH VENKATA PERUMAL RAJAH, MINOR, BY HIS NEXT FRIEND, MR. W. A. VARADHACHARIAR—PLAINTIFF No. 3—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Adverse possession—Purchaser at Court sale delivered formal possession by proclamation of property under tenants—Burden of proof that purchaser was not in possession.

In 1881 a village was leased for a term of 10 years. The lease was to terminate on the last day of June 1891. In 1885 the lessor mortgaged the village. In 1887 the mortgagee sued on his mortgage and obtained a decree. In 1889 he purchased the village in execution of his decree and on 7th May 1890, when the property was still in the possession of the lessees, the purchaser obtained possession of the reversion by proclamation. In 1903 the successor of the lessor sued the purchaser for recovery of possession of the village on the ground that the property, being dedicated to a temple, was trust property and that consequently the auction-sale was void:

Held, that whether Article 142 or Article 144 of the first Schedule to the Limitation Act applied, the suit was barred inasmuch as the purchaser was in possession of the village adversely to the temple from May 1890.

Where a purchaser at a Court auction-sale had obtained through Court as full and complete a possession as was possible under the circumstances, strong evidence was required to show that the auction-purchaser was not in possession and did not collect the rent of the property.

Appeal from the decree of the Court of the Temporary Subordinate Judge of North Arcot, in Original Suit No. 2 of 1910, (Original Suit No. 1 of 1907, on the file of the District Court of North Arcot).

Messrs. *K. Srinivasa Aiyangar* and *S. Ramaswami Aiyar*, for the Appellants.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondent.

JUDGMENT.

MILLER, J.—The suit was instituted in 1903 by the Rajah of Karvetnagar through a next friend, an officer of the Court of Wards, to recover possession, on behalf of the temple of Sri Venugopalasami in Karvetnagar, of the village of Konasamudram which, according to the plaint, was given to the temple on the 29th of August 1808 by a *sanad* of that date. The present Rajah has after the institution of the suit taken over the *zemindari* from the Court of Wards and continues the suit himself. In 1881 a lease of the village for a term of 10 years terminating on the last day of June 1891 was given by the then Rajah to two persons whom I may call the lessees, at a rental of Rs. 4,000 a year which was to be credited in payment of sums due to them on mortgages executed by the Rajah. The Rajah is admittedly hereditary *Dharmakarta* of the temple of Sri Venugopalasami, but the money borrowed on the mortgages was not for the purposes of the temple but for his own private use.

2. In 1885 Konasamudram and another village were mortgaged by a simple mortgage to the father of the defendants,—I may call him the purchaser—and in 1887 he sued on the mortgage and obtained an *ex parte* decree on the 1st of April of that year.

3. The property was attached in execution of the decree, and was brought to sale in August 1889 and purchased by the mortgagee; the judgment-debtor attempted to get the sale set aside alleging, *inter alia*, that the property sold, the Konasamudram village, was "*Tanakha*" of the Sri Venugopalasami Temple and some other temples. The District Judge in March 1890 dismissed the application, and the High Court dismissed the appeal from his order, observing as regards the allegation that the property was temple property, that that point ought to have been raised in the suit. The judgment of the High Court was on the 16th April 1891, but the sale was confirmed in April 1890 after the District Judge's order, and possession was delivered by proclamation on the 7th of May 1890 to the purchaser who, as I have said, was the mortgagee himself.

4. In 1891 the Rajah's mother sued the purchaser to recover the village from him on behalf of the temple, but her suit, Original Suit No. 9 of 1891, was dismissed by the District Judge who held that on the facts stated in the plaint she had no cause of action. From this decision no appeal was preferred, and the purchaser and after him his sons remained in possession of the village until this suit was filed on the 30th of June 1903.

5. The Subordinate Judge has decreed the plaintiff's claim; holding that the village was granted to the temple and is in possession of the Rajah in his capacity of hereditary *Dharmakarta*, and consequently that its alienation was unlawful and the Rajah as *Dharmakarta* can recover possession of it.

6. He also dealt with several pleas in bar of the claim, deciding them all against the defendants. Of these pleas the only ones argued before us are those which raise questions of limitation, *res judicata*, and *bona fide* purchase without notice.

7. I will deal first with the plea of limitation. For the appellants it is claimed that Article 142 of the first Schedule of the Limitation Act applies and that the plaintiff is bound to show that he was not dispossessed twelve years before the institution of the suit, while the respondent contends that the defendants must show adverse possession for 12 years if they want to bar the suit. In the Court below some other provisions of the Limitation Act were relied on, but before us no argument was based on them.

8. As the evidence stands, it is not very important to decide which of the two Articles, 142 or 144, is applicable to the case, but I am unable to see any reason why Article 142 should not be applied if it is necessary to apply it.

9. For the appellants it was contended, as in the lower Court, that the *Dharmakarta* lost possession at the date of the lease, *i.e.*, in 1881: the lease was given by the Rajah not as *Dharmakarta* but as *zemindar*, and the lessees did not, therefore, hold under the *Dharmakarta* but adversely to him. The Subordinate Judge has rejected this contention and, I think, has rightly rejected it. As *Dharmakarta* the

Rajah could lawfully grant a lease for a term of years, and though he did not grant the lease as *Dharmakarta* and put the proceeds into his own pocket and not into the temple chest that makes no difference; the grant of the lease was lawful and the possession of the lessees was lawful; their right to possession may be referred to the right of the *Dharmakarta* to give them possession and his misappropriation of the rent does not affect their possession.

10. The real question is, it seems to me, a question of fact. Possession was transferred by proclamation after the Court sale, and from the date of proclamation the purchaser, it is contended, obtained possession of the reversion, the term of the lease being then unexpired. The proclamation of possession was made, it will be remembered, on the 7th of May 1890, and the term continued until the 30th of June 1891. The suit was instituted on the 30th of June 1903. It is not denied by Mr. Srinivasa Iyengar that, although possession of the reversion was transferred on the 7th of May 1890 to the purchaser, still if the Rajah continues to receive the rent from the lessees, he must be held to have re-taken possession in spite of the Court, and if he continued to receive all the rent due up to the end of the term, he must be said to have been in possession on the 30th of June 1891 and, therefore, within twelve years of the suit. Mr. Govindaraghava Iyer contended that though the proclamation of the 7th of May 1890 transferred the possession of the Rajah to the purchaser, it did not transfer that of the *Dharmakarta*. As *Dharmakarta* the Rajah continued in possession: the fallacy in the argument seems to lie in the claim that a man can be in and out or partly in and partly out of possession at the same time: though turned out by the Court as Rajah, the plaintiff may no doubt still have had a right to remain in possession as *Dharmakarta*, but the right to possession is not possession.

11. Mr. Govindaraghava Iyer also contended that inasmuch as the lessee could not by any act of his own make his possession adverse to his lessor, the payment of rent, if any, to the purchaser cannot make any difference. This is really irrelevant because the lessee's possession is not in question: the question is whether the possession of the Rajah ceased before the expiry of the term. The Court certainly took it from him by its proclamation and unless he re-acquired it by receipt of rent, he has lost it.

12. The lessees had undertaken to pay to the temple a sum of Rs. 1,500 annually out of the rent of Rs. 4,000 for the last four years of the term, and the accounts now produced by the Rajah from his *Devastanam* office are intended to prove that rents were received up to July 1891.

[After discussing evidence on the question his Lordship proceeded as follows:—]

17. I have dealt with all the evidence to which our attention was called on behalf of the plaintiff and it cannot be said to prove satisfactorily that anything was paid to the Rajah by the lessees for rent falling due after the date of transfer of possession. The defendants do not show that their father received rent before June 1891; they do not produce their father's accounts, but it is perhaps unfair to draw any inference against them from this fact, as the matter was over 12 years old at the date of the trial and so far as the lessees were concerned had been entirely closed. There was no debt due to the *Sowcar* which would require the preservation of the account relating to it, or its being brought up into the accounts of succeeding years.

18. There is the evidence of defendants' 2nd witness who swears that the lessees were asked by him to pay the rent for the last year of their term to the *Sowcar*, *i.e.*, the purchaser, and that they agreed to settle with the *Sowcar* directly; he does not personally know if they actually paid anything. This evidence is supported by the *prima facie* probability that the *Sowcar* having obtained possession would demand the rent, and that the lessees after the Court's proclamation would not have paid the Rajah anything. They might have withheld payment from both sides, but there is no evidence as to that: the Rajah's mother sued in March 1891 to recover the village for the temple, but before that time there is no apparent reason why the lessees should have refused payment to the purchaser. I think then there is sufficient evidence to show that the Rajah lost possession before

the 30th of June 1891; and that is sufficient to bar the suit for possession.

19. It is not so clear that the purchaser received any rent before the end of June 1891, but he had the possession given him by the Court in 1890, and that will, I think, be possession adverse to the Rajah, it not being shown that rent falling due subsequent to that date was paid to the Rajah or any one else. The fact, if it be a fact, that the lessees did not pay their rent until after the end of June 1891, will not make the purchaser's possession any the less adverse to the Rajah.

20. The suit is, therefore, in my opinion, barred by limitation.

21. It is, however, desirable in view of the probability that the case may be taken to a higher Court that we should decide also the principal issues in the suit, that it is to say, those dealing with the question whether the village was granted to the temple and so became trust property in the Rajah's hands and the mortgage and sale were, therefore, inoperative as against the trust.

[After discussing some evidence his Lordship proceeded as follows:—]

24. Now there is no evidence as to what is the accepted signification of the word "*Tanakha*" in the registers and accounts of the Karvetnagar *Zemindari*, if I except the statement of plaintiff's 7th witness that in the *zemindari* it generally means 'giving away' a statement on which I do not think much reliance can be placed and which Mr. Govindaraghava Iyer did not ask us to accept as of great value. From Wilson's Glossary and other dictionaries which have been shown to us I gather that the word might be used to indicate a permanent assignment of the revenue of a village to a particular purpose, but that is not its necessary signification, and it may equally well connote a temporary order allotting or assigning, in the non-technical meaning of that word, certain income to a certain purpose for convenience and for such time as convenience may support the arrangement. It certainly does not necessarily import a permanent grant.

25. Here we have the fact that the Rajah was himself the hereditary *Dharmakarta* of the Venugopalasawmi temple and the *Shamlat* institutions, and there seems nothing unreasonable or improbable in the view that he may have found it more convenient to allot the income of the village of Konasamudram to the temple than to make appropriation from the *rusum* collections. Perhaps indeed the very fact that he was *Dharmakarta* as well as *zemindar* renders it less probable, because less necessary, that he would make permanent grants out of the *zemindari* land. It was his business to keep the temples going, but not necessarily to endow them for that purpose—and if the collection of *rusums* failed, it may be that he would not have been at all bound to supplement the income of the institution from his own revenues.

I am not prepared in these circumstances to infer from the use of the word "*Tanakha*" that there was a grant to the temple: I do not rely on the fact that neither Punyam nor Konasamudram villages appear as Devadayam grants at the Inam Settlement instituted by the British Government. It may be that neither of these villages was allotted to the temples before the Permanent Settlement. Exhibit CC is not clear on this point and there is no other evidence.

[After discussing further evidence his Lordship proceeded as follows:—]

30. There is in this case a good deal more evidence in favour of the plaintiff than was found in *Konwar Doorganath Roy* v. *Ram Chunder Sen*(1). We have the separate appropriation of rents and the description of the villages over a long period. But even so, I doubt, having regard to the ambiguity of the word "*Tanakha*" and "*Jari*" and to the Rajah's position in respect of the temples, whether we can properly be said to have here that very clear and strong evidence which their Lordships in that case held 'ought to exist' to enable the plaintiff to discharge the burden which lies upon him, the burden in the present case of proving that the *Melvaram* of the village of Konasamudram was inalienably conferred upon the temple of Sri Venugopalasami Varu and the connected temples in Karvetnagar to sustain the worship in those institutions. Upon the whole, though not without some doubt, I think the evidence is insufficient to discharge the burden. In the absence of an express grant there is nothing inconsistent with a

(1) 2 C. 341 (P. C.); 4 I. A. 52.

temporary appropriation of the rents of the village, an appropriation which it has been found convenient to allow to continue for a long period until the money was wanted for other purposes. I would for this reason as well as upon the ground of limitation allow the appeal and dismiss the suit with costs in both Courts.

31. It is unnecessary in this view of the case to decide the other two questions argued. The argument on the plea of *res judicata* was confined to the effect of the decision of the District Judge in the Suit No. 9 of 1891 instituted on behalf of the temple by the Rajah's mother to recover the same village. The District Judge held that on the facts stated in the plaint—the District Judge speaks of the allegations on the pleadings, but the earlier part of paragraph 16 of his judgment shows that he is referring only to the plaint—the plaintiff had no cause of action: the temple, it appeared to him, was in the plaint alleged to be a private institution and the funds provided for its upkeep were at the disposal of the Rajah. It is, as I have said, unnecessary to decide whether in these circumstances the present suit by the plaintiff is barred or not.

32. The other question is whether the defendant's father as a *bona fide* purchaser for value without notice of the trust is entitled to retain the village inspite of the trust. The finding that there is no trust renders it unnecessary to decide this question either.

TYABJI, J.—I agree in the judgment prepared by my learned colleague which I have the benefit of reading. The facts leading up to this appeal are set out in that judgment and I need not repeat them.

The first question with which I propose to deal is whether the village of Konasamudram appertains to the Sri Venugopalasami temple as alleged by the plaintiff.

[After discussing the documentary evidence on the point his Lordship concluded as follows :—]

After considering the whole of the evidence adduced in this suit with reference to the dedication of the village, I have come to the conclusion that the village of Konasamudram was not dedicated to the Venugopalasami temple and that, therefore, the sale to the defendants' predecessors-in-title was a valid sale.

The next point with which I shall deal is whether the suit is barred by limitation. I agree that the suit is barred. The defendants' father purchased the village on the 8th August 1889 at a Court-auction held in execution of his mortgage-decree, and possession was transferred to him in May 1890. Exhibit VI is the sale certificate, dated 24th April 1890, and Exhibit VI (*a*) is the receipt for possession, dated the 7th May 1890. At the date of Exhibit VI (*a*) the village was in the actual possession of *ijaradars* to whom the property had been leased by the *zemindar*. It is contended for the plaintiffs that the purchaser did not obtain possession of the village in May 1890, nor until the lease had expired. As against this, we have the fact that under the decree of the Court the auction-purchaser was purported to be put into such possession as could be given to him in May 1890; and strong evidence would be required to show that inspite of the execution proceedings the defendant did not obtain as full and complete a possession as was possible under the circumstances.

The plaintiff contends that as a matter of fact after the date of Exhibit VI (*a*) rent was paid by the *ijaradars* to the *zemindar* as trustee of the temple and not to the defendants or their predecessors-in-title ; and for this contention reliance is mainly placed on Exhibit X2 which is a memorandum of account. The heading of Exhibit X2 is as follows : "List showing details of amounts received from 1887 to September 1890, on account of *Devastanam* dues paid by Konduru Venkataraju and others lessees of Konasamudram." The item in Exhibit X2 relied upon by the plaintiff is for Rs. 250 bearing date the 16th July 1890. Exhibit X2, is referred to in the evidence of the fourth witness for the plaintiff and Exhibits X and XI show how it came into being. It seems to me that the item in Exhibit X2 for Rs. 250 is not a genuine one. It is unexplained why this item should be credited to the *Vikruti* year, 1890 of the Christian Era, when, as a matter of fact, the rent for the previous year 1889 was not fully

discharged. That it was not fully discharged is shown by the fact that a total of only Rs. 4,000 is shown as having been received at the foot of the account. The rent being at the rate of Rs. 1,500 per year, the total amount due for the three years 1887, 1888 and 1889 would be Rs. 4,500. This fact connected with the facts to which I have alluded before makes it extremely improbable that the sum of Rs. 250 should have been paid and accepted as rent for the *Vikruti* year, 1890.

Similar remarks apply to the entry for Rs. 100 in Exhibit Y2 which entry, however, does not refer to the period in respect of which the sum was received. Exhibit Z might show that, as a matter of fact, some portion of the rent was recovered after the transfer of possession to the defendants' father but that might well refer to the rent due for the period anterior to the purchase by the defendants' father.

It was argued that inspite of these facts, the village must be presumed to be in the possession of the trustee so long as the *ijara* continued. But it seems to me that there is nothing to prevent possession of the lands being transferred by the tenants being made to attorn to the transferee, and if, as a matter of fact, the rent is recovered by the transferee, he has obtained complete possession of the lands.

In this connection it should be mentioned that there is no evidence that the rent of Konasamudram was collected immediately after the date of Exhibit VI (*a*) by the auction-purchaser, the present defendants' father. The absence of such evidence was explained by the fact that the person who actually purchased the village in the auction-sale and through whom the present defendant claims it, has died and it is difficult to trace the accounts at this time so long after the events. This explanation seems to me to be not unreasonble, and in any event it must be for the plaintiff to prove, that inspite of the auction sale and of the formal delivery of possession to him by Exhibit VI (*a*), the rent was collected by the plaintiff and not by the auction-purchaser: it is admitted that at the present moment the sons of the auction-purchaser are in possession. Their possession can be most reasonably traced to the auction-purchase: no circumstances are proved from which their possession can be referred except to the auction-purchase; and if their possession is to be referred to the auction-purchaser, it must *prima facie* be referred also to Exhibit VI (*a*).

I am, therefore, of opinion that the defendant was in possession of the village adversely to the temple as from May 1890. There was some discussion as to the Article of the Limitation Act that must apply. On behalf of the appellant Articles 134, 142 and 144 were suggested as the Articles that must apply; the respondent's Pleader suggested Article 144. In any case if the defendants or their predecessors-in-title have been holding the land adversely to the temple since May 1890, the present suit was barred by limitation.

Two other points were argued before us on behalf of the appellant, namely, that the appellant was a *bona fide* purchaser for value without notice of any trust, and *secondly* that the suit was barred by the doctrine of *res judicata*. It is unnecessary to deal with these points in view of the opinion that I have formed as regards the two questions with which I have dealt.

I agree, therefore, that the appeal should be allowed and the suit dismissed with costs throughout.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REVISION PETITION No. 12 OF 1912-13 OF BAHRAICH DISTRICT.

April 20, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. G. A. Tweedy, J. M.

RAM PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARJOO—PLAINTIFF—RESPONDENT.

Registration of lease necessary—Lessee cannot save his ejectment by relying upon lease registration of which compulsory.

A lessee cannot resist his ejectment by relying upon the lease which secures him in possession for an indefinite period and the registration of which is thus compulsory, inasmuch as the unregistered lease does not under law affect the land it relates to.

Appeal from the decree of the Commissioner, Fyzabad, dated 19th May 1913, upholding that of the Assistant Collector, Bahraich, dated 24th January 1913.

RATTI RAM *v.* KUNDAN LAL.

Babu *Aditya Prasad*, for the Appellants.
Mr. *G. H. Thomas*, for the Respondent.

JUDGMENT.

BAILLIE, S. M.—(*April 7th*, 1914.)—The appellants had a lease from the Kapurthala Estate in which theland in question is included. They executed in favour of the respondent a document which, in my opinion, is clearly a sub-lease, in which they agree that the respondent should hold the land now in question at the rent due to the Kapurthala Estate and for as long as the lease was in the name of the appellatns or of their descendants. The document was executed on tamped paper, but was not registered. The Court of first instance held that registration was not required, that the agreement was binding, and cancelled the notice of ejectment issued by the appellants. This judgment was upheld by the Commissioner who simply records that the appellants were bound by their own agreement. The Commissioner does not refer to the question of registration, but this question is not one which can, according to law, be dismissed from consideration. If registration is necessary, the law prohibits a Court from holding that an unregistered agreement in any way affects the land to which it relates. In my opinion, registration is necessary. The leases which are by order of the Local Government exempt from the necessity for registration, are leases for a term not exceeding five years and for a rent not exceeding 50. Now this lease is not for a term not exceeding five years. It is a lease which secures the respondent in possession for an indefinite period. It is not, in my opinion, exempt under the order of the Local Government. The parties to the agreement themselves recognized that it was one to be registered as the document contains provision for registration. This being so, it does not affect the land and the respondent cannot rely on it to resist ejectment. I would allow this appeal, cancel the order of the Commissioner and the Court of first instance, with costs on the respondent throughout.

TWEEDY, J. M.—I concur.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 41 OF 1911.

April 27, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

RATTI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUNDAN LAL, REPRESENTATIVE OF SHEO KARAN DAS, DECEASED, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 908), s, 21—Jurisdiction—Suit instituted in wrong Court—Consequent failure of justice—Alterations in procedure—Retrospective effect.

Where a suit was instituted in the Court of the District Judge, Lyallpur, for recovery of the balance due to plaintiffs on account of certain transactions carried out by defendants as plaintiffs' commission agents at Karachi, it being alleged that the agreement by the defendants to act as plaintiffs' agents was entered into at Lyallpur:

Held, that as the plaintiffs had failed to prove the alleged contract, the Lyallpur Court had no jurisdiction to adjudicate upon the claim of the plaintiffs;

(2) that alterations in procedure being always retrospective, section 21, Civil Procedure Code, 1908, applied even though the suit was instituted in 1906; and the objection as to the place of suing could not be allowed, because there had been no consequent failure of justice.

First appeal from the decree of the District Judge of Lyallpur, dated the 5th of December 1910, decreeing claim for Rs. 4,416-7-0.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—This appeal arises out of a dispute between two mercantile firms in respect of money due on certain transactions between them. The plaintiffs carry on their business at Lyallpur under the name and style of "Sheo Karan Das-Har Karan Das", and the defendants' firm called "Ratti Ram-Ram Bhagat" have their business at Karachi. It appears that the plaintiffs were employed to purchase goods at Lyallpur as commission agents of the defendants and send them to the latter at Karachi. The present suit, however, relates entirely to transactions connected with the sale of goods at Karachi by the defendants as plaintiffs' commission agents.

According to the plaintiffs these transactions began in pursuance of a contract which was entered into at Lyallpur at the

time of the visit of Daya Mal, one of the defendants, when it was agreed that the plaintiffs would send their goods to the defendants at Karachi and the latter after deducting the commission money due to them would remit the balance of the price to the former at Lyallpur.

The plaintiffs claimed that the amount to which they were entitled as the result of the account between the parties was Rs. 5,669-12-0 and filed a suit for the recovery thereof. The defendants, though admitting the sale of the plaintiffs' goods as commission agents, denied the formation of the contract at Lyallpur and pleaded that the Court there had no jurisdiction to try the suit. They also disputed the correctness of the amount sued for by the plaintiffs and claimed set-off for certain items which were not admitted by the other side. The District Judge, Mirza Zafar Ali, decided, by an order, dated the 24th August 1906, that the Lyallpur Court had jurisdiction to try the suit and his successor, Mr. Brasher, passed on the 15th December 1910 a decree for Rs. 4,416-7-0 in favour of the plaintiffs.

The defendants have preferred an appeal to this Court and the plaintiffs have filed cross-objections against the finding of the District Judge as to certain items disallowed by him. In the appeal, the main question for decision is whether the District Judge of Lyallpur was competent to try the suit and, if not, whether the decree should be set aside on the ground of defect of territorial jurisdiction and the plaint returned to the plaintiffs for presentation to the proper Court.

It is clear that the sole reason for instituting the suit in the Lyallpur Court is the contract of agency alleged to have been entered into between the plaintiffs and Daya Mal at the former's shop at Lyallpur. It is not disputed that Daya Mal was at Lyallpur on or about the date of the alleged contract, but the defendants deny the formation of any such contract.

We have, therefore, to see whether the plaintiffs have succeeded in establishing their contention. The contract was not reduced to writing and the evidence in support of it consists of the statements of Sheo Narain, one of the plaintiffs, Dewan Chand and Ramji Lal. But Sheo Narain admits that during the period when the goods were consigned to Karachi, the plaintiffs had at that place at first their servant Bansi Lal and subsequently their partners Ram Rattan and Hira Lal. He further admits that at least some of the consignments were sent to Hira Lal and not to the defendants. If the defendants had been appointed commission agents on the terms alleged by the plaintiffs the consignments should have, in our opinion, been sent to the defendants. These admissions lend colour to the defendants' contention that the contract of the agency was made by Hira Lal at Karachi and that he received the goods and arranged for their sale through the agency of the defendants. We have read the evidence of Diwan Chand and Ramji Lal and consider it unreliable and wholly insufficient to prove the contract set up by the plaintiffs. The letter referred to in the order of the District Judge by which the defendants offered to remit to plaintiffs the price of goods in advance, does not appear to apply to the transactions in dispute. The plaintiffs allege that in pursuance of the contract accounts were submitted to them at Lyallpur by the defendants and this allegation, if substantiated, would be a strong piece of evidence in favour of the plaintiffs' contention. But the learned Advocate for the respondents admitted that he was unable to cite any evidence in support of it. It was pointed out to him that if the defendants became the agents of the plaintiffs from the date of the contract as alleged in the plaint, there would be entries in the account books of the plaintiffs showing the payment or credit of commission fee to the defendants and that entries of that character would, if proved, be of great help in proving the contract relied upon by the plaintiffs. He, however, expressed his inability to show us any entries relating to commission, because he said he had not studied the accounts.

There is, therefore, absolutely no documentary evidence to prove the contract which is the basis of the jurisdiction of the Lyallpur Court and the oral evidence is, in our opinion, interested and unreliable. It is wholly insufficient to prove the alleged contract. We must, therefore, hold that the plaintiffs have not relieved themselves of the burden which rested on them to prove the existence

of the contract, which brought this suit within the cognizance of the Lyallpur Court, and that that Court had not the territorial jurisdiction to adjudicate upon the claim of the plaintiffs.

What then is the effect of this finding on the proceedings taken in the Lyallpur Court? If we were to answer this question by reference to the Civil Procedure Code of 1882, we would have no hesitation in holding that the proceedings are *coram non judice* and must be set aside and the plaintiffs must be told to go to the proper Court to get an adjudication of their claim. There is, however, an important provision of law introduced for the first time in the Code of 1908 which has a direct bearing upon the issue before us. But the first point which we have to determine is whether this law, which came into force on the 1st of January 1909, can affect a case which was instituted in 1906 prior to the date on which the new Code came into operation.

Section 21 of the Civil Procedure Code, 1908, which contains the law referred to above, runs as follows :—

"No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice."

Now the wording of this section clearly shows that it lays down a rule for the guidance of only the Appellate or Revisional Court and does not influence the Court of first instance in its decision on the question of territorial jurisdiction. When the original Court has given its finding on the matter of jurisdiction and it is re-agitated before a Court of appeal or revision, then the latter Court shall have to consider whether the defect of jurisdiction should or should not be cured by applying its provisions. If, for instance, the plaintiff institutes a suit in the Court of a particular district and fails to substantiate the allegation bringing his case within the cognizance of that Court, the latter cannot, then, invoke the help of section 21 and proceed to hear and determine the suit. In the same way the Appellate Court, if it concurs with the Court of first instance in its finding on jurisdiction adverse to the plaintiff, cannot use the provisions of the section for the purpose of conferring jurisdiction on the original Court and remand the case for decision on the merits. If, on the other hand, the Court of the first instance holds that it has jurisdiction and proceeds to decide the suit on the merits and the Appellate or Revisional Court finds the first Court, though otherwise fully competent to hear the suit, had not the territorial jurisdiction over it, then it has to consider whether the defect can be condoned by applying the principle laid down in section 21. It will, thus, be observed that the only case in which the question of the applicability of the section arises is when the first Court, after giving a finding in the affirmative on the point of jurisdiction, decides the case on the merits and the Appellate or Revisional Court disagrees with that finding, and that the section is meant solely for the guidance of the latter Court. It does not profess to confer jurisdiction on the original Court, but it empowers the higher Court to validate certain proceedings which would otherwise be invalid.

The object of the Legislature in enacting this salutary principle of law is that when the Court of first instance after giving an affirmative finding on jurisdiction takes proceedings on the merits of the case, the latter should not be rendered abortive and all the time and labour spent thereon should not be wasted simply by reason of the fact that the higher Court comes to a contrary finding on the preliminary point of jurisdiction. A similar provision will be found in section 11 of the Suits Valuation Act which is intended to cure the defect of jurisdiction arising from under-valuation of suits or appeals.

Having held that section 21 of the Code of 1908 is intended for use by the Appellate or Revisional Court, we are not aware of any canon of the interpretation of Statutes which will exclude its operation in the present appeal. It is true that the suit was instituted before the Code came into force, but the decree appealed against was passed after it had come into operation. The section was clearly in existence when the appeal was instituted in this Court and it is in existence when the appeal comes

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on for hearing before us. Are we then sitting as a Court of Appeal, for whose guidance the section was enacted, justified in ignoring its provisions on the sole ground that the litigation commenced in the first Court prior to the date of its coming into operation?

It is a well-known rule of law that no person has a vested right in the course of procedure and there is a general principle of the construction of Statutes that alterations in the procedure are always retrospective unless there be some good reason against it. There can be no objection to their having effect immediately, even though they should affect past transactions and the mode of enforcement of vested rights: Vide *Jogodanund Singh* v. *Amrita Lal Sircar* (1). We see no valid reason why the Code should not apply to pending proceedings and must, therefore, hold that the present appeal is not excluded from the operation of section 21.

We now proceed to consider whether the appellants have fulfilled both the requirements of the section which are a *sine qua non* to the success of their objection as to the place of suing. We find that the objection was taken before the settlement of issues and that the first condition has, therefore, been complied with. But we cannot, in the present case, see any failure of justice on account of the suit having been instituted in the Lyallpur Court. The only prejudice alleged by the learned Counsel for the appellants is that his clients have not been able to produce certain evidence which they would have done if the suit had been heard by the Karachi Court. The non-production of evidence was, as will be seen later, due to their negligence and cannot, in our opinion, be attributed to the change of *forum*. Our conclusion, therefore, is that though the Lyallpur Court had not the jurisdiction to hear the suit, the objection as to the place of suing cannot be allowed because there has been no consequent failure of justice.

Upon the merits of the case there is not much to be said. The learned Counsel for the appellants expressly gave up ground 4 of the appeal and confined his argument to the question of remand for further evidence to enable his clients to prove the items claimed by them by way of set-off. The proceedings on pages 88 and 89 of the printed record show that the plaintiffs closed their evidence on the 26th of January 1910 and that the defendants-appellants were ordered on that day to produce their evidence at the next hearing. Repeated adjournments were subsequently granted to them to produce their witnesses, but they did not examine a single witness. The learned District Judge was, in these circumstances, compelled to pass an order on the 11th of November 1910 refusing any further adjournment of the case for the defendants' evidence. On these facts we have no hesitation in agreeing with the learned Judge of the Court below that the delay was due to the negligence of the defendants. We entertain no doubt that they, if so advised, could have easily produced their account books in support of their claim of set-off and also their witnesses, the majority of whom were either their relatives or their servants. They wanted to delay the decision of the suit and their conduct amounted to an abuse of the process of the Court.

We cannot, therefore, pass an order which will encourage litigants in adopting tactics of this kind and must, therefore, decline to remand the case for recording the evidence of the defendants. This concludes the appeal and as the decree of the District Judge has not been disturbed, the appeal fails and is hereby dismissed.

The cross-objections by the respondents have not been argued before us and we must, consequently, reject them. Taking all the circumstances into consideration, we order that the parties do bear their own costs in this Court.

Appeal dismissed.

(1) 22 C. 767 at p. 779 (F. B.).

MIR SYED HASAN *v.* TAIYABA BEGAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 54 OF 1911.

April 28, 1913.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

MIR SYED HASAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat TAIYABA BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof, allocation of, after evidence produced by both parties upon clear and specific issues—Evidence as a whole to be considered—Parties brought on record on their application, names of, striking off—Additional defendants, pleadings and evidence of, not to be expunged from record—Defendants, two sets of—Admission of plaintiff's claim by one set of defendants—Denial of plaintiff's claim by other set of defendants—Relief, separate, not claimable against each set of defendants—Claim of plaintiff not to be decreed against defendants admitting it—Pleadings, object of—Court, duty of, where pleadings vague and unsatisfactory—Attestation of Will—Succession Act (X of 1865*), s.* 50*—Execution of Will—Executant's signature on document, place for, no law as to—Signature for purpose of execution—Re-execution of Will—Will, execution of, includes signature of executant and attestation of witnesses—Adoption itself does not revoke previous Will—Document, construction of—*"Janashin waqaim-muqam," *interpretation of—Testamentary character of document—Bequest of* talukdari *estate—Revocation of previous Will—Estate received under Will, divesting of—Burden of proof, nature of, in case where document set up as having effect of setting aside previous Will—Suspicion in mind of Court to be removed—Execution, both mechanical and intelligent or conscious to be proved—Pleadings, point not stated in, tried to be established—Rebutting evidence, objection as to, not entertainable—Cross-examination, question put in—Admission—Statements of deceased testator or executant, when admissible in evidence—Deceased executant, conduct of, relevancy of—Evidence Act (I of* 1872*), ss.* 11, 18, 19 *and* 21*—Oral evidence as to statements of deceased executant—Cancelled registered document, admissibility in evidence of—Admissions against one's own interest, when lose their force as such—Unregistered document can be referred to for ascertaining executant's state of mind at or about time of its execution.*

Where a suit has gone to trial upon clear and specific issues, in respect of which evidence has been produced by both parties, a Court ought not to pay much heed to the arguments as to the allocation of the burden of proof, or the precise point at which such burden of proof may be said to have shifted to one side or the other in consequence of particular pleadings or admissions or particular items of evidence, but should prefer as a rule simply to consider the evidence as a whole, treating the pleadings of the parties as pieces of evidence relevant under the head of admissions, and endeavouring if possible to arrive at a clear finding upon the questions of fact involved.

On certain persons applying to be added as defendants in a case the Court of first instance, in spite of the plaintiffs' protest, ordered them to be so added. The plaintiffs did not reserve it as a matter which might be called in question, if necessary, later on in appeal from any decree which might be passed in the case, but at once appealed from that order, which even the Appellate Court upheld. These additional defendants were thus brought on the record, entered their pleadings, putting the plaintiffs to proof of their entire case, cross-examined the plaintiffs' witnesses, and tendered evidence of their own. The Court of first instance passed a decree in the case against the plaintiffs, and they again contended on appeal from that decree, on certain new allegations not brought home to the Appellate Court in the previous appeal from the said order, that the present additional defendants ought never to have been brought upon the record, and that not only their pleadings but also the evidence led by them ought to be ignored and excluded from consideration:

Held, that the additional defendants could not be struck off the record at that stage and that their pleadings and the evidence led by them could not be expunged from the record or ignored in arriving at a decision on the facts.

Where there are two sets of defendants and one of those sets admits and the other denies the plaintiffs' claim, and the case is such that no separate reliefs can be granted against each set, the plaintiffs cannot get a decree as against the defendants admitting their claim if they fail to establish their case, which they are bound to prove owing to the pleadings of the other defendants denying their claim.

The sole object of every system of pleadings is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues.

Sayad Muhammad v. *Fatteh Muhammad*, 22 C. 324; 22 I. A. 4, referred to.

Where the pleadings of a party are vague and unsatisfactory, a Court ought to endeavour to have them clearly specified as far as possible.

A Will, after having been executed but without having been signed by any attesting witness was deposited in a sealed cover at the office of the Sub-Registrar. About ten years later the executant went to the Sub-Registrar's office, took out the Will from the sealed cover and formally presented it for registration as a Will and admitted its execution in the presence of attesting witnesses, and these witnesses as well as the executant himself signed the document in the proper places:

Held (per *Piggott, J. C.*), that the above proceedings amounted to an attestation of the Will sufficient to satisfy the requirements of section 50 of the Indian Succession Act.

Nitye Gopal Sircar v. *Nagendra Nath Mitter Mozumdar*, 11 C. 429; *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee*, 27 C. 169, referred to.

Held, further, (per *Piggott, J.C.*), that the execution of the Will was not legally complete before the time when it became valid in law in consequence of its attestation by the Sub-Registrar and by the identifying witnesses.

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Held, also (per *Piggott, J.C.*), that as there is no law as to the precise place on a document where the executant must affix his signature in order that his act in so doing may amount to an execution, the Will in question could be said to have been executed and registered on one and the same day.

Held, lastly (*per Lindsay, A. J. C.*), that as the execution of a Will included both the signature of acknowledgment by the testator and the attestation of the subscribing witnesses, the Will in question could not be said to have been executed until it was attested by the marginal witnesses.

Anne Casement v. *John Williamson Fulton*, 3 M. I. A. 395 at p. 406; 5 Moo. P. C. 130; 1 Sar. P. C. J. 293; 70 R. R. 19; 18 E. R. 549; 13 E. R. 439, referred to.

The adoption of a son does not in itself operate to revoke or nullify a valid Will executed by the adoptive father in favour of his wife, any more than the birth of a natural son does.

A document purported to constitute a person the "*Janashin wa qaim-maqam*" (representative or *locum tenens*) of the executant and provided that "*hamesha bad mere tamam umur talukdari ka anjam deta rahegi*" (after the executant's death the person will always attend to or perform all the duties appertaining to *talukdar*), and that he should represent the executant in the presence of officials, members of the brotherhood, tenants of the estate and others, and on official occasions such as *Darbars* held by the Lieutenant-Governor and the like. It was contended that these words and expressions considered together might reasonably be interpreted as being of a testamentary character and as implying a bequest of the *talukdari* estate in that person's favour and thus revoking a Will previously in existence:

Held, that, inasmuch as a revocation in order to be valid and operative as a fresh bequest must be in clear and unambiguous terms, and as words to the effect that the person named in the document in question was merely to be the *janashin* or *locum tenens*, the document could not, in the absence of a clear and positive bequest of the estate in his favour, be interpreted as a Will conferring the *taluka* upon him and to divest the legatee of such estate in whose favour the Will had previously been made.

Where the plaintiffs put forward a document which they contended had the effect of setting aside the Will in favour of the defendant:

Held, that the burden of proof to be laid upon the plaintiffs should be just the same as legally lies upon the propounders of a Will, and more particularly upon the propounders of a Will which has the effect of revoking a Will previously in existence, and that once any circumstances are shown to exist which may reasonably excite proper and well-grounded suspicion in the mind of the Court, a person claiming under such a document is bound to satisfy the Court, not only as to its mechanical execution, but also as to the fact that the executant fully understood the nature and the terms of the deed.

Shunmugaroga Mudali v. *Manikka Mudaliar*, 3 Ind. Cas. 799; 32 M. 499, 11 Bom. L. R. 1206 (P. C.); 10 C. L. J. 276; 6 M. L. T. 204; 19 M. L. J. 640; 36 I. A. 185, *Shama Churn Kundu* v. *Khettromoni Dasi*, 27 C. 521; 4 C. W. N. 501; 27 I. A. 10, referred to.

A party endeavouring to establish a point not specifically stated in his pleadings cannot object to the opposite party's tendering rebutting evidence as regards that point.

If a party's Counsel simply asks a witness in cross-examination as to whether a certain event happened, it cannot be said that that party commits himself to the assertion that such an event actually took place.

In cases of disputed Wills or other dispositions of property, evidence as to statements alleged to have been made by the deceased testator or executant, from which inferences can be drawn as to the execution or otherwise of the documents in dispute or as to the circumstances under which such execution was obtained, is admissible.

Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become, shortly after the execution of the deed, aware of its existence, purport and effect, and after having become so aware had taken steps to cancel it or to nullify its effect, the conduct of the executant from the moment that he became admittedly aware of the existence, purport and effect of the deed is not merely a relevant fact, but a very important fact in the case; and the evidence offered by the defendant as to statements made by the executant in the interval of the execution of the deed and his death expressing the view taken by him of the deed after he had known of its existence, or the action which he had conceived himself to have taken regarding it, cannot be excluded as irrelevant, but is admissible under the head of admissions under sections 18, 19 and 21 or section 11 of the Evidence Act.

It is a dangerous thing to admit oral evidence as to statements alleged to have been made by a deceased executant as having the effect of practically cancelling a registered document, unless there are anomalous and suspicious circumstances already in existence.

In ordinary cases the admissions made by a party against his own interest might well be regarded as decisive against him. But in special cases where there exist a variety of circumstances calculated to discount the value of such admissions, those admissions may well be ignored from consideration as being of no effect.

An unregistered document, although inoperative as a deed of transfer of property or the like, can be looked at for a collateral purpose, for instance, to ascertain the executant's state of mind on or about the time that the document was executed.

Appeal from the decree of the Subordinate Judge, Hardoi, dated 31st October 1910.

Syed *Wazir Hasan* and Syed *Shakinshah Husain*, for the Appellants.

The Hon'ble Rai *Sri Ram* Bahadur, for Respondent No. 1.

Pandit *Gokaran Nath Misra*, Babu *Ramapat Ram* and Sheikh *Ali Abbas*, for Respondents Nos. 2 and 3.

MIR SYED HASAN *v.* TAIYABA BEGAM.

Mr. *Muhammad Siddique*, for Respondent No. 3.

JUDGMENT.

PIGGOTT, J. C.—This was a suit for possession of an estate known as *taluka* Waira Kazi in the Bahraich District. This estate was granted by the British Government to Mir Muzaffar Husain, whose name was entered at No. 160 in List 1 and No. 63 in List 3 of the lists of *talukdars* and grantees prepared under the provisions of the Oudh Estates Act (I of 1869). It was transferred by him in the year 1874, by a deed of gift *inter vivos* duly registered according to law, to his only son Mir Kazim Husain. The latter died without issue on May the 12th, 1894, and his death was immediately followed by a dispute as to the succession to the estate, in which there were at least four distinct parties. One was *Musammat* Taiyaba Begam, the widow of Mir Kazim Husain; another was Mir Saiyid Ali, the son of one Saiyid Muhammad, a resident of the Agra District, by his marriage with *Musammat* Sughra Begam, a sister of *Musammat* Taiyaba Begam above-mentioned. Mir Saiyid Ali claimed the estate as the adopted son of Mir Kazim Husain and set up a deed of adoption dated November the 9th, 1893, and purporting to have been duly registered on November the 14th, 1893. A third claimant was Saiyid Muhammad Hasan whose mother was an own sister of Mir Kazim Husain. The fourth claimant was Karamat Husain, the son of an own brother of Mir Muzaffar Husain, the first holder of the *taluka*. As a matter of fact Mir Muzaffar Husain had two brothers each of whom left a son, but the estate is one which must descend to a single heir, and the actual claimant appears to have been Karamat Husain as above stated. Under circumstances which I propose to consider more in detail later on, the possession of the estate actually passed into the hands of *Musammat* Taiyaba Begam and has continued in her hands ever since. Mir Saiyid Ali himself died on September the 1st, 1901, leaving him surviving a brother, Mir Saiyid Hasan. On April the 24th, 1906, the said Mir Saiyid Hasan executed a deed of sale by which he purported to transfer one-half share in the Waira Kazi estate to two persons, Saiyid Muhammad Mehdi Hasan, a resident of Lucknow, and Nawab Ali Khan, a resident of Amroha in the Moradabad District. This deed was registered on the following day, that is to say on April the 25th, 1906, and its avowed purpose was to obtain funds by which Mir Saiyid Hasan might prosecute his claim to recover the Waira Kazi estate from the possession of *Musammat* Taiyaba Begam. The present suit was instituted on May the 11th, 1906, the original plaintiffs being Mir Saiyid Hasan, Saiyid Muhammad Mehdi Hasan and Nawab Ali Khan above-mentioned. Nawab Ali Khan has since transferred his rights to Saiyid Muhammad Mehdi Hasan, so that the appeal now before us is being prosecuted by Mir Saiyid Hasan, as the alleged rightful heir to the estate on the death of Mir Saiyid Ali, and by Saiyid Muhammad Mehdi Hasan as a speculative purchaser of a half share in the estate on the chance of the other plaintiff being able to make good his claim. The respondents before us are *Musammat* Taiyaba Begam, the lady in actual possession of the estate, and Saiyid Muhammad Hasan and his sister, *Musammat* Askari Begam, whose presence on the record has been the subject-matter of much controversy. I have already explained that this Saiyid Muhammad Hasan is the son of an own sister of Mir Kazim Husain. Shortly before the present suit was instituted, another suit had been brought by Saiyid Muhammad Hasan and *Musammat* Askari Begam in respect of a single item of property, namely a share in a village called Basahiya Patti, which appears as item No. 3 in the list of the properties forming the Waira Kazi estate appended to the plaint in the present suit. Saiyid Muhammad Hasan and his sister alleged that this share in village Basahiya Patti was non-*talukdari* property and they claimed a portion of the same as heirs of Mir Kazim Hussain under the ordinary Muhammadan Law. They asked that the plaintiffs in the suit now before us should be added as defendants in the suit brought by them for village Basahiya Patti and that they themselves might be added as defendants in the suit now under appeal. This was strongly opposed by the present plaintiffs-appellants, whose position has throughout been that the present suit

ought to be fought out as between themselves and *Musammat* Taiyaba Begam only. They sought to strengthen their position on this point by formally abandoning their claim to the property in village Basahiya Patti, which small item has accordingly been struck out from the list of the property now in suit. Nevertheless the learned Judge of the Court below granted the application of Saiyid Muhammad Hasan and *Musammat* Askari Begam as regards both the pending suits, and his order to this effect dated September the 3rd, 1906, was at once appealed to this Court by Mir Saiyid Hasan and his co-plaintiff and was made the subject-matter of the two connected Miscellaneous Appeals No. 80 and No. 83 of 1906, disposed of by this Court under an order dated November the 12th, 1906. The effect of that order was to reverse the decision of the Court below as regards the array of parties in the small suit for the property in village Basahiya Patti, but to affirm that decision as regards the main suit for possession of the *taluka*. The present suit has, therefore, been fought by the plaintiffs as against the original defendant *Musammat* Taiyaba Begam and the two defendants, Saiyid Muhammad Hasan and *Musammat* Askari Begam, who were added as such on their own application.

The suit was litigated at enormous length in the Court below and was not decided till the 31st of October 1910, when the learned Subordinate Judge produced an elaborate judgment dealing at length with the 36 issues fixed by him on the pleadings, but finally dismissing the plaintiffs' suit upon a clear finding of fact, namely, that the plaintiffs had failed to prove the execution by Mir Kazim Husain of the alleged deed of adoption in favour of Mir Saiyid Ali, or that Mir Saiyid Ali was in fact the adopted son of Mir Kazim Husain or had succeeded to the Waira Kazi estate on the death of the latter. The learned Judge of the Court below has taken infinite pains over the trial of this suit, but he does not seem to me to have exercised that sort of control over the proceedings which it is desirable that Courts of Justice should exercise, in the interests of the litigants themselves as well as in those of the administration of justice generally. The suit seems to me in fact a bad example of a sort of abuse which has come under my notice on one or two occasions, namely the practice in this Province of Oudh of fighting out suits in which valuable property, and more especially *talukdari* property, is involved at preposterous length and with an utter disregard of all considerations of time and expense. A number of side issues were allowed to be raised and to be debated at a length altogether out of proportion to their real bearing on the result of the suit; and the right of cross-examination was exercised in the case of some of the witnesses at a length which I can only characterise as an abuse of the procedure of the Court. The result is that it is no easy matter at this stage to disentangle the essential points of the case from the mass of superfluous or irrelevant matter with which they have been overlaid, and that the attention of the Court below was so far distracted from these essentials that on more than one occasion a witness was allowed to leave the box after a lengthy examination without certain questions having been put to him which now appear to have been really necessary and important.

The plaintiff, Mir Saiyid Hasan, has obviously no claim to the Waira Kazi estate as heir of Mir Kazim Husain, his relationship to the latter being limited to the fact that he is a son of a sister of *Musammat* Taiyaba Begam, widow of Mir Kazim Husain. In order to make out his case, the plaintiff has to satisfy the Court that the property in dispute passed from Mir Kazim Husain to Mir Saiyid Ali and that the latter was in law the rightful owner of the Waira Kazi estate from the death of Mir Kazim Husain on the 12th of May 1894 to his own death on the 1st of September 1901. It is not denied that Mir Kazim Husain had a right, subject to the provisions of the Oudh Estates Act (I of 1869), to bequeath the property in dispute by Will, or by adopting a son to bring such adopted son on to the list of heirs in case of intestacy set forth in section 22 of the same Act. The case for the plaintiffs is that Mir Kazim Husain did adopt the late Mir Saiyid Ali by a writing executed and attested and duly registered in the manner required by law. This writing is the deed

of adoption, Exhibit 1 on the file, dated November the 9th, 1893, and purporting to have been registered on November the 14th, 1893. Before the plaintiffs' suit can be decreed, the Court must be prepared to hold that this document is the act and deed of Mir Kazim Husain and was registered in accordance with law. The Court below has not only held this not to be proved, but has gone a good deal further, holding in effect that the deed is a forgery and that its registration was brought about by bribing a corrupt Sub-Registrar. One of the main contentions urged upon us in appeal on behalf of the plaintiffs is that no such finding as the above is really open to the Court on the pleadings, that the execution of the document, Exhibit 1, by Mir Kazim Husain should be regarded as an admitted fact and that the only questions really in issue are questions of fraud, coercion or undue influence, the burden of establishing which should be laid upon the defendants.

Where a suit has gone to trial upon clear and specific issues, in respect of which evidence has been produced by both parties, I am ordinarily disposed to be somewhat impatient with regard to arguments as to the allocation of the burden of proof, or the precise point at which such burden of proof may be said to have shifted to one side or the other in consequence of particular pleadings or admissions or particular items of evidence. I should prefer as a rule simply to consider the evidence as a whole, treating the pleadings of the parties as pieces of evidence relevant under the head of admissions, and endeavouring if possible to arrive at a clear finding upon the questions of fact involved. I must, however, deal with the question of the pleadings in the present case at some little length, because it seems to me a very important, if not a vital, part of the appellants' case. There are two distinct questions involved, namely, the pleadings of *Musammat* Taiyaba Begam, the original defendant in the case, and the position of the second and third defendants, who were brought on the record by order of the Court. It is not denied that the pleadings of the latter simply put the plaintiff to proof of his entire case, including the execution of the deed of adoption, Exhibit 1, as well as its registration and its validity in law. The appellants do not deny this, but it is contended on their behalf that Saiyid Muhammad Hasan and *Musammat* Askari Begam have no possible claim in law either to the present possession of the Waira Kazi estate or to succession to the same hereafter, that they ought never to have been brought upon the record of the case and that, not only their pleadings but the evidence led by them, ought to be ignored and excluded from consideration. The case for these defendants is that *Musammat* Taiyaba Begam is at present in possession of the Waira Kazi estate merely as the widow of a deceased *talukdar* for her life-time only, under clause 7 of section 22 of Act I of 1869, and that after her death the estate must go to such persons as would have been entitled to succeed to the same under the ordinary law in accordance with the provisions of clause 11 of the same section. The parties to this suit are Muhammadans of the *Shia* sect, and Saiyid Muhammad Hasan and *Musammat* Askari Begam claim that they would be the next heirs of Mir Kazim Husain under this law after the death of his widow, they being the son and daughter of an own sister of Mir Kazim Husain. In the course of argument before us it was conceded that the estate must go to a single heir and that *Musammat* Askari Begam could have no claim, at any rate in the life-time of her brother, Saiyid Muhammad Hasan; but it was still contended that Saiyid Muhammad Hasan would be entitled to the estate on the death of *Musammat* Taiyaba Begam in the event of his surviving her, and that he was rightly brought on the record in order to enable him to defend his reversionary interests. Against this the case for the plaintiffs-appellants is twofold. They contend that the Court below has itself found that *Musammat* Taiyaba Begam is not in possession of the Waira Kazi estate as the widow of a *talukdar* under section 22, clause 7, of the Oudh Estates Act (I of 1869), but as a legatee under a Will registered on January the 15th, 1887, which, though it may not be valid as against an adopted son (in case the adoption of Mir Saiyid Ali is proved), would certainly be valid as against the children of Mir Kazim Husain's sister. Obviously, if *Musammat* Taiyaba Begam is in possession of the Waira Kazi estate, not as heir under an intestacy

but as legatee under a valid Will, her title would be an absolute one not limited to her life only, and whatever might be the devolution of the estate after her death the surviving relations of her late husband could have no present interest in the estate, such as was put forward by Saiyid Muhammad Hasan and his sister when they asked to be brought on this record as defendants. In the second place, it is argued on behalf of the appellants that, if Mir Kazim Husain died intestate and without having adopted Mir Saiyid Ali, his estate would descend as an impartible estate according to the rule of primogeniture as understood in the law of England. If so, the rightful heir after the death of *Musammat* Taiyaba Begam would have to be sought by ascending to Mir Kazim Husain's father and searching amongst the descendants of the latter in the male line. It is suggested that that heir would at this moment be Karamat Husain, the son of a brother of Mir Muzaffar Husain, who was one of the claimants to the estate on the death of Mir Kazim Husain, but is no party to the present suit. Authority for this proposition is sought in the decision of their Lordships of the Privy Council in *Debi Bakhsh Singh* v. *Chandrabhan Singh* (1), and apart from this it is contended that the question is placed beyond doubt by the amendments effected in the Oudh Estates Act by the new Act (III of 1910). This latter contention raises a further question whethert the defendant, Saiyid Muhammed Hasan, could be said to have acquired a vested interest in this Waira Kazi estate before the amending Act came into force; while, as regards the Privy Council ruling above referred to, we were asked to consider the remarks of their Lordships with reference to the particular facts of that case and to the old ruling in the case of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2), which was at any rate not dissented from in the later case. It seems to me unnecessary to decide the intricate questions of law thus raised, and altogether inexpedient to pronounce any opinion concerning them in the present case. When the Court of first instance brought Saiyid Muhammad Hasan on the record as a defendant, the plaintiffs did not elect to submit to that order and to reserve it as a matter which might be called in question, if necessary, later on in appeal from any decree which might be passed in the case. They exercised their right of appeal under section 588, clause 2, of the former Code of Civil Procedure and brought the question at once before this Court. At the hearing of that appeal it is obvious that the plaintiffs did not raise any of the questions now argued before us. They did not plead a Will in favour of *Musammat* Taiyaba Begam as putting Saiyid Muhammad Hasan out of Court, because they were at that time denying altogether both the execution and the validity of the Will registered on January the 15th, 1887. This Court was entitled to treat it as an admitted fact, as between the plaintiffs on the one hand and Saiyid Muhammad Hasan on the other, that *Musammat* Taiyaba Begam's possession was either that of a trespasser without any valid title, or that of the widow of a *talukdar* who had succeeded under the provisions of section 22, clause 7, of the Oudh Estates Act (I of 1869) and was in no case that of the legatee of a *talukdar*. The order passed by this Court on November the 12th, 1906, shows that the case was so regarded. It shows further that no question as to the possible rights of Karamat Husain was raised at that time before this Court, but that it was accepted as an admitted fact that, if *Musammat* Taiyaba Begam was lawfully in possession for her life-time under section 22, clause 7, aforesaid, then Saiyid Muhammad Hasan would be the eventual heir under clause 11 of the same section. This Court was asked to consider only whether or not under such circumstances Saiyid Muhammad Hasan would be a proper defendant in the case, and this point was decided in his favour and against the plaintiffs. There must be some finality about the decision of a Court on such a point, so far at least as that same Court is concerned. I do not see that we are bound to re-consider the propriety of the order passed by our predecessors on November the 12th, 1906, or that it would be in any way expedient to do so. The fact remains that these defendants have been brought on to the record, have entered their pleadings, have cross-examined the witnesses for the plaintiffs and have tendered evidence of their own. I am clearly of opinion that these matters cannot now be expunged from the record or ignored in arriving at

(1) 7 Ind. Cas. 724; 14 C.W. N. 1010; 12 C.L.J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 20 M. L. J. 917; 32 A. 599; 13 O.C. 316; 37 I. A. 168.

(2) 5 I. A. 1; 1 C. L. R. 318.

a decision on the facts. Suppose the defendants who were added in accordance with this Court's order had been in a position to produce evidence which satisfied us beyond possibility of doubt that the document, Exhibit 1, was a forgery and that any admissions to the contrary made by *Musammat* Taiyaba Begam were collusive and obtained from her by improper means, could it be seriously contended that we should be bound nevertheless to decree this suit in favour of the plaintiffs because we thought our learned predecessors had made a mistake in bringing Saiyid Muhammad Hasan on to the record? I thought it right to go into this point carefully, but as a matter of fact my view of the case as a whole would not be seriously affected if I had to consider the evidence on the record with reference only to the pleadings of the first defendant, *Musammat* Taiyaba Begam. The paragraph of the plaint in which Saiyid Ali's adoption and the execution of the deed, Exhibit 1, were set up as the foundation of the plaintiffs' case was paragraph 2. To this *Musammat* Taiyaba Begam's reply was that she admitted the fact of Mir Kazim Husain's death without issue and the blood relationship between the plaintiff Mir Saiyid Hasan and the late Mir Saiyid Ali. She then continued: "The rest of the allegations of this paragraph are not admitted, subject to additional pleas." What those additional pleas were, I find, set forth in paragraphs 14, 15, 16 and 17 of the same written statement. It was expressly denied that there had ever been any "valid and lawful adoption" of Mir Saiyid Ali, for that Mir Saiyid Ali ever acquired any good title in law to the Waira Kazi estate. As regards the document, Exhibit 1, the defence set up was threefold:—

(1) That it "was written contrary to the intention of Mir Kazim Husain, at a time when he was in consequence of illness unable to understand the nature and effect of the document."

(2) That it was subsequently cancelled by Mir Kazim Husain and its cancellation was accepted and ratified by Mir Saiyid Ali himself.

(3) That in any case this document could not have the effect of superseding the Will in favour of *Musammat* Taiyaba Begam duly registered on the 15th of January 1887.

The pleading as regards the *factum* of execution was obviously vague and unsatisfactory. The plaintiffs in their replication were quick to seize upon it as an implied admission of execution and challenged defendant No. 1 to specify more clearly the grounds upon which she alleged the document to be invalid. The result of this was that, in a later proceeding of February the 5th, 1907, the learned Counsel who represented *Musammat* Taiyaba Begam made a statement to the following effect :—

"That the execution of the said deed of adoption, dated 9th of November 1903, in favour of Saiyid Ali is not denied by the first defendant, but it is denied that it is valid and subsisting under the law in force in British India."

It is to be observed at the same time that immediately after this, the documentary evidence tendered by the plaintiffs was gone through, and the document, Exhibit 1, was endorsed as denied, without any qualification or any note being made as to there being any difference of pleading on this point between the two sets of defendants. Even as the case then stood, the pleadings of the first defendant were not, in my opinion, sufficiently clear or specific, and it would have been as well if the Court had taken up this point at once and pressed for a clear explanation as to what was intended by this admission of execution and how this admission was to be reconciled with the original plea that the document was contrary to the purpose or intention (*khilaf mansha*) of Mir Kazim Husain. As it was, the point came up again for consideration on the 14th of March 1897, and there can be no doubt that the first defendant then shifted her ground and did so in a somewhat disingenuous fashion. It was then stated on her behalf that the words "*khilaf mansha*" in the original written statement were intended to mean that the document was executed without the knowledge of Mir Kazim Husain. This does not appear to be a reasonable translation of the vernacular expression, and in any case the first defendant might well have been pressed to enter some precise and specific pleadings as regards every portion of the document, Exhibit 1, which purports to bear any writ-

ing by the pen of Mir Kazim Husain himself. The Court, however, accepted the pleadings as they stood and actually framed amended issues on the 14th of March 1907, on the strength partly of this new pleading as to the meaning of the words "*khilaf mansha.*" On a review of these pleadings as a whole, confused and defective as I think them, it seems to me that the utmost that can be said is that *Musammat* Taiyaba Begam admitted that Mir Kazim Husain had actually appended his signature to the document, Exhibit 1, but pleaded that he did so without being aware of the nature, contents or effect of the said document. She was never asked to enter any specific pleadings as to the registration of the document, or as to the signatures which purport to be those of Mir Kazim Husain appearing at the foot of the registration endorsements on the back of the document. Considering, however, that those endorsements include express statements to the effect that the document was tendered for registration by Mir Kazim Husain at his own house at Jarwal and execution of the same admitted by him in the presence of the Sub-Registrar, who was personally acquainted with the executant, the plea that the document was written contrary to the intention of Mir Kazim Husain, and the further plea that it was written or executed without his knowledge, necessarily involved a plea that fraud of some sort or other had been committed in connection with the registration of the document as well as in connection with its execution.

I think it advisable to pause at this point to consider the position of the parties with regard to the Will in favour of *Musammat* Taiyaba Begam, because the existence of this document has, in my opinion, a considerable bearing, not only on the general probabilities of the case as affecting the credibility of the oral evidence, but also on the question of the pleadings, when the Court comes to estimate the nature of the burden of proof to be laid on the plaintiffs in respect of their document, Exhibit 1. On the original pleadings the plaintiffs denied both the execution and the validity of the Will in favour of the first defendant. The evidence as to execution is necessarily scanty, there being no witness now alive to give direct evidence on the point. There can be no doubt, however, that the document before the Court purporting to be the Will of Mir Kazim Husain in favour of *Musammat* Taiyaba Begam was executed by him and was duly registered; this point was finally conceded and taken for granted in the arguments addressed to us on behalf of all the parties concerned. I find then that on May the 12th, 1877, within three years of his coming into possession of the Waira Kazi estate, Mir Kazim Husain, being then about 45 years of age, executed this Will in favour of his wife, *Musammat* Taiyaba Begam, then a young woman of 17, and deposited it in a sealed cover at the office of the Sub-Registrar of Lucknow. The Will as thus executed had not been signed by any attesting witness. More than nine years later the fact that an unattested Will thus deposited would not satisfy the requirements of the law, must have been brought to the notice of the testator, and we find that on the 15th of January 1887 Mir Kazim Husain went to the Sub-Registrar's office at Lucknow, took out the Will in question from the sealed cover and formally presented it for registration. It is perhaps worth noticing that the document, as it now stands, not only bears Mir Kazim Husain's signature in the margin at the place where the executant would naturally sign it, but that his signature appears in three places in the body of the deed as attesting erasures or corrections. This fact was noted by the Sub-Registrar in his endorsement; it is not clear whether that official caused these additional signatures to be made when the Will was tendered to him for formal registration, but there seems to me a distinct probability that this is what actually occurred. In any case Mir Kazim Husain presented the document to the Sub-Registrar for registration as a Will and admitted its execution in the presence of three attesting witnesses, and these witnesses, as well as Mir Kazim Husain himself, proceeded to sign the document on the back in the proper places below the registration endorsements. According to the view repeatedly expressed by various Judges of the Calcutta High Court, as for instance in *Nitya Gopal Sircar* v. *Nagendra Nath Mitter*

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Mozumdar (3) and *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee* (4), these proceedings amounted to an attestation of the Will sufficient to satisfy the requirements of the Indian Succession Act, section 50 of Act X of 1865. This view seems to me both good law and good sense, as there cannot be the shadow of a doubt regarding the purpose and intention of Mir Kazim Husain in thus getting the Will registered. He deliberately reaffirmed after an interval of more than 9½ years his intention of making *Musammat* Taiyaba Begam his legatee. If he did not copy out the Will on to a fresh piece of paper and sign it over again in the presence of the Sub-Registrar and the identifying witnesses, the only possible reason for this was that he did not think it necessary to take the trouble to do so. He undoubtedly signed the paper in two places on the back at the foot of the registration endorsement in the presence of the Sub-Registrar and of the attesting witnesses, and I think it highly probable that he also signed it in three places on the face of the deed at the instance of the Sub-Registrar, where that official noticed certain corrections or alterations in the deed. I say that this is probable, because the corrections or alterations in question have the appearance of being mere rectifications of an original slip of the pen, and I think it unlikely that the idea of attesting them with his signature would have presented itself to Mir Kazim Husain's mind unless his attention was drawn to it by the Sub-Registrar at the time of its formal registration. We thus have in favour of *Musammat* Taiyaba Begam a Will executed, attested and registered as required by law more than three months before the death of the testator, and, therefore, valid against all the world except for one possible objection to be considered presently. Now it seems to me beyond doubt that the subsequent adoption of Mir Saiyid Ali, if such adoption in fact took place would not in itself operate to revoke or nullify a valid Will, any more than the birth of a natural son would have done. The contention for the plaintiffs, however, a contention which has found favour in the Court below, is that if the *factum* of adoption were held to be proved in respect of Mir Saiyid Ali, then this Will would *ipso facto* become inoperative, because it was not registered within one month from the date of its execution. In the second place, it was further contended before us that the deed, Exhibit 1, contains words and expressions which give it the effect of a testamentary disposition in Mir Saiyid Ali's favour; so that, even though the mere execution of a deed of adoption should be held not to have the effect of nullifying the Will, yet the particular document before us is so worded that it has that effect. A question of law is thus raised which strikes at the very root of the plaintiffs' case. If it be decided against them, the great bulk of the record now before us becomes superfluous, and the issues raised regarding the execution and validity of the deed, Exhibit 1, also become superfluous. I do not propose to decide the case on this point alone, because after all that has taken place in the course of this litigation it seems to me very desirable that this Court should, if possible, come to some definite finding on the issues of fact which have been litigated at such enormous length. I am bound to say, however, that the more I have considered the point, the less disposed I feel to accept the position taken up by the learned Judge of the Court below as to the practical cancellation of the Will by the adoption deed, Exhibit 1, if the execution and validity of the latter should be affirmed. It seems to me that the execution of the Will was not legally complete before the 15th of January 1887, when it became valid in law in consequence of its attestation by the Sub-Registrar and by the identifying witnesses. There is, moreover, no law as to the precise place on a document where the executant must affix his signature in order that his act in so doing may amount to an execution and I do not see why the signatures of Mir Kazim Husain to the registration endorsement and his signatures to the corrections on the face of the document (supposing I am right in my belief that these latter were affixed on the 15th January 1887) should

(3) 11 C. 429.
(4) 27 C. 169.

not be treated as a re-execution, or as the first valid execution of the document by the act of signing the same in the presence of attesting witnesses. From either of these points of view it would seem that the Will was executed on the 15th January 1887 and was, therefore, registered on the very day of its execution. I have felt more difficulty regarding the arguments addressed to us on behalf of the appellants regarding the actual wording of the deed, Exhibit 1. That document purports to constitute Mir Saiyid Ali, not merely the adopted son but also, the "*janashin o qaim muqam*" of the executant. Now each of these words may be translated either a "representative" or "*locum tenens*" or a "successor," so that there is a certain ambiguity involved in the expressions; while a few lines further occur the words "*aur hamesha bad mere tamam umur talukdari ke anjam deta rahega*," that is to say, the executant provides that after his death Mir Saiyid Ali will attend to or perform all the duties appertaining to a *talukdar*. I have felt considerable force in the contention on behalf of the appellants that these words and expressions considered together might reasonably be interpreted as being of a testamentary character and as implying a bequest of the *talukdari* estate in favour of Mir Saiyid Ali. Nevertheless upon full consideration I am not satisfied on this point. There was a previous Will in existence, and if that was to be revoked and a fresh bequest made in favour of another person, I should have expected this to be done in clear and unambiguous terms. There is good reason for supposing, as I shall show presently, that on or about the 14th of November 1893 Mir Kazim Husain was meditating the execution of, and probably did actually execute, (it is at any rate the plaintiffs' case that he did so), another deed making over to Mir Saiyid Ali in very wide terms the management of his estate. If I were satisfied that Mir Kazim Husain in fact executed the document, Exhibit 1, that he did so with full knowledge and understanding of its contents and that he caused it to be duly registered on the 14th November 1893, I should still not feel satisfied that the old gentleman's intention was altogether to annul his Will in favour of *Musammat* Taiyaba Begam and to disinherit her in favour of Mir Saiyid Ali. I should be disposed to read the ambiguous words "*janashin o qaim muqam*," as well as the curious expression about performing the duties of a *talukdar*, in connection with the provisions of the other deed, which the plaintiffs allege to have been also executed on the 14th of November 1893, and with an expression contained in Exhibit 1 itself about representing the executant in the presence of officials, members of the brotherhood, tenants of the estate and others, and on official occasions such as *Darbars* held by the Lieutenant-Governor and the like. From this point of view the words "*janashin o qaim muqam*" would be treated as tautological and as meaning no more than "representative and *locum tenens*," and the presumed intention would be that Saiyid Ali should continue after Mir Kazim Husain's death to perform the public duties attaching to the position of a *talukdar* while the estate itself went to *Musammat* Taiyaba Begam in accordance with the Will of January the 15th, 1887. In making these remarks I am, of course, adopting for the moment the plaintiffs' case with regard to the fact of execution and registration. I fully admit the force of the arguments addressed to us that a Muhammadan *talukdar* could have no possible motive for executing a deed of adoption except for the purpose of effecting thereby a devolution of his estate, and that on the face of it the Will in favour of *Musammat* Taiyaba Begam gives that lady an absolute estate and not merely an estate for life. To these contenions, however, I would reply, still accepting for the sake of argument the case for the plaintiffs as to the facts of execution and registration, that Mir Kazim Husain might conceivably have acted in the belief that in adopting a son to himself he was also adopting a son to *Musammat* Taiyaba Begam, that no disagreement was likely to take place between that lady and a young man so deeply indebted to her as was Mir Saiyid Ali, and that he really supposed that the combined effect of the Will of January the 15th, 1887, and the adoption deed of November the 14th, 1893, would be that *Musammat* Taiyaba Begam would succeed to the estate under the Will, that Mir Saiyid Ali would be her agent and representative during her life-time and would finally succeed himself after her death. I

differ, therefore, from the learned Subordinate Judge on this point, and hold that the effect of the deed, Exhibit 1, even if it be proved to have been duly executed and registered, would not be to divest *Musammat* Taiyaba Begam of the estate which she took on the death of her husband under the Will of January the 15th, 1887.

I paused to consider this point at this stage because of its bearing on the question of the pleadings and of the burden of proof which should, in my opinion, be laid on the plaintiffs in respect of their document, Exhibit 1. I have expressed my opinion that that document, even if fully proved, would not have the effect of setting aside the Will in favour of *Musammat* Taiyaba Begam, but it must be remembered that it is put forward by the plaintiffs as a document which has that effect. Whatever room for argument there may be about the testamentary character or otherwise of any of the provisions of this deed, the broad fact remains that it is propounded by the plaintiffs as a document the execution of which by Mir Kazim Husain had in law the effect of nullifying the disposition of his estate made by that gentleman under his Will of January the 15th, 1887, and of substituting Mir Saiyid Ali for *Musammat* Taiyaba Begam as the immediate heir to the estate on the death of Mir Kazim Husain. The burden of proof, therefore, to be laid upon the plaintiffs should, in my opinion, be in no way less than that which the Courts have seen fit to lay upon the propounders of a Will, and more particularly upon the propounders of a Will which has the effect of revoking a Will previously in existence. Once any circumstances are shown to exist which may reasonably excite proper and well-grounded suspicion in the mind of the Court, a person claiming under such a document is bound to satisfy the Court, not only as to its execution, but also as to its representing in fact the mind and deed of the alleged executant. Such cases as those of *Shunmugaroya Mudaliar* v. *Manika Mudaliar* (5) and *Shama Churn Kundu* v. *Khettromoni Dasi* (6) show the kind of burden of proof which the highest Court of Appeal has laid in analogous circumstances upon the propounders of Wills. That there are circumstances existing in the present case, some of them apparent upon a mere examination of the document itself, calculated to excite grave and reasonable suspicion seems to me quite beyond question. In my opinion this case can only be rightly decided by laying upon the plaintiffs the burden of satisfying the Court, not only as to the mechanical execution by Mir Kazim Husain of this document, Exhibit 1, but also of the fact that he fully understood its nature and its terms, that he intended it to have the effect of divesting *Musammat* Taiyaba Begam of the right of successson to the Waira Kazi estate upon his death, and that he himself presented it for registration and caused it to be registered with that purpose and intention.

This is a case in which there is a direct conflict of testimony upon essential matters of fact, and more particularly as to what took place at the house of Mir Kazim Husain at Jarwal on the 14th of November 1893. Under these circumstances I think it advisable first of all to consider and discuss a number of facts bearing on the general probabilities of the case, as to which there is either no controversy at all or there is, in my opinion, a clear preponderance of evidence in favour of certain more or less definite conclusions. Mir Saiyid Ali appears to have been born somewhere about the year 1879, A. D., and his mother died when he was two years old. He was then sent for to Jarwal at the instance of *Musammat* Taiyaba Begam and was brought up by this lady in Mir Kazim Husain's house. It may be noted that, inasmuch as Mir Kazim Husain was not yet 50 years of age at that time and was married to a young wife to whom he was obviously much attached, it would seem *prima faice* as if he had no reason to abandon the hope of begetting a son of his own. As against this, however, we have clear evidence that Mir Kazim Husain was in bad health for a considerable number of years before his death in 1894, and that his illness was of a nature to affect injuriously his powers of procreation. On the evidence as a whole I am of opinion that, by about the year 1890 at any rate, Mir Kazim Husain had pretty well

(5) 3 Ind. Cas. 799; 32 M. 400; 11 Bom. L. R. 1206 (P. C.); 10 C. L. J. 276; 6 M. L. T. 304; 19 M. L. J. 640; 36 I. A. 185.

(6) 27 C. 521; 4 C. W. N. 501; 27 I. A. 10.

made up his mind that he would never have a child of his own, and I think it not unreasonable to suppose that *Musammat* Taiyaba Begam herself may have arrived at that conclusion some years earlier. I think it quite established by the evidence that Mir Kazim Hussain was not on good terms with his own family and not likely to contemplate with satisfaction the prospect of his estate devolving after his death, either on his first cousin, Karamat Husain, or on his sister's son, the defendant Saiyid Muhammad Hasan. He was evidently much attached to *Musammat* Taiyaba Begam and, I should say, a good deal under her influence. The Will in her favour shows that Mir Kazim Husain had quite made up his mind that his estate should pass into her possession after his death rather than into that of any of his own relatives. At the same time I fully appreciate the force of the contention on behalf of the plaintiffs that the way in which Mir Sayid Ali was brought to Jarwal as a mere infant, and his subsequent treatment in the family of Mir Kazim Husain, was such as to raise a certain presumption that the idea of eventually adopting him as a son was present to the minds of the persons concerned for a good many years prior to the date on which an adoption is alleged to have been actually effected. The difficulty to my mind is to make sure how far this idea was *Musammat* Taiyaba Begam's alone, or was fully shared by Mir Kazim Husain himself, also how far *Musammat* Taiyaba Begam may have looked upon the possible adoption of Mir Saiyid Ali, not os much as a thing desirable in itself, but as an alternative which it was advisable to keep open to meet certain possible contingencies. On the one hand, one may reasonably presume that this lady would think it a more desirable thing to become absolute owner of the Waira Kazi estate on the death of her husband than to be ousted from that possession by her young nephew. On the other hand, it is not unreasonable to suppose that she may have come to feel a strong affection for this lad whom she had brought up from infancy. Her position as legatee under a Will was in any case precarious, inasmuch as the Will might be revoked at any moment by Mir Kazim Husain in the event of her failing to retain her hold upon that old gentleman's affections. I have no doubt whatever that she would consider the succession to the estate of a lad who was her own nephew and who owed everything to her, as far preferable to that of any of the relatives of her husband, with whom she was more or less at feud. An arrangement which would leave her the estate for life, with Mir Saiyid Ali in the assured position of her appointed heir and successor, would, I have little doubt, appear to her an ideal one. In the month of July 1893 a suit was pending in the Court of the Munsif of Kaisarganj, in which the plaintiff was apparently seeking to fix Mir Kazim Husain with liability for the payment of some small sum of money on the strength of a contract entered into with Mir Saiyid Ali. Mir Kazim Husain was summoned to attend the Munsif's Court for examination, and on the 31st of July 1893 he appeared before that Court and was examined while reclining in his palanquin. His statement is Exhibit A-26 on this record, as to which there has been a good deal of controversy. I am content to note only that Mir Kazim Husain on that occasion stated in very positive terms that it was not true that he had at any time up to that date adopted Mir Saiyid Ali as his son. This document shows, on the one hand, that the notion of Mir Saiyid Ali's adoption was in the air at the time; on the other hand, it not merely emphasises the admitted fact that no actual adoption had yet taken place, but I think it tends to show that there was no clear purpose or intention of effecting such adoption present at that time in Mir Kazim Husain's mind. I must now go back for a moment to the end of January or the beginning of February 1893, when an event took place which has, I am certain, a very considerable bearing on the facts of this case. Mir Saiyid Ali was then married from Mir Kazim's house to a daughter of Saiyid Mehdi Hasan. Considering all the more or less superfluous evidence with which this record has been encumbered, I am bound to say that I feel some surprise that the defendants have not thought it worth their while to get on to the record some fuller and more precise evidence as to the personality of Saiyid Mehdi Hasan, to his career as a Government servant and to his whereabouts during the year 1893, more particularly as to the possibility of his having been present in Jarwal sometime during the early part of November of that year. This much I can take from the record, that he was a *taluk-dar*, the head of a Muhammadan family

in Jarwal, which was more or less a rival to that of Mir Kazim Husain, that he was a Government servant and attained to the position of Subordinate Judge before his service came to an end. This marriage of Mir Saiyid Ali's to this man's daughter may, I think, fairly be regarded as a marriage somewhat above Mir Saiyid Ali's station in life, unless he was to be regarded as an eventual successor to the Waira Kazi *taluka*. On the one hand it suggests that people likely to know the truth thought it not improbable that he might be adopted by Mir Kazim Husain, or at any rate that he would succeed to the estate later on in the event of its first passing into the hands of *Musammat* Taiyaba Begam. On the other hand the marriage called into existence a powerful interest (that of Saiyid Mehdi Hasan and his family) in favour of making that adoption an accomplished fact, and, what is more, of making Mir Saiyid Ali's succession to the estate a thing certain and immediate, that is to say, neither postponed to the succession of *Musammat* Taiyaba Begam nor dependant on the continuance of her favour.

It will be convenient at this point to take up the most important of the various side issues into which this case has diverged and to consider the evidence bearing on Mir Kazim Husain's health, more especially during the year 1893. The only expert medical evidence produced has been on the side of the defendants, who caused to be examined Sitla Din (D. W. No. 1), a medical officer in charge of the hospital maintained by the Kapurthala Estate at Bondi, twenty-four miles from Jarwal, and Ejaz Husain, a physician of Lucknow who was examined and cross-examined at preposterous length on commission. I think there can be no doubt whatever that both these gentlemen attended Mir Kazim Husain in their professional capacity and that their evidence deserves careful consideration. With regard to the rest of the oral evidence bearing on this point the difficulty is simply this, that it is in the main the evidence of witnesses who support the case for their respective parties upon other points of more direct and vital importance. If, for instance, we can feel sure that the witnesses for the plaintiffs who depose to the actual execution of the document, Exhibit 1, are speaking the truth on that point, we must, of course, believe what they say regarding the state of Mir Kazim Husain's health; if, on the other hand, we distrust their evidence on the question of execution, their statements regarding the health of the executant must go overboard along with the rest. Similar remarks apply to such witnesses for the defendants as Manohar Lal (D. W. No. 5) and Muhammad Raza (D. W. No. 2). On the other hand the statements of Thakur Lal Bahadur Singh (D. W No. 14) and Riaz Husan (D.W. No. 18) seem to me less open to objection on this ground, and their evidence does corroborate that of the medical men in important particulars. On the evidence as a whole, there can be no doubt whatever that Mir Kazim Husain suffered from rheumatic fever and syphilitic rheumatism for many years before his death and that his eye-sight was badly affected by cataract. On the question of the eye-sight we reached common ground in the course of arguments up to a certain point. It was admitted on both sides on a review of the evidence that one of Mir Kazim Husain's eyes had been affected by cataract before the year 1889, that it was operated upon in that year by some unqualified practitioner, with the result that he lost the sight of it altogether, and that cataract must have developed itself in his other eye in the course of the years 1890 and 1891. About the month of December 1891 Mir Kazim Husain went to Allahabad and there had his remaining eye operated on for cataract by an English physician, Dr. Hall. Such an operation would presumably not take place until the cataract had reached an advanced stage, that is to say, until the man must have been practically blind for some little time. It is common ground that Dr. Hall's operation was to a certain extent successful, but from this point the parties are definitely at issue. The case for the defendants is that the relief thus afforded proved only temporary and that by the end of 1892, or the beginning of 1893, Mir Kazim Husain sank into total blindness and continued in this condition until his death; the case for the plaintiffs is that a more or less permanent cure was effected and that Mir Kazim Husain could see sufficiently for all practical purposes during the last $2\frac{1}{2}$ years of his life. The chief difficulty which I feel about arriving at a positive conclusion on this

point arises out of the question of the pleadings and the difficulties raised at a late stage of the case when the plaintiffs tendered rebutting evidence. I am bound to say that, if Kazim Husain was in fact totally blind on the 14th of November 1893, I should have expected this fact to be definitely stated in the pleadings and to have been put in the forefront of the defendants' case. This was not done, and the utmost that can be said for the defendants is that they disclosed the position they intended to take up on this point more or less gradually in the course of their cross-examination of the plaintiffs' witnesses, so that the plaintiffs ought to have been under no delusion on this point by the time they came to close their case. As regards the exclusion of rebutting evidence, the matter was argued out before us with reference to this and to one or two other points of some importance; it is also referred to in the grounds of appeal to this Court. I felt compelled to put it plainly to the learned Counsel for the appellants whether he did or did not intend to ask for an order of remand for the production of additional evidence under the provisions of Order XLI, rule 27, of the Code of Civil Procedure. The reply received was that the appellants did not desire the case to be remanded for further evidence, or to tender additional evidence before this Court. I can only deal, therefore, with the record as it stands, but if the case for the defendants on this question of blindness is in fact a true one, they would have been wiser to have been more direct and plain-spoken in their pleadings, and I think they need not have objected to some attempt on the part of the plaintiffs to deal with the point in their rebutting evidence. As regards Mir Kazim Husain's general health, I take note of the fact that when he appeared before the Munsif at Kaisarganj at the end of July 1893 he was examined while lying in a palanquin. I note further that, although the Sub-Registrar's office was situated in the town of Jarwal within a few hundred yards of Mir Kazim Husain's house, the registration of the document, Exhibit 1, purports to have been effected on commission at the house of the executant, as is ordinarily done only when an executant is prevented by illness or other sufficient cause from attending at the office. It is also an admitted fact that at the time when the registration purported to be effected, Mir Kazim Husain was lying in an antechamber (*deorhi*) of his *zanana* house, a place to which one would not expect a Sub-Registrar or other outsiders to be admitted, unless the man's state of health was such as to make it difficult for him to proceed a short distance to his own male apartments. A half-hearted attempt was made on behalf of the plaintiffs to neutralize this point by suggesting that the *mardana* house was under repairs, or was being white-washed or something of the sort, but it did not strike them that there was not any force in this suggestion. A few days later, however, Mir Kazim Husain was undoubtedly well enough to travel, for he left Jarwal on November the 19th, 1893, for Lucknow. Nevertheless this journey was that of an invalid in search of proper medical treatment, for it is beyond question that Mir Kazim Husain remained under medical treatment at Lucknow until he returned to Jarwal on March the 11th, 1894. He died, as already noted, two months later, on May the 12th, 1894. I note in this connection that His Honour the Lieutenant-Governor of the United Provinces paid a visit to Bahraich early in the year 1894 and held a *Darbar* there. Mir Kazim Husain was excused attendance at this *Darbar*, and in support of his application to be so excused he put in a certificate (Exhibit 103 on the record), dated December the 16th, 1893, by Babu Nobin Chandra, a Lucknow physician. This certificate was to the effect that Mir Kazim Husain was in Lucknow under treatment, suffering from chronic rheumatism, and not in a fit state to undertake a railway journey. It is certainly worth noticing that nothing is said in this document about failure of sight, but I am not sure that the point was relevant, for even total blindness might not have been accepted as in itself a sufficient excuse for failure on the part of a *talukdar* to attend an official *Darbar*. I may add that it seems to me exceedingly probable that the knowledge of the Lieutenant-Governor's impending visit, and the desire to avoid the necessity of putting in an appearance at a harassing public function at a distance from his home, probably exercised a considerable influence on Mir Kazim Husain's actions in the month of November 1893, not only by prompting him to get away to Lucknow for treatment, but by inclining him to lend a

ready ear to the suggestion that he should execute some sort of document which might have the effect of putting Mir Saiyid Ali forward as a "representative or *locum tenens*," capable of performing in his place any public duties which the Government might consider incumbent on a gentleman holding the position of an Oudh *talukdar*. The conclusion to which I have arrived on a consideration of the entire evidence on this point is that there is a distinct preponderance of evidence in favour of the defendants' case generally. If the question of Mir Kazim Husain's total blindness had been specifically raised in the pleadings, as I think it ought to have been, or if the plaintiffs had been allowed an opportunity of producing rebutting evidence on the point and had failed to do so, I am bound to say that on the evidence of Sitla Din, Ejaz Husain and Riaz Husain more particularly, considered in connection with the general probabilities and the established facts of the case, I should have been much disposed to hold it proved that Mir Kazim Husain was on the 14th of November 1893 to all intents and purposes a blind man. That he was in a very feeble state of general health, I hold to be fully established. There are indications in the evidence that he would have wished before his departure for Lucknow to pay a visit to the head-quarters of his own estate at Aini, eight miles from Jarwal by road, and that he did not do so because he did not feel himself equal to a road journey of such a distance. There is a clear preponderance of evidence that he had been confined to his house, if not to his *zanana* quarters, for some time before the 14th of November 1893. As regards his eye-sight I hesitate, for reasons already indicated, to record a finding that he was totally blind, but the impression left on my mind is that the sight of his one remaining eye had been failing him as the beneficial effects of Dr. Hall's operation began to wear off, and that it was in the month of November 1893 in such a condition as to make it highly improbable that Mir Kazim Husain would be able to acquaint himself with the contents of a document by reading it. His eye-sight was in fact, in my opinion, so extremely defective that it would not have been difficult for an unscrupulous person in whom he reposed confidence to practise some such fraud upon him as would be involved in obtaining his signature on two distinct documents while he was under the impression that he was signing one document in two different places.

During Mir Kazim Husain's absence in Lucknow certain transactions took place, mostly in connection with the Lieutenant-Governor's visit already referred to, in which Mir Saiyid Ali was allowed to put himself forward as the adopted son of Mir Kazim Husain and the prospective heir of *taluka* Waira Kazi. In connection with this part of the case we have the evidence of certain retired officials who were examined on commission, namely, Mr. Parmanand Chaube, a retired Tahsildar, Mr. Hakimuddin a retired Deputy Collector of these Provinces subsequently holding a distinguished position in the State of Bhopal, and Mr. Ehsan-ul-Haqq, who seems to have retired from service as a Naib-Tahsildar after having acted as Tahsildar on one or more occasions. In considering all this evidence it must be borne in mind that Mir Kazim Husain had gone off to Lucknow and left Mir Saiyid Ali in charge of his estate, principally, as I think, in order that he might not be worried with matters connected with the Lieutenant-Governor's visit. The local officials had in any case to look to the gentleman actually managing the Waira Kazi estate for sundry services in connection with the camping arrangements for His Honour the Lieutenant-Governor, and they would naturally address themselves to the gentleman whose services they were thus invoking in such polite terms as they might consider likely to be agreeable to him. Moreover, whatever may be the truth about the document, Exhibit 1, it is quite certain that from the 14th of November 1893 there was in existence in the registers of the Sub-Registrar's office at Jarwal a copy of that document entered according to law and purporting to be a deed of adoption in favour of Mir Saiyid Ali duly executed, attested and registered. Whatever had in the meantime become of the original, I have no doubt that Mir Saiyid Ali would have no difficulty about securing a registration copy for such use as he might see fit to make of it, and that the knowledge that such a document was in existence would be common to all the officials at Kaisarganj Tahsil. I attach, therefore, very little importance to the plaintiffs' evidence regarding Mir Saiyid Ali's proceed-

ings during the absence of Mir Kazim Husain in Lucknow, except as showing that he was still hopeful regarding his chances of being able successfully to maintain the position he was taking up as the adopted son of Mir Kazim Husain. In the one document addressed to Mir Saiyid Ali on behalf of the Deputy Commissioner and bearing the signature of that official there is no reference to any adoption, and the privilege granted is merely that of a formal interview with His Honour the Lieutenant-Governor while on tour, a privilege which would, I have no doubt, have been granted to Mir Saiyid Ali as the manager actually in charge of *taluka* Waira Kazi during the absence of its owner, apart altogether from any question of his alleged status as an adopted son. I do not consider that knowledge of the fact that Mir Saiyid Ali was arrogating this status to himself was brought home to Mir Kazim Husain by any satisfactory evidence.

It will be expedient, however, that I should pause at this point to look through the evidence of the three officials examined on commission.

Mr. Parmanand Chaube never met Mir Kazim Husain at all, and all he really knows is that Mir Saiyid Ali was described to him as the adopted son of Mir Kazim Husain by some of his subordinate officials. His evidence is really worthless. Mr. Ehsan-ul-Haqq began by deposing that Mir Kazim Husain had often told him that he had brought Mir Saiyid Ali up as his own child and that he regarded him as his heir and successor, but it seems to me that the learned Subordinate Judge is substantially right in regarding this witness as having more or less broken down in cross-examination. He made one or two statements which are certainly not true; as for instance that Mir Kazim Husain had not lost the sight of the eye which was operated on by an unqualified practitioner. He admitted that he only saw Mir Kazim Husain once between July 1893 and March 1894, and he subsequently placed this interview in the month of July or August 1893. This would, therefore, be just about the very time that Mir Kazim Husain was repudiating the alleged adoption of Mir Saiyid Ali in the sworn evidence which he gave before the Munsif's Court at Kaisarganj. The witness only spoke of one other specific occasion on which he could remember that he had talked with Mir Kazim Husain about Mir Saiyid Ali's position. This he placed shortly after the operation by what he calls the "native ophthalmist." He says that he then saw Mir Kazim Husain lying very ill at his own house at Jarwal. The latter told him he had no hope of life and begged him to be kind to Mir Saiyid Ali, whom he regarded in every way as his son and who would be his heir after him. I am confident that no statement substantially to this effect was made, or could have been made, to this witness by Mir Kazim Husain at the end of the year 1889 or the beginning of the year 1890. There had been no adoption of Mr. Saiyid Ali up to that date, and if Mir Kazim Husain had died then his estate would have passed to *Musammat* Taiyaba Begam, under the Will registered at the beginning of 1887. I do not say that the witness is necessarily lying; he may have been carried away by friendly feelings towards Mir Saiyid Ali, or by an honest belief, which had somehow remained in his mind from the days of his official connection with Tahsil Kaisarganj, that there had really been an adoption, and thus have entertained in his own mind and conveyed to the Court an exaggerated and incorrect impression of certain friendly expression regarding Mir Saiyid Ali really used to him by Mir Kazim Husain at or about the time to which he refers. So far as the questions in issue in this case are concerned his evidence seems to me practically worthless. The statement of Mr. Hakimuddin is of more importance and requires to be carefully considered. He was posted to the Bahraich District about the end of the year 1892 and was transferred, apparently in April 1894, though he says it was in March of that year. It is important to notice that he had an interest in Mir Saiyid Ali, because he knew his father and his family at Agra. I think it highly probable that Mir Saiyid Ali regarded this Deputy Collector as a friend at Court, and made the most of his acquaintance with him during the proceedings connected with the Lieutenant-Governor's visit in January and February 1894. So far as Mr. Hakimuddin's evidence relates to that particular matter, and to the alleged admission of Mir Saiyid Ali to the Lieutenant Governor's *Darbar* in the capacity of adopted

son of Mir Kazim Husain, I think it is of no great weight as regards the questions in issue in the present suit, and is almost certainly incorrect in some of its most important details. The statement that Mir Saiyid Ali was put forward for admission at the formal *darbar* as representing the Waira Kazi estate appears to me improbable and inconsistent with the Deputy Commissioner's letter granting Mir Saiyid Ali a formal interview to which I have already referred. The crux of Mr. Hakimuddin's evidence, however, lies in his deposition as to certain statements said to have been made to him by Mir Kazim Husain. He spoke to one interview at Jarwal during the tour season of 1893. On that occasion he said that Mir Kazim Husain expressed to him his intention of adopting Mir Saiyid Ali. Now this interview must have taken place about the time of, or shortly before, Mir Saiyid Ali's marriage. I can well conceive of it as probable that Mr. Hakimuddin would be interested in the position of a young man with whose family he had a previous acquaintance, and who was about to contract a distinguished marriage into the family of a brother official like Saiyid Mehdi Hasan, and that he might enter into conversation with Mir Kazim Husain as to the young man's future prospects. I think it probable that the witness's memory is not at fault when he says that on this occasion Mir Kazim Husain expressed to him some sort of intention of making Mir Saiyid Ali his adopted son and the eventual successor to his estate. It also seems to me perfectly conceivable that Mir Kazim Husain might make some such remarks, under the circumstances indicated, without having come to any final or positive decision in his own mind, and more particularly without having formed any intention whatsoever of entirely superseding his Will in favour of *Musammat* Taiyaba Begam by making Mir Saiyid Ali his immediate heir. Another statement made by this witness is more to the point. He says that he had another interview with Mir Kazim Husain at the village of Aini, which is the head-quarters of the Waira Kazi *taluka* and close to Tahsil Kaisarganj. There, according to the witness, Mir Kazim Husain definitely informed him in the presence of another well-known *talukdar* of the Bahraich District (since deceased) that he had actually adopted Mir Saiyid Ali by executing a deed of adoption in his favour. In another part of his evidence the witness added that it was in the course of this interview that Mir Kazim Husain expressed an intention of going to Lucknow for treatment. Now it is beyond question that the witness's recollection on this point is inaccurate. The deed, Exhibit 1, is supposed to have been executed on November the 14th, 1893, and Mir Kazim Husain left for Lucknow four days later. No interview between those two dates could possibly be described as having taken place at the beginning of the year 1894. I am further of opinion that it is proved beyond question that Mir Kazim Husain did not go to Aini between the two dates above referred to. From the evidence as a whole, I also gather that he did not go to Aini between the date of his return to Jarwal and the date of his death. From any point of view, therefore, the witness is making a mistake both as to the place and as to the time of the alleged interview. I am not much impressed by the counter-argument strongly urged upon us on behalf of the appellants, that a question put to this witness in cross-examination suggested that the defendants themselves believed that there had been some interview between Mir Kazim Husain and Mr. Hakimuddin at Jarwal in the interval between November the 14th and November the 19th, 1893. To begin with the defendants' Counsel simply put the question, and I do not see that the defendants have in any way committed themselves to the assertion that such an interview actually took place. Moreover, if there is any foundation for the question put by the defendants, the result would be that Mr. Hakim uddin must have remembered that the interview took place at Jarwal and was telling a deliberate falsehood when he placed it at Aini, and is, therefore, to be regarded as an altogether dishonest witness. I do not desire to cast such an imputation on Mr. Hakimuddin, but I am bound to say that the one material point in his evidence seems to me seriously shaken by the fact that his memory must have failed him as to the time and place of the interview to which he deposes. I do not think it possible under the circumstances to place any reliance on his recollection regarding the substance of what passed at the supposed interview. It is

quite possible that he carried away with him from the Bahraich District, mainly in consequence of communications which had passed between himself and other officials (perhaps including Saiyid Mehdi Hasan), a strong impression that Mir Saiyid Ali had in fact been adopted, so that when he came to furbish up his memory as to the precise materials upon which that impression was based, a *bona fide* belief in the justice of the plaintiffs' case led him more or less unconsciously to put a stronger colour on his evidence than the facts would really bear. I cannot, under all these circumstances, regard the statement of this witness as of serious value in support of the plaintiffs' case.

There is other evidence as to matters alleged to have occurred between November the 14th, 1893, and the date of Mir Kazim Husain's death, which is of very considerable importance. The document, Exhibit 1, was first produced before the Revenue Court which was engaged in dealing with the case as to mutation of names in the revenue registers arising out of the dispute which broke out on the death of Mir Kazim Husain. I regard it as one of the cardinal facts in this case, the importance of which must be steadily borne in mind in dealing with the entire evidence, that this document was not then produced from the custody in which one would have expected to find it. The Revenue Court was informed that the deed of adoption had been deposited for safe custody with one Saiyid Abul Hasan, *Mujtahid* of Lucknow; it was in fact produced in Court from this gentleman's custody and he was examined on commission and made a statement as to the circumstances under which he had become possessed of the document. A certified copy of this statement is Exhibit A7 on the record. I pause to note that Saiyid Abul Hasan was not only a gentleman of authority, as a *Mujtahid* or high priest of the *Shia* sect, but was a connection by marriage of the family with whose affairs we are dealing. He had married one Fatima Begam, the daughter of a sister of *Musammat* Taiyaba Begam, who would, therefore, be a niece of that lady and a first cousin of Mir Saiyid Ali and of the present plaintiff, Mir Saiyid Hasan. The statement made by Saiyid Abul Hasan as a witness is a very brief one and was obviously put together with the strictest possible economy of truth. What he said was that during the second half of a Muhammadan month which would correspond with the period from November the 25th to December the 9th, 1893, one Saiyid Shafi Haider, who is an important personage in this case, being the own brother of *Musammat* Taiyaba Begam, brought him this document and left it with him in deposit (*amanat rakha*). He went on to add that when this document was thus entrusted to him, it bore an endorsement on the back to the following effect:—"Inasmuch as this document has been cancelled by a fresh deed of adoption, I am returning this deed to the executant." This curious endorsement purports to be signed by Mir Saiyid Ali, and the venerable *Mujtahid* began by deposing somewhat doubtfully that from the appearance of the writing he thought this really was Saiyid Ali's signature. He was pressed to be more precise on this point and he then stated that, on the day the deed, Exhibit 1, was entrusted to him, Shafi Haidar and Saiyid Ali came together to his house bringing the document with them, that they had some conversation at his house in his presence but that he was not near enough to them to hear distinctly what they were saying, and that finally Saiyid Ali in his presence wrote the endorsement on the back of the deed to which reference has just been made and affixed his signature to the same. Then he says Shafi Haidar made over the document to his custody, but that nothing further was said to him as to the meaning or purpose of this curious proceeding. From the latter part of his statement it appears that he intended to depose that his own son, Saiyid Muhammad Hadi, had also been present at the interview in the course of which the deed was deposited, and he explained that at the time when he was making this statement the said Muhammad Hadi was absent in Bombay and there was no immediate prospect of his return. A statement to a similar effect was made in the course of the mutation proceedings before the Deputy Commissioner of Bahraich by Shafi Haidar, who appears to have been acting as agent or attorney for his sister, *Musammat* Taiyaba Begam. A copy of this statement is on the record, as Exhibit A-14, and considerable reliance is placed by the plaintiffs on its opening words, which are: "The deed of adoption executed by Kazim Husain on November the 9th, 1893, is with Saiyid Abul Hasan, *Mujtahid* of Lucknow." He then goes on to make a statement which is

clearly inconsistent in its details with that of Saiyid Abul Hasan. According to this story, Kazim Husain went to Lucknow for medical treatment (as we know he did on the 19th of November 1893) with this deed, Exhibit 1, in his possession. He there gave it to Shafi Haidar, telling Shafi Haidar to make it over to Saiyid Abul Hasan. Some days afterwards Kazim Husain told Saiyid Ali to go with Shafi Haidar to the *Mujtahid* and to write an endorsement on the deed to the effect that it had been returned to the executant. He added that the deed was to be left with Saiyid Abul Hasan to be producible in case of a dispute. Accordingly the deponent Shafi Haider and Mir Saiyid Ali went together to the *Mujtahid's* house, where Mir Saiyid Ali wrote the endorsement already described, the only other persons present at the time being Saiyid Abdul Husan and his son, Saiyid Muhammad Hadi. The witness went on to depose that there really had been another deed of adoption subsequently executed, but qualified his statement on this point by saying that he knew nothing about it except by hearsay, though he believed such a document had really been executed because he had seen a draft of it. Finally, we have to turn for information on this point to the evidence of Saiyid Muhammad Hadi, who was examined in this case on commission on behalf of the plaintiffs. He said that he remembered that Saiyid Ali and Shafi Haidar came to his father's house bringing this document with them. A conversation took place between the two, which the witness was able to hear and of which he professed to remember some fragments. The document which they had brought with them was not at all fovourable to *Musammat* Taiyaba Begam and Shafi Haidar was urging upon Mir Saiyid Ali that this document ought to be cancelled and another substitued for it, which should provide for *Musammat* Taiyaba Begam's interests as well. Mir Saiyid Ali made him swear an oath, presumably to the effect that he really would obtain for him a second deed of adoption, and thereupon Mir Saiyid Ali proceeded to write the endorsement in question and the deed was then handed over to Saiyid Abul Hasan.

This is all the evidence available in respect of this remarkable transaction, and the one thing that can be said about it with any certainty is that the whole truth was not disclosed at the time of the mutation proceedings and has not been disclosed now. It is obvious that something must have been said to the *Mujtahid* at the time when the document was handed over to him and that this was kept back by Saiyid Abul Hasan when he was examined in 1894, while Saiyid Muhammad Hadi professes not to remember what Shafi Haidar or Saiyid Ali said to his father when they made over the document to him. The whole of Saiyid Muhammad Hadi's cross-examination seems to me more or less unsatisfactory; he says there was a conversation between Shafi Haider and Saiyid Ali which lasted about an hour before the latter consented to write the endorsement. Yet what he professes to recollect of this conversation would not occupy five minutes. Moreover, it stands to reason that Shafi Haidar and Saiyid Ali must either have come to the *Mujtahid's* house after having thoroughly discussed the matter between themselves and made up their minds as to what was to be done, or they must have come there in order to talk the matter over with the venerable *Mujtahid* and obtain his advice. The statement of Saiyid Muhammad Hadi is hopelessly at variance with either of these probabilities. To Shafi Haidar's extraordinary statement I may have to return later; for the present I am content to note the inconsistencies between his story and that told by Saiyid Abul Hasan, and that on two distinct points he makes statements the correctness of which is not now asserted by either of the parties before us. It is no one's case that the deed, Exhibit 1, was executed on the 9th of November 1893, the evidence for the plaintiffs being that its execution took place the day on which it was registered, that is to say, on the 14th of November 1893. It is no one's case now that any subsequent deed of adoption was ever executed by Mir Kazim Husain and nothing further has transpired in the evidence regarding the draft which Shafi Haidar professed to have seen. There was considerable argument before us as to the legal effect of the endorsement made by Mir Saiyid Ali, but the only question with which I feel any concern is the bearing of the fact of Mir Saiyid Ali's having consented

to make such an endorsement, and the very curious procedure adopted in handing over the document to the custody of Saiyid Abul Hasan, on the question of the genuineness of the document itself and of the credibility of the plaintiffs' evidence as to its due execution and registration. The case for the plaintiffs has been outlined in the evidence of their witness Saiyid Muhammad Hadi. They ask the Court to hold, in the first place, that there is no evidence that Mir Kazim Husain himself had anything to do with the obtaining of this endorsement, or with the handing over of the document to the *Mujtahid;* in the second place, they suggest that all that took place was that Shafi Haidar was dissatisfied with the effects of the document on his sister's interests, and so contrived to trick or bully his young nephew into some sort of a surrender of the same, assuring him all the time that he would get another document executed in its place. Shafi Haidar's position is in fact one of the difficult points in the entire case. It would appear that he did not ordinarily reside at Jarwal, but at his own family home at Kintaur in the Bara Banki District. He was frequently coming and going between that place and Jarwal; and he was, no doubt, in the confidence of *Musammat* Taiyaba Begam and the natural protector of her interests. She made him her general attorney by a deed executed immediatly after Mir Kazim Husain's death and he acted for her in the litigation which followed in the Criminal and Revenue Courts. It is fully established by evidence that he was not in Jarwal on November the 14th, 1893, but that he arrived there either on the 15th or on the 16th of November. The evidence for the defendants is that he was angry and disturbed about the alleged execution and registration of the deed, Exhibit 1, and drew the attention of Mir Kazim Husain to the fact. In trying to estimate this man's conduct and his probable motives. I make due allowance for the facts that he was probably astute enought to realize that the Will of January 1887, on the face of it, appeared to confer upon *Musammat* Taiyaba Begam an absolute estate in the Waira Kazi *taluka*, and that he might himself succeed to the same after her death if she died intestate, or if Mir Kazim Husain failed to make some other provision for the succession before his own death. Shafi Haidar himself died after the institution of the present suit and before any question could arise as to his examination as a witness. The evidence, as a whole, does not suggest to my mind that he was personally unfriendly to Mir Saiyid Ali, and I have little doubt that, if driven to choose between Mir Saiyid Ali and some member of Mir Kazim Husain's family as eventual heir to the Waira Kazi estate, he would have preferred the former.

In order to deal with this part of the case as a whole, I propose next to consider certain evidence put forward by the defendants with regard to statements alleged to have been made by Mir Kazim Husain in the interval between the 14th of November 1893 and his death. There was a good deal of argument before us as to the admissibility of these statements. It seems to me that in almost every single case to which we were referred in the course of arguments, as bearing on the general principles to be applied in allocating the burden of proof and estimating the value of evidence in connection with disputed Wills or other dispositions of property, evidence was freely admitted with regard to statements alleged to have been made by deceased testators from which inferences could be drawn as to the execution or otherwise of the documents in dispute, or as to the circumstances under which such execution was obtained. The objections taken to the oral evidence, which I am about to consider, would apply equally to the document, Exhibit A26, and to a good deal of other evidence which I find on the record. Personally I have little doubt that the whole of this evidence can be brought in under the head of admissions, under the provisions of sections 18, 19 and 21 of the Indian Evidence Act (I of 1872); but if the correct view should be that these sections apply only to a certain limited class of cases, in which the representative character of a person against whom an alleged admission is sought to be proved is not in dispute, I would still hold the evidence in question to be relevant under the general provisions of section 11 of the Indian Evidence Act. In most cases where the genuineness or validity

of a Will is in dispute, it will be found that the case of the party denying the Will is that the alleged executant died without ever having become aware of the existence of the document, or at any rate without ever having become aware of its nature or effect. Now in the present case it was from the very first alleged on behalf of the defendants that Mir Kazim Husain did become aware, shortly after the 14th of November 1893, of the existence, purport and effect of the deed, Exhibit 1, and it was further pleaded that the result of his so becoming aware was that he took such steps as appeared to him under the circumstances necessary and sufficient to cancel it or to nullify its effect. It is obvious that the conduct of Mir Kazim Husain from the moment that he became admittedly aware of the existence, purport and effect of the document, Exhibit 1, is not merely a relevant fact, but a very important fact in the case. The word "conduct" in such a connection as this must, in my opinion, be interpreted very widely; it would obviously include abstinence from taking any action, as such abstinence would be an important point in favour of those asserting the genuineness and validity of the document. Under these circumstances it seems clear to me that the plaintiffs cannot reasonably ask the Court to exclude as irrelevant evidence offered by the defendants of statements made by Mir Kazim Husain expressing the view taken by him of the deed, Exhibit 1, after he knew of its existence, or the action which he conceived himself to have taken regarding it. I note, therefore, the following evidence on behalf of the defendants on this point.

D. W. No. 8, Raghubar Singh, is an elderly gentleman residing at a village about a mile and a half from Jarwal. He speaks to an interview which he had with Mir Kazim Husain some two months before the death of the latter, that is to say, very shortly after his return from Lucknow to Jarwal. He says that Mir Kazim Husain spoke bitterly about the intrigues of Saiyid Haidar Mehdi's family in favour of the daughter who had been married to Mir Saiyid Ali. Through these intrigues, he said, a deed of adoption and a deed investing Saiyid Ali with the management of the Waira Kazi estate had been "prepared in Saiyid Ali's favour without his notice and against his will." He added that he had been to Lucknow to see if he could get rid of these deeds and that he had anyhow succeeded in getting back the deed of adoption. At present he was very ill and did not intend to do anything further in the matter, but if he should recover his health he would see what ought to be done. D. W. No. 14, Thakur Lal Bahadur Singh, is a respectable gentleman fairly well-to-do, an Honorary Magistrate and member of the Bahraich District Board. There seems no doubt that he was on visiting terms with Mir Kazim Husain. He says he saw the latter about a month and a half before his death and that Mir Kazim Husain then told him that, while he was blind and unable to get about, Saiyid Haidar Mehdi's people had instigated Mir Saiyid Ali to obtain from him what he calls "a forged deed of adoption and a *supurdnama*," and that these deeds were registered without his knowledge. He added that when he came to know about the two deeds, he got them back from Mir Saiyid Ali. A more detailed statement is made by D. W. No. 18, Riaz Husain. He says he saw Mir Kazim Husain in Lucknow early in the year 1894. The latter then complained that while he was sick and blind, Saiyid Ali and his wife's relations had contrived to get a forged deed of adoption registered, and that he was so angry when he came to know about it that he had meditated instituting criminal proceedings, but being dissuaded from doing so by *Musammat* Taiyaba Begam and Shafi Haidar he had contented himself with getting back the deed and having an endorsement made on the back if it, after which it was entrusted for safe keeping to the *Mujtahid* Saiyid Abul Hasan. The witness says that Mir Kazim Husain was asking for advice as to whether this proceeding would be sufficient to annul the deed of adoption. The witness, who deposes to Shafi Haidar's return to Jarwal and to what took place when the latter called Mir Kazim Husain's attention to the existence of the alleged deed of adoption, is an old servant of the estate, Muhammad Ali Khan, D. W. No. 24. I have given my best attention to the arguments which were addressed to us on behalf of the appellants against the credibility of these witnesses, and I have endeavoured also to

make due allowance in my own mind for the consideration that it is a dangerous thing to admit oral evidence as to statements alleged to have been made by a deceased executant as having the effect of practically cancelling a registered instrument. It seems to me, however, that this evidence requires to be considered in connection with the undoubted facts of the production of the deed in dispute from the custody of the *Mujtahid* and of the existence thereon of the endorsement already noticed in the hand-writing of Mir Saiyid Ali himself. I lay no great stress on the alleged use by Mir Kazim Husain of the word "forgery." Such an expression, or its equivalent in the vernacular, is frequently used in ordinary talk of a document in connection with which some sort of fraud is alleged to have been perpetrated, quite independently of any question as to whether such fraud amounted to forgery in the legal signification of the term. It seems to me that the evidence for the defendants which I have noticed above is little, if at all, shaken in cross-examination. As regards the witness Riaz Husain in particular, I cannot find that any definite argument was put forward on behalf of the appellants as to why he should be disbelieved. The opinion which I have formed as regards this part of the case is substantially as follows:—that when Shafi Haidar returned to Jarwal on November the 15th or 16th, 1893, he did in fact speak to Mir Kazim Husain about the execution and registration of the deed, Exhibit 1, and remonstrated with him as to the possible effect of that deed on the interests of *Musammat* Taiyaba Begam. I am not in a position to come to a positive finding as to what Mir Kazim Husain precisely said, either then or afterwards, regarding the execution and registration of this deed, but I hold it to be proved that he did assert then and afterwards that a fraud of some sort had been perpetrated in connection therewith, as the result of a conspiracy by the relatives of Mir Saiyid Ali's wife to which that young man had been induced to lend himself. I do believe that it was at the instance of Mir Kazim Husain and under some sort of pressure from him that Mir Saiyid Ali was induced to write the endorsement, which now appears on the back of the deed, and to hand it over to Saiyid Abul Hasain as a person in whose integrity both parties had the fullest confidence. I do not think that any substantial argument in favour of the plaintiffs is to be drawn from the fact that there was no criminal prosecution instituted against Mir Saiyid Ali, and that he was in fact re-admitted to favour and left in charge of the management of the Waira Kazi estate. Shafi Haidar himself was in a difficulty which will require to be further noticed presently, inasmuch as the signature of his own son, Ali Haidar, appeared in the margin of the disputed deed as one of the attesting witnesses. In any case anything like a criminal prosecution and the interference of the Police would not have suited *Musammat* Taiyaba Begam or Shafi Haidar, to say nothing of Mir Kazim Husain himself, who in his then state of health would probably have regarded a Police inquiry into a matter so intimately concerning his own family and the possibility of his own appearance as a witness before a Criminal Court with quite invincible repugnance. I think it highly probable that the idea of trying to effect some arrangement by which *Musammat* Taiyaba Begam should succeed to the property after his death, with Mir Saiyid Ali as her manager and eventual heir and successor, still continued present to Mir Kazim Husain's mind and was favoured by *Musammat* Taiyaba Begam herself. Whether Shafi Haidar would look favourably on such an arrangement is a different question; but it seems to me that, whatever might be this gentleman's hopes and schemes for the future, it would be necessary for him to walk very warily so as not to injure his sister's interests with Mir Kazim Husain. Mir Saiyid Ali's position under the circumstances would be a fairly strong one, at least strong enough, as I conceive it, to enable him to make his own terms up to a certain point, once it was quite certain that, whatever might happen, Mir Kazim Husain was not going to institute criminal proceedings. I can quite understand his being in a position to bargain for the execution of some further deed in his favour, so modified as to safeguard the interests of *Musammat* Taiyaba Begam. He was probably quite astute enough to realize that it was at any rate very doubtful whether such an

endorsement as that made by him on the reverse of Exhibit 1 could have any legal effect on the validity of the document itself. My conclusion, therefore, is that, after Mir Kazim Husain had had an opportunity of talking over matters with Shafi Haidar, he insisted that a trick of some sort had been played upon him in connection with the deed, Exhibit 1, and that it must be delivered up and cancelled; the endorsement actually written by Mir Saiyid Ali and the handing over of the document to the custody of the *Mujtahid* were the results of a compromise as to the precise nature of which it seems to me impossible on the evidence as it stands to come to any more definite finding.

A few words may conveniently be said in this place as to the proceedings which followed on the death of Mir Kazim Husain. It was Mir Saiyid Ali himself who, on May the 6th, 1894, laid before the Criminal Court a petition to the effect that Mir Kazim Husain was dying and that a dispute was pending as to the succession to his estate which was extremely likely to result in a breach of the peace. Proceedings under section 145 of the Code of Criminal Procedure were actually instituted under magisterial orders dated May the 15th, 1894, and May the 28th, 1894. These proceedings were pending when, on June the 23rd, 1894, the estate was attached for arrears of land revenue under the provisions of the Oudh Land Revenue Act. One of the most extraordinary of the side issues in the case relates to a compromise which was patched up between *Musammat* Taiyaba Begam and Mir Sayid Ali in the course of these criminal proceedings, in respect of which the documents Exhibits A5 and A6 on the record are principal evidence. The Magistrate finally passed an order the effect of which was to refuse to deliver possession to any one, pending the institution of a civil suit to clear up the disputed question of title. It would have been well probably if the parties concerned had never been permitted to evade the terms of this order; but they managed somehow to persuade the Revenue Court of the district to take up the dispute under the provisions of the Land Revenue Act relating to the maintenance and correction of the village papers. The dispute between Mir Saiyid Ali and *Musammat* Taiyaba Begam then broke out afresh. Mir Saiyid Ali protested, as the plaintiffs have done in the present case, that he had been tricked into the compromise evidenced by Exhibit A5. The Revenue Courts, although they knew that the estate was for the time being under attachment and not in the possession of any one of the claimants and though they had before them the Magistrate's order directing the continuance of the attachment pending the decision of a competent Civil Court, actually proceeded to give a decision on the mutation side in favour of *Musammat* Taiyaba Begam and this was followed by the handing over to that lady of the possession of the estate. There has been an infinity of controversy both in the Court below and before us on appeal with regard to the compromise arranged between Mir Saiyid Ali and *Musammat* Taiyaba Begam, its legal effects and its bearing on the other issues in the case. From the point of view which I have taken of the case as a whole, I consider it unnecessary to go into these matters. The broad fact remains that Mir Saiyid Ali acquiesced in the decision of the Revenue Courts and in the handing over of the estate to *Musammat* Taiyaba Begam, and that up to the time of his death on September the 1st, 1901, he made no further attempt to assert the claim which has now been put forward by his brother as his legal representative. The case for the defendants is that Mir Saiyid Ali's conduct was perfectly natural, because in the first place he had a very poor case on the basis of the adoption deed of November 1893, and in the second place he had entered into an amicable settlement of all pending disputes with *Musammat* Taiyaba Begam, under which he was enjoying substantial benefits. The case for the plaintiffs is that Mir Saiyid Ali had an unanswerable claim in law under the deed of adoption, and that though he was tricked into putting in a petition of compromise before the Criminal Court, he never in fact entered into any arrangement with *Musammat* Taiyaba Begam under which he received a single anna by way of compensation for his conduct in refraining from pressing his claim to the ownership of the entire estate. If the latter of these pleas be accepted, the stronger to my mind becomes the inference that Mir Saiyid Ali had no great faith in the strength of any claim which could be put forward by him on the basis of the deed, Exhibit 1. My own opinion on this part of the case is that Mir Saiyid Ali did in

fact come to a friendly settlement with *Musammat* Taiyaba Begam, as he most certainly does appear to have continued on friendly and even intimate terms with her up to the time of his death; but the only result to my mind of accepting the contention put forward on behalf of the appellants regarding the alleged settlement would be to strengthen the presumption against them as to the validity of the deed, Exhibit 1.

I am now in a position to take up the consideration of this document as it stands and the evidence bearing on its alleged execution and registration.

The deed purports to be in the handwriting of one Saiyid Afzal Husain, who signs it at the foot, having dated it the 9th of November 1893 with the corresponding date of the Muhammadan era. In the right hand margin comes first of all the hieroglyph which represents the words "Kazim Husain *afi anhu*" followed by the words "*talukdar baqalam khud*," and immediately under this are the words "*tabniat nama haza ham ne ba khushi apni likha ba qalam khud*," that is to say, "I have written this deed of adoption of my own free will with my own pen." The repetition of the words "*ba qalam khud*" at the end of this note, without any second signature of Mir Kazim Husain, represents in any case some oversight or clerical error, for it is not suggested that the entire deed was written by Mir Kazim Husain with his own hand: no doubt what the words are intended to imply is that the note (*tabniat nama haza ham ne ba khushi apni likha*) is in the hand of Mir Kazim Husain. Next to this in order follow the signatures of six witnesses as below: --

1. Saiyid Ali Haider;
2. Saiyid Hifazat Ali;
3. Jafar Ali, resident of Garha Khurd Mahal, Khairabad, District Sultanpur;
4. Sheoratan Lal, resident of Jarwal;
5. Ram Kishen Sah, resident of Naugayan; and
6. Amir Ali.

The signature in each case purports to be by the pen of the attesting witness himself. We may at once pause to consider who all these persons were. The scribe, Afzal Husain, was employed by Mir Saiyid Ali on the recommendation of Saiyid Bakar Mehdi, own brother of Saiyid Haidar Mehdi. He was a brother-in-law of Muhammad Asghar, Sub-Registrar of Jarwal, and seems to have done odd jobs about the Registration Office. Hakim Hifazat Ali was a physician who had been in attendance on the family of Saiyid Haidar Mehdi and was living in Jarwal with a mother-in-law of that gentleman. About Jafar Ali there was a certain amount of controversy and we were referred to correspondence relating to him which passed between Mir Kazim Husain and Mir Saiyid Ali after the departure of the former from Jarwal. I have no doubt that he was sent for by Mir Saiyid Ali and given employment on the Waira Kazi estate very shortly before the execution of the deed in dispute. Amir Ali is proved by the plaintiffs' witness No. 4 to have been a servant of Saiyid Haidar Mehdi. Apparently he was the tutor to a son of the latter. When Jafar Ali himself (P. W. No. 6) was cross-examined about this man, he began by saying that he knew nothing whatever about him. He went on to say that, while Amir Ali was certainly present when the deed, Exhibit 1, was executed, attested and registered, he certainly never saw him at Mir Kazim Husain's house on any other occasion. Sheoratan Lal was an old servant of the Waira Kazi estate but a mere clerk and certainly not a witness of any independent position. Ali Haidar was the son of Shafi Haidar, and seeing that he gave his age as 33 years when he gave evidence in this case, he must have been about 19 in the year 1893. It is in evidence that he arrived in Jarwal on November the 13th, 1893. Ram Kishen Sah was the banker and agent of the Waira Kazi estate. He held certain villages on lease under a contract that he should be responsible for the punctual payment of the land revenue due from the estate. He resided at a village a few miles from Jarwal. Of these witnesses, Amir Ali is dead; his signature on the document has been identified. Sheoratan Lal, Ali Haidar and Jafar Ali have given evidence for the plaintiffs. Ram Kishen Sah was examined on commission on behalf of the defendants. He admitted his signature on the deed in dispute, but said he had taken Mir Saiyid Ali's word for it that Mir Kazim Husain wanted him to sign it, had certainly not been present when Mir Kazim Husain signed the

deed or when it was presented for registration, and made a number of other statements supporting the case set up by the defendants. Afzal Husain and Hifazat Ali were alive when this case was pending, and were not examined as witnesses.

A small side issue was raised on this point about which there was considerable controversy. There is no doubt that Afzal Husain was present in the Court below during part of the hearing of the case, that he went away without being examined and that the plaintiffs purported to make various efforts to secure his attendance on later dates but failed to do so. As regards Hifazat Ali also the plaintiffs purported to make various efforts to secure his attendance, but he never appeared before the Court below. The case for the plaintiffs is that they were all along anxious to produce these two witnesses and that the Court below was very hard on them in not allowing them adequate opportunities for making some further attempt to secure their production. As I have already noted in connection with another part of the case, the appellants do not want a remand order for the examination of these witnesses, but they ask the Court not to draw any unfavourable inference against the plaintiffs' case from the fact of their non-appearance. On the other hand, the defendants contend that unfavourable inferences of the strongest kind ought to be drawn, that the plaintiffs never honestly intended to put Hifazat Ali in the witness-box, but kept him back because they were afraid he might break down in cross-examination, more particularly if he were questioned as a physician regarding the state of Mir Kazim Husain's health. As regards Afzal Husain, the defendants contend that all desire on the part of the plaintiffs to produce him as a witness vanished when the defendants produced in Court a certain document, Exhibit B1, which is relied upon as evidence of a bribe or illegal gratification paid by Mir Saiyid Ali to the Sub-Registrar, Asghar Husain. I find it impossible to come to any very positive conclusion on this point, but I am content to say that the mere absence of the evidence of Afzal Husain and Hifazat Ali from the record is from any point of view a very unfortunate thing for the plaintiffs. I have shown that out of the group of witnesses called together to write out and attest this important document, the trial of some connection with the family of Saiyid Haidar Medhi is over three out of the seven, namely Afzal Husain, Hifazat Ali and Amir Ali. Jafar Ali and Sheoratan Lal are mere servants likely to be under the influence of Mir Saiyid Ali, who would find it difficult to refuse compliance with his wishes, if he pressed them to sign some document in the margin on the strength merely of his own assurance that he had seen Mir Kazim Husain execute it and that Kazim Husain wished them to sign it. Ali Haidar was a youth of 19 and not a person of independent position, such as one would have expected to see brought in as attesting witness on such an occasion; on the other hand, if the possibility of a conspiracy to perpetrate a fraud of some sort in connection with the execution and attestation of the document be once admitted, the convenience from the point of view of the conspirators of fettering Shafi Haidar's future liberty of action by drawing his own son into the circle of the conspiracy would be very great indeed. It comes practically to this: on the case put forward by the plaintiffs Ali Haidar would not be a particularly likely witness for this deed, while if there is any truth in the case for the defendants-respondents, he would be the likeliest possible person to be asked to sign the deed, provided it were in any way possible to bribe or coax or trick him into doing it. The one witness with any pretence to an independent position is Ram Kishen Sah, and he has given evidence against the plaintiffs. The next point to be noticed is that the deed was faired out and dated by Afzal Husain on the 9th of November 1893, but according to the evidence it was not executed until five days later. It was not kept back, as it might conceivably have been had the transaction been a genuine one, in order that Mir Kazim Husain might execute it in the presence of the Sub-Registrar, for all the witnesses for the plaintiffs are agreed that its execution and attestation had been completed before the Sub-Registrar arrived. It is

difficult to conceive of any reason, therefore, why execution of the document should have been kept back for five days, unless it was that the attendance was considered necessary of attesting witnesses whose services could not have been obtained on November the 9th, 1893. Now the only attesting witnesses who were not in Jarwal on this date, but who had arrived there five days later, were Ram Kishen Sah and Ali Haidar, and these two are beyond question the most important, in different ways, of the attesting witnesses. I think there is great force in the suggestion, which I took from the learned Counsel for the appellants in the course of his replication, that the real reason why the attestation of this deed (and of course its execution, if any execution took place) was deferred to November the 14th, 1893, was that the persons who desired to get the document executed and attested were not prepared to rely upon an adoption deed signed only by Hifazat Ali, Jafar Ali, Sheoratan Lal and Amir Ali, but delayed the execution of their plans until they could secure the attendance of Ali Haidar and Ram Kishen Sah. We were taken through the evidence of Sheoratan Lal, Ali Haidar and Jafar Ali in detail and I have very carefully weighed and considered it. Sheoratan Lal was undoubtedly under the impression that the deed, Exhibit 1, was actually written the same day that it was signed, attested and registered, that is to say, on November the 14th, 1893. The examination of the witnesses was not satisfactory, in spite of the length at which they were cross-examined. Sheoratan Lal was not pressed, as he should have been, with regard to the statements made by him on page 34 of the printed record, or the discrepancy between his evidence and that of the succeeding witnesses might have been put beyond all question, instead of remaining only a matter for reasonable inference. The importance of pressing each and all of the witnesses to say whether they did or did not see Mir Kazim Husain with his own hand writing the words "*tabaiat nama haza ham ne ba khushi apni likha ba qalam khud*," as they appear in the margin beneath his signature, was not adequately realized. Apart from the point already noticed, there is no particular discrepancy in the evidence. The cross-examination of Sheoratan Lal and Jafar Ali was mainly directed towards showing that they were mere creatures of Mir Saiyid Ali's and that of Ali Haidar, towards showing that about the time when this suit was instituted, he had written letters as a partisan of *Musammat* Taiyaba Begam's anxious to protect her interests against the machinations of her enemies, and that he had been severely disappointed shortly afterwards when *Musammat* Taiyaba Begam declined to accept him as her manager and general agent in place of his father, Shafi Haidar, but preferred to place her interests in the hands of Saiyid Muhammad Hasan, the second defendant. The only other witness for the plaintiffs whose evidence is of any particular importance is Mir Sakhawat Abid (P. W. No. 8). The point of his evidence, apart from his deposing as to the general health and capacity of Mir Kazim Husain in the month of November 1893, lies in his statement that he saw Mir Kazim Husain a day or two after the execution of the deed (Exhibit 1) and was informed by him that he had executed a deed of adoption and a *supurdnama* in favour of Mir Saiyid Ali. I think this witness more or less broke down in cross-examination. He had to admit that the difference in age btween himself and Mir Saiyid Ali was much more considerable than he had at first tried to make out, and that he must in fact have been only about 14 years old in 1893. His evidence looks to me very much the sort of stuff which a learned predecessor of mine was wont to describe as "padding," and altogether valueless. A curious point came out during the examination of the defendants' witness Manohar Lal. The plaintiffs themselves tendered to this witness a certain document, showing him nothing but the signatures, and he deposed that the paper seemed to him to bear a genuine signature of Mir Kazim Husain, as also the signatures of Hifazat Ali, of Manohar Lal (himself), and of Kedar, son of Ram Kishen Sah, as marginal witnesses. This document was finally put on the record as Exhibit 140 and there has been much

controversy concerning it. It purports to be executed by Mir Kazim Husain in favour of Mir Saiyid Ali on the 3rd of October 1893, and is drawn up in very wide terms, so as to operate both as a deed of adoption and as a *supurdnama* or deed making over the management of the Waira Kazi estate to Mir Saiyid Ali. When Manohar Lal was finally shown the deed, he seems to me to have been obviously taken back, but he said no more than that he had no recollection about the matter, though the deed certainly bore his signature. Later on he was taken in hand by the learned Subordinate Judge himself, and in reply to a number of questions he made statements which I can only understand as meaning that he disavowed his original identification of the signature on this document as a genuine signature of Mir Kazim Husain. The learned Subordinate Judge has arrived at a somewhat extraordinary conclusion on the strength of his own examination of this witness. He thinks he has been able to demonstrate that this Manohar Lal could successfully imitate the ordinary signature of Mir Kazim Hussain, and that he must himself have forged that signature as it appears on Exhibit 140, and very probably also the marginal signature and the signatures on the reverse under the registration endorsements of Exhibit 1. This really seems to me somewhat fanciful and hard to reconcile with Manohar Lal's eventual appearance in the witness-box as a witness for the defendants. Considering that he is the only witness who says anything about Exhibit 140, and in view of the peculiar nature of his statement, I do not think that any Court would be justified in holding that document to be satisfactorily proved by his evidence. It seems difficult, however, to let the matter go as that, for the existence of this document and its presence on the record are in themsevles important facts, to which it would be possible to attach some evidential value. The document No. 140 is either a forgery or it is not. If it is, then some one perpetrated the forgery of this deed of adoption in favour of Mir Saiyid Ali on the 3rd of October 1893, but the plot broke down because for some reason or other it was found impossible to get the forged deed registered. If, on the other hand, the deed is so far genuine that it bears a genuine signature of Mir Kazim Husain, we must take it that some persons working in Mir Saiyid Ali's interests succeeded on the 3rd of October 1893 in getting Mir Kazim Husain to write the words "*Kazim Husain afianhu talukdar ba qalam khud*" in the margin of a document which purported to give Mir Saiyid Ali both the status of an adopted son and full powers of management over the Waira Kazi estate, that this document was attested by Hifazat Ali, Manohar Lal and Kedar, son of Ram Kishen Sah, but that it subsequently proved valueless because the persons interested in obtaining it found it impossible to get it registered. I do not think it is treating the plaintiffs in any way unfairly to look at the case, if only for the sake of argument, in the light of this latter supposition; the plaintiffs assuredly would not prefer the Court to discuss the evidence on the assumption that Mir Kazim Husain's signature as it appears on Exhibit 140 is a forgery. It has been suggested that the only reason why Exhibit 140 was never registered is that it was found to be insufficiently stamped. The argument is that it purports to effect both an adoption and an appointment of the adoptee as manager of the estate, and that for such a purpose two documents bearing respectively a ten-rupee and a fifteen-rupee stamp would be required. It is obvious that the deed, Exhibit 140, could never have been formally tendered for registration, for had it been so tendered the Sub-Registrar must have impounded it under the rules, so that the stamp law might be complied with by the recovery of duty and penalty under the orders of the Collector, after which it would have been registered in due course.

The only suggestion put forward is that it may have been informally shown to the Sub-Registrar and then laid aside on his giving it as his opinion that it was insufficiently stamped. A number of questions present themselves to my mind in this connection. Would a gentleman in Mir Kazim Husain's position, contemplating the execution of a document of such importance, have done so without taking

legal advice of any sort or kind; and if it be suggested that he may in fact have taken legal advice, would any qualified lawyer have failed to warn him that the deed as drafted would require a stamp of higher value than ten rupees? Again, if the deed had in fact been drafted under Mir Kazim Husain's directions and executed by him with full knowledge of its contents and in a manner perfectly fair and above board, is it likely that any one would have taken the trouble to consult the Sub-Registrar informally about the question of getting it registered? Would not the next step have been to tender it formally for registration and would not the Sub-Registrar then have been bound to impound the document and to take proper action under the law? If, on the other hand, the deed as it now stands is the outcome of some underhand conspiracy, if it was drafted without Mir Kazim Husain's knowledge and if his signature to it was either forged or obtained by some trick, the next step in the conspiracy would necessarily be to consult the Sub-Registrar privately as to the possibility of getting it registered, and an objection raised under such circumstances to the sufficiency of the stamp duty would obviously upset the whole plan, as far as that particular document was concerned. It is in this connection that it becomes important to consider a further point in the case for the plaintiffs. Their witnesses are agreed that on November the 14th, 1893, Mir Kazim Husain executed and caused to be registered two distinct documents, namely the adoption deed, Exhibit 1, and a *supurdnama* or deed making over to Mir Saiyid Ali the management of Waira Kazi estate with fairly extensive powers. This latter document has disappeared and what we have on the record as Exhibit 2 is copy of the same obtained from the Registration Department. Another side issue in the case has been the question whether the plaintiffs have been responsible for the disappearance of the original of this Exhibit 2 and whether they could have produced it if they had seen fit. From any point of view the non-prodcution of this original document seems to me very damaging to the plaintiffs' case. I cannot rid my mind of a suspicion, which seems to me fair and reasonable on the evidence as a whole, that the plaintiffs could have produced the original document if they had seen fit to do so. If I could say positively that this was my opinion, there would be an end to the plaintiffs' case, for the only possible motive for keeping it back would be a knowledge on the part of the plaintiffs that a careful comparison of the signatures, the registration endorsements and the like on this document with those appearing on the deed, Exhibit 1, would help the Court to arrive at a correct conclusion as to the nature of the fraud perpetrated in connection with the execution and registration of the two deeds. As the case stands, I can only say that the disappearance of the original of Exhibit 2 is a most unfortunate circumstance for the plaintiffs and that I cannot altogether rid my mind of the suspicions thereby aroused. In this connection I turn back once more to the details of the evidence of Sheoratan Lal, Ali Haidar and Jafar Ali. That of Sheoratan Lal I do not discuss, because it is hopelessly confused by his belief that the drafting of the deed, Exhibit 1, took place on November the 14th, 1893, on the same day as the execution and registration; the best that can be said for the plaintiffs would be that the memory of this witness has failed him. Ali Haidar was examined-in-chief on this point in a manner which seems to me very unsatisfactory. He was not asked to throw back his memory to the events of November the 14th, 1893, and to endeavour to put forward in the form of a connected and detailed narrative his recollection of what took place on that date, from the moment when the attesting witnesses began to assemble in Mir Kazim Husain's room for the purpose of obtaining the execution and the attestation of the deed of adoption and the *supurdnama*. The very first question put to him on the point was in a form which was rightly objected to by the Counsel for the defendants, and the sequence of events to which this witness intends to depose is difficult to put together from the details given in his examination and cross-examination. He says that on the morning of November the

14th, 1893, Mir Kazim Husain came into the antechamber (or *deorhi*) of his female apartments and was there joined by the deponent and the scribe and other attesting witnesses of the deed, Exhibit 1. He does not explain who produced the actual document, Exhibit 1, which we know to have been faired out five days previously. He says that Mir Kazim Husain signed this deed in his presence and wrote with his own hand underneath his signature the words already quoted, which purport to show that he was aware of the fact that he was executing a deed of adoption. He himself handed the deed to the deponent and asked him to attest it. After this the deed was attested by Sheoratan Lal, Hifazat Ali, Jafar Ali, Ram Kishen Sah and Amir Ali, who were all present at the time. The *supurdnama* was then written out by Afzal Husain upon a stamped paper; I do not find that this witness says anything about the draft or other instructions used by Afzal Husain for the purpose. It was then signed by Mir Kazim Husain and attested by some of the witnesses who had previously attested Exhibit 1. The registration copy before us shows that the persons who thus attested the *supurdnama* were Hifazat Ali, Jafar Ali, Ram Kishen Sah and Sheoratan Lal. Neither Ali Haidar nor Amir Ali purports to have attested this second deed. All this, according to the witness, happened about 9 A.M. and the Sub-Registrar arrived between one and two hours later. The Sub-Registrar proceeded to read over the deed of adoption word for word to Mir Kazim Husain and asked him if he understood it and had executed it, and received his reply in the affirmative. In reply to what was evidently a question especially directed to this point, the witness said further that Mir Kazim Husain had read over the deed to himself before the Sub-Registrar read to him, but he did not particularise whether this took place before or after the arrival of the Sub-Registrar. The formalities necessary to effect the registration of the deed of adoption were then gone through, and after this had been done the *supurdnama* was read out to Mir Kazim Husain, who suggested a certain alteration therein upon a matter of detail and got that alteration duly carried out. This second document in its turn was then formally registered. The Sub-Registrar proceeded to take from the attesting witnesses an affidavit, of which I shall have something more to say presently. Jafar Ali says that a week prior to the execution of the deed, Exhibit 1, he knew of Kazim Husain's intention to execute a formal deed of adoption in favour of Saiyid Ali, because Kazim Husain had sent for some Hindu Pleader, whose name and residence he was unable to recollect, and had taken his advice on the subject. When the witness himself came into the *zanana deohri* of Mir Kazim Husain's house, that gentleman was holding in his hands the deed, Exhibit 1, which had been scribed by Afzal Husain some days previously. Mir Kazim Husain then signed the deed and handed it over to the attesting witnesses. The deposition here becomes confused and hesitating, the witness deposing first that the deed was attested by "five or six persons such as *sepoys* and *khidmutgars*," but then correcting himself and adding that the deed was attested by Hifazat Ali, Ali Haidar and himself, and also by some other persons whose names he was unable to recollect Mir Kazim Husain then handed to Afzal Husain a draft of the *supurdnama* and the latter proceeded to fair out upon stamped paper the deed of which Exhibit 2 is a copy. This deed also was executed then and there and attested by "almost all the persons who had attested the deed of adoption." The witness was not even sure whether some one may not have attested the *supurdnama* who had not attested the deed of adoption. The Sub-Registrar arrived some 2 or $2\frac{1}{2}$ hours later. Mir Kazim Husain handed him the deed of adoption and the Sub-Registrar read it out aloud word for word in the hearing of Mir Kazim Husain and of all the other persons present. Mir Kazim Husain having admitted execution, this deed was registered according to law. The *supurdnama* was then read out by the Sub-Registrar and Mir Kazim Husain suggested a certain addition, which was duly made by Afzal Husain. The registration of this deed was then completed, after which the Sub-Registrar proceeded to take an affidavit from all the attesting witnesses as to Mir Kazim Husain's bodily and mental health and as to the fact that the deed had been duly executed

by him and registered. When shown the deed, Exhibit 1, the witness deposed positively that the words immediately underneath Mir Kazim Husain's signature were written by that gentleman with his own hand in presence of the witness. As to Mir Kazim Husain's reading the document himself with his own eyes the witness was very vague; he said he thought Mir Kazim Husain must have done so, but his statement implies that this was at any rate not done in the presence of the Sub-Registrar. Looking through the cross-examination of this witness, I take note of the following details. The witness admitted that Ram Kishen Sah could not read Urdu. He said he had himself never been in the *zanana deorhi* before and was never admitted to that room on any other occasion. He deposed that the draft of the *supurdnama* was taken by Kazim Husain out of the pocket of the tunic which he was wearing. He differs from Haidar Ali as to a detail of time, by saying that the Sub-Registrar arrived only 15 or 20 minutes after the execution and attestation of the *supurdnama*. The sentence added to the *supurdnama*, according to this witness, was one reserving to the executant in express terms a right of revocation in case Mir Saiyid Ali should ever do anything to displease him. One more point may conveniently be noticed in this connection. The deed, Exhibit 1, bears in two places what purport to be signatures of Mir Kazim Husain under the two registration endorsements. The first of these is feeble and irregular in a very marked degree, distinctly more so than the signature appearing as that of the executant in the margin, or even than the signature underneath the second registration endorsement. This latter signature as it stands on the paper reads as follows :—"*Kazim Husain afianhu ba qalam khud wald Saiyid Muzaffar Husain qaum Saiyid sakin Jarwal pesha talukdari ba qalam khud tarikh chaudah Narambar* 1893." It is an extraordinary fact that of all the witnesses for the plaintiffs only Ali Haidar was definitely pressed to say whether the whole of these words as they stand were written by Mir Kazim Husain with his own hand. He replied that only the words "*Kazim Husain ba qalam khud*" were in the hand-writing of the executant, and as to the rest, he could not say. The learned Subordinate Judge has taken a very strong view as to the effect of this admission. I am myself clearly of opinion that, apart from what Ali Haidar said, no one could possibly believe that the words "*wald Saiyid Muzaffar Husain etc.*," as they appear on this paper, were written by the same man whose pen had just traced the feeble and faltering signature appearing under the first registration endorsement only a minute or two previously. I am quite persuaded in my own mind that these words were not written by Mir Kazim Husain; my difficulty is to conceive of any possible reason why these words, with their significant repetition of the expression "*ba qalam khud*", should have been deliberately added by any person acting in good faith to a genuine signature of Mir Kazim Husain. The learned Subordinate Judge says that these words, disowned by the witness Ali Haidar, can only be regarded as a palpable and admitted forgery, and that if these words are a forgery, then the same person who wrote them must also have forged the signature "*Mir Kazim Husain ba qalam khud*", which immediately precedes them. I might not myself put the point quite so strongly. It is perhaps just conceivable, on the theory of the whole transaction being genuine and above board, that the old man was not equal to writing anything more than his ordinary signature, "*Mir Kazim Husain afianhu ba qalam khud*," that it was thought advisable to append a formal description of his parentage and residence to his signature under the second registration endorsement and that the person employed to do this, out of pure carelessness, slipped in the expression "*ba qalam khud*." At the same time I am so far in accordance with the opinion of the Court below that such an explanation as this seems to me improbable in a very high degree. The existence of this endorsement, admittedly not in Mir Kazim Husain's hand-writing, is in itself a matter for grave suspicion, it obviously serves to cast a doubt upon the genuineness of the words "*tabniat nama haza kam ne ba khushi apni likha ba qalam khud*," as they appear under the signature in the margin. Taken in connection with what seems to me the glaring difference between the form of the signature under the first registration endorsement and that

under the second, and still more between the signature under the first registration endorsement and the signature which purports to be that of the executant in the margin of the deed, it arouses in my mind the gravest doubts as to whether the signature in the margin of the deed and the signature under the second registration endorsement are not forgeries out and out. If we had the original of Exhibit 2 before us, it seems to me highly probable that an examination of that paper would either dispel my suspicions or convert them into certainties. My suspicion frankly is that on the 14th of November 1893 Mir Kazim Husain only executed and only presented for registration one single document, namely, the missing original of Exhibit 2, and that it was found possible to bring Exhibit 1 into existence, in part by the use of forgery and in part by getting Mir Kazim Husain to append his feeble and hesitating signature under the first registration endorsement on the back of each of the two deeds, he being at the time under the impression that he was signing two registration endorsements on one and the same paper. My suspicions are at any rate not mitigated by the presence on the record of the plaintiffs' Exhibit 22, which is described as being an affidavit under section 63 of the Registration Act (III of 1877). It commences with a recital by the Sub-Registrar to the effect that Saiyid Kazim Husain presented for registration on the 14th November 1893 a deed of adoption dated November the 9th, 1893, in favour of Saiyid Ali, and that the said Sub-Registrar attended on commission at the house of the executant for the registration of the deed. The document having been presented was read out to the executant and the latter, having heard it read, "admitted it word for word." Then the Sub-Registrar continues: "It seems proper as a precautionary step and to ensure the fact of the deed of adoption having been read out, as well as of the executant's being in good health and proper senses, to take the written statements on oath of the attesting witnesses, so that these statements may be kept on record in the office." To this, apparently as an afterthought, a note has been added that the proceedings relating to the *supurdnama* are also to be included in the affidavit. Then follows a joint affidavit purporting to be signed by six persons. Five of these are attesting witnesses to the deed Exhibit 1, namely Hifazat Ali, Ali Haidar, Jafar Ali, Sheoratan Lal and Ram Kishen Sah. The signature of the sixth person appears as Afzal Ali in the copy on the record, the paper, Exhibit 22, being the certified copy of an original which has been weeded out and destroyed in the ordinary course of business. This "Afzal Ali" must be either a mistake for Amir Ali or for Afzal Husain, but I do not know that anything particular turns on this. The affidavit is quoted at length in the judgment of the Court below. I note that it again refers to the deed of adoption as being dated the 9th of November 1893, without any suggestion that it was only executed five days later. The deponents then proceed to swear that the deed of adoption was at the time of registration read out word by word to the executant, and that Kazim Husain admitted that writing and execution of the said deed: also that he had himself read through the deed of adoption with his own eyes before admitting the correctness of its contents. A phrase is further inserted to the effect that Saiyid Kazim Husain is in good health and in his proper senses, and at the end comes a note that he caused some additions to be made to the *supurdnama*, this latter document not having been referred to hitherto in the course of the affidavit. The entire proceeding seems to me a most extraordinary one, as it did to the learned Subordinate Judge. The power given under the Registration Act and the rules contained in the Registration Manual to Sub-Registrars to examine on oath persons appearing before them is provided to be used only in cases when the Sub-Registrar sees reason to doubt the correctness of any statement made to him. The affidavit, Exhibit 22, relates entirely to matters which purport to have taken place before the very eyes of the Sub-Registrar himself, the only exception perhaps lying in the statement as to the executant's being in good health and in his proper senses. If the Sub-Registrar felt any doubts on this latter point he should, in my opinion, have taken other steps for the removal of those doubts; but the obvious purpose and intention of the whole proceeding was to tie down the attesting witnesses so

that they might not be able at any future time, without risking a prosecution for perjury, to deny any of the facts set forth in the affidavit. I admit it to be possible that the Sub-Registrar may have thought it expedient to do this out of nervousness and as a special precaution, even though fully satisfied in his own mind of the truth of the facts set forth in the affidavit and the perfect *bona fides* of the entire transaction. I feel bound to say, however, that, even if there were no other elements of suspicion in this case, the above theory would have seemed to me a somewhat improbable one, and the mere existence of this affidavit would have put me on my guard as to the possibility of there having been some malpractice about the matter. Why should the Sub-Registrar have been so anxious to tie the hands of the witnesses if his own mind was perfectly free from doubt? There is, moreover, to my mind something peculiarly suspicious about the insertion in the affidavit, somewhat out of its natural order, of the curious phrase as to Saiyid Kazim Husain's having looked through the document and perused it with his own eyes. I have pointed out that there is some discrepancy in the oral evidence as to whether Mir Kazim Husain was supposed to have read through the document himself before the arrival of the Sub-Registrar or after. I do not see why under any circumstances, the Sub-Registrar should have thought it necessary to read over the document aloud to the executant, if he was sure that the executant had just read it through himself in his very presence. I have already discussed the question of the state of Mir Kazim Husain's eyesight in the month of November 1893 and recorded my opinion that he was not able at that time to acquaint himself with the contents of a document by reading it. If this finding is correct, the insertion of this particular phrase in the affidavit, Exhibit No. 22, becomes at once a matter for the gravest possible suspicion.

The case for the defendants as to the circumstances under which the regitsration of this document was effected is to be found in the statements of Manohar Lal (D. W. No. 5), Ibad Ali (D. W. No. 3), Muhammad Raza (D. W. No. 2) and in the evidence of Ram Kishen Sah taken on commission. I do not propose to discuss this evidence in detail, partly because I think, the plaintiffs' case fails on its own merits, and partly because a good deal of this evidence is of very doubtful value. The most extraordinary feature of it was the production of the document Exhibit B1. I have no doubt whatever that while this case was pending, the witness Muhammad Raza approached the defendants, disclosed the existence of this document in his possession and in all probability put the document itself and his own evidence up for sale for such price as the defendants might be prepared to pay. He admits himself that the other side tried to get at him, and his account of their attempts to do so and of his proceedings in connection therewith have left an impression upon my mind decidedly unfavourable to his general veracity. The man was a half-brother of Muhammad Asghar, the late Sub-Registrar, and afterwards married that gentleman's widow. He says that he often found the document Exhibit B1 amongst Muhammad Asghar's papers and I am disposed to believe him on this point. The only alternative suggested is that it may have passed into the possession of Ram Kishen Sah and been handed over to the defendants by the latter; but this strikes me as improbable and it is in no way supported by Ram Kishen Sah's own evidence. It is a draft for Rs. 1,000 by Mir Saiyid Ali on Ram Kishen Sah in favour of Saiyid Bakar Mehdi, brother of Saiyid Mehdi Husain, accepted by Ram Kishen Sah and endorsed by the latter with a note to the effect that he would pay it off by instalments. It is dated November the 15th, 1893. The plaintiffs began by denying this document altogether, but ended by admitting it and producing evidence to prove that it presented a perfectly *bona fide* transaction. Their case is that Mir Saiyid Ali was in urgent need of money to pay in certain arrears of land revenue and that he proposed to borrow the sum of Rs. 1,000 for that purpose from Saiyid Bakar Mehdi, his wife's uncle, and gave the latter an order on Ram Kishen Sah to secure his re-payment. According to the evidence for the defendants the paper cannot possibly represent anything but the pledge or security for a bribe, to be paid hereafter through the agency of Ram Kishen Sah to the Sub-Registrar, Muhammad Asghar, in return for services rendered by him on November the 14th, 1893. The evidence produced regarding this document was various and complicated

and represents the most extraordinary of the side issues into which this case diverged. The crux of the matter to my mind lies in the question whether Muhammad Raza is to be believed when he says that this document was found by him amongst Muhammad Asghar's papers. I incline to the opinion that this is a true statement and if so, it is difficult to believe that the document Exhibit B1, can represent anything but an arrangement for the payment of a substantial bribe, with Saiyid Bakar Mehdi occupying the position of a stake-holder in whom both the parties concerned in the iniquitous transaction felt sufficient confidence. I have given my best consideration to the arguments addressed to us on behalf of the appellants to prove the genuineness of the transaction and to the evidence of the witness Saiyid Nadir Husain whom they produced in rebuttal. I think it sufficient to say that this consideration leaves on my mind the impression that the story put forward by the plaintiffs in rebuttal is intrinsically improbable and inadequately supported by evidence. To my mind the two principal points in favour of the defendants to be arrived at on a consideration of their evidence on this point of execution and registration, are the existence of this document, Exhibit B1, discovered amongst the papers of the late Sub-Registrar, and the broad fact that Ram Kishen Sah, now an old man in failing health with no apparent motive for supporting either one side or the other, has chosen to give evidence in favour of the defendants. I think it probable that he has not told the whole truth; he had to account for the presence of his admitted signature in the margin of Exhibit 1 and at the foot of the affidavit, Exhibit 22, and I am not prepared to say that I fully believe his explanation. According to his own story he signed as an attesting witness two important documents which had certainly not been executed in his presence by Mir Kazim Husain, and he did so merely on the strength of Saiyid Ali's verbal assurance that Mir Kazim Husain had signed the papers and wished him to attest his signature. His evidence is certainly open to the suspicion that he may have had a much shrewder idea than he was prepared to admit that a fraud of some sort was being perparated, and that he may at the time have been willing to lend himself to that fraud. I find it difficult altogether to dissociate my view of this man's probable conduct on the 14th of November 1893 from the fact, which the plaintiffs have themselves put forward as part of their case in rebuttal against the document Exhibit B1, that Ram Kishen Sah received few days later a sum of Rs. 4,000 in cash, on what purported to be a loan from Mir Kazim Husain out of reserve funds in that gentleman's possession. The suggestion for the plaintiffs is that the object of this loan was to put Ram Kishen Sah in a position to pay the instalment of revenue at that moment due from the estate, but it was admittedly a good deal in excess of the sum required for payment of land revenue. If, as a matter of fact, Mir Kazim Husain discovered just before his departure for Lucknow that the arrangements which he had made for the payment of the land revenue of his estate through Ram Kishen had broken down, and it is difficult to understand why they should have broken down at that particular moment, and Mir Kazim Husain had, as a matter of fact, in his possession inside his house a reserve of cash more than sufficient to meet the liability, the simplest thing surely would have been to meet the Government demand out of that reserve and to balance Ram Kishen Sah's account accordingly. There was litigation between Ram Kishen Sah and *Musammat* Taiyaba Begam after Mir Kazim Husain's death in which the question of this alleged loan, and also that of the payments made by Ram Kishen Sah on account of land revenue and his receipts from the villages of which he was lessee, were all gone into and adjusted; this, however, does not prove that the person responsible for arranging this so-called loan of Rs. 4,000 in Ram Kishen Sah's favour did not intend that some substantial portion of it should stick to the fingers of the latter, if everything had gone well and Mir Saiyid Ali had succeeded peaceably to the Waira Kazi estate on the death of Mir Kazim Husain. As regards the witnesses Manohar Lal and Ibad Ali, their evidence lies open, in my opinion, to much the same suspicion as I have suggested in respect of that of Ram Kishen Sah. The real question is whether they are telling the whole truth now, or whether it is not more probable

that they knew or suspected more than they are prepared to admit regarding the nature of the transactions which were going on in Ram Kishen Sah's house at Jarwal on November the 14th, 1893, and whether they would not have been prepared to keep their eyes and their mouths shut in the event of those transactions proving completely successful in the establishment of Mir Saiyid Ali's position as heir and successor to Mir Kazim Husain.

Before finally summing up my opinion on this part of the case, it is necessary for me to allude to one more matter and this brings me back to the question which I discussed at the beginning of my judgment, namely *Musammat* Taiyaba Begam's pleadings. As an admission of a relevent fact by a person likely to know the truth, the plaintiffs are undoubtedly entitled to ask the Court to attach considerable importance to the admission of the execution of the deed Exhibit 1 made on *Musammat* Taiyaba Begam's behalf in the proceeding of February the 5th, 1907. Over and above this, without going into superfluous detail, I am content to note that other admissions of the genuineness of this document, made by or on behalf of *Musammat* Taiyaba Begam in the course of various litigations subsequent to the death of Mir Kazim Husain, have been put in evidence and satisfactorily established on behalf of the plaintiffs. In an ordinary case admissions against interest of this sort, proved against a defendant in the position of *Musammat* Taiyaba Begam, might well be regarded as decisive. The case before us, however, is not an ordinary one and I have already mentioned, in one connection or another, a variety of circumstances calculated to discount the value of such admissions on the part of *Musammat* Taiyaba Begam. That lady's own position, or rather the position which she was induced to accept, may be gathered from the document A6, which is a petition of compromise presented on her behalf before the Magistrate engaged in hearing the case under section 145, Criminal Procedure Code, early in the month of July 1894. It must be borne in mind that *Musammat* Taiyaba Begam, or rather her agent Shafi Haidar, had previously received from Mir Saiyid Ali the document Exhibit A5, in which that gentleman in express terms admitted the rights of *Musammat* Taiyaba Begam as heir and successor to Mir Kazim Husain under the Will. He admitted also her actual possession over the estate and accepted for himself the position of her agent or manager. In return for this *Musammat* Taiyaba Begum was prepared to accept Saiyid Ali as the adopted son of herself and of her husband and to nominate him as her heir and successor, as her representative on public or official occasions and as the manager of her estate. She also undertakes to pay an allowance of Rs. 3,000 per annum to him and to his heirs after him, until such time as the estate itself shall pass to him as a whole. Both parties have led evidence, some of it of a very extraordinary character, as to the negotiations which preceded the compromise embodied in Exhibits A5 and A6 and as to the circumstances under which those documents came to be executed and laid before the Criminal Court. The one thing I am quite sure of is that there must have been negotiations as to which the precise truth will probably never be known. *Musammat* Taiyaba Begam's affairs were largely in the hands of her brother Shafi Haidar, and as I have already remarked, it is difficult to arrive at a certain conclusion as to this gentleman's motives or objects, or as to the precise extent to which his hands were fettered by the appearance of his own son Ali Haidar as one of the attesting witnesses to Exhibit 1. Whatever the true facts regarding this document may be, it is fairly obvious that, after Mir Kazim Husain had declined to bring the question of its execution or registration before the Criminal Courts, it would have been all but impossible to institute a prosecution after his death, even if it had suited *Musammat* Taiyaba Begam and Shafi Haidar to do so; yet to denounce it as a forgery without inviting an inquiry by the Police would have put Shafi Haidar in a very curious position. It is clear, moreover, that *Musammat* Taiyaba Begam was quite prepared to accept Mir Saiyid Ali as her heir, provided that he accepted her title to the present succession to the estate. Under these conditions a compromise was exceedingly probable, and no compromise was possible except on the basis of a more or less explicit acknowledgment of the genuineness of the deed of adoption. Certainly no compromise would have been possible if *Musammat* Taiyaba Begam and Shafi Haidar

had persistently denounced that document as one the execution and registration of which had been effected by forgery or fraud. In this same connection I have to take account of an important argument much pressed upon us on behalf of the appellants, namely that *Musammat* Taiyaba Begam did not go into the witness-box. She seems in fact to have been absent from India on pilgrimage during the greater part of the time that this suit was pending in the Court below; I have done my best to make all due allowance for these considerations, I admit them to be not without weight, and they form in fact to my mind the strongest portion of the appellants' case. I have, however, given my reasons for declining to accept the admissions made by *Musammat* Taiyaba Begam as decisive and those reasons seem to me sufficiently to explain her reluctance to tender herself for examination.

Looking through the case before recording my final conclusion, I find one more point which I might perhaps have noticed at an earlier stage, and that is the difference of wording between the deed Exhibit 140, and that of the two deeds Exhibit 1 and Exhibit 2, more especially as regards the powers given to Mir Saiyid Ali as manager or *supurdar* of the estate. I am disposed to suspect that the persons interested in obtaining these documents from Mir Kazim Husain found it difficult to induce him knowingly to execute, or to cause to be registered, even a *supurdnama* in as wide terms as they desired. The statement by the witnesses for the plaintiffs, that at the registration of the *supurdnama* on November the 14th, 1893, Mir Kazim Husain roused himself sufficiently to enter some objection even to the terms of that document and to insist on the insertion of a clause reserving to himself a power of revocation, looks to me very much like a fragment of truth which has been permitted, for obvious reasons, to remain imbedded in the midst of a mass of perjury. I do not overlook the point that according to the registration copy before us, the original of Exhibit 2 referred to the execution of the deed Exhibit 1 and spoke of Mir Saiyid Ali as the adopted son as well as the representative and *locum tenens* of the executant; this point would only be material if I were prepared to believe the witnesses for the plaintiffs when they depose that the whole of the *supurdnama* was read over to Mir Kazim Husain at the time of registration. If I believe them on this point I should have no adequate reason for not believing them on a number of others.

I do not conceal from myself the fact that there are difficulties about the view which I am disposed to take regarding the execution of the deed Exhibit 1 and the circumstances of its registration. It may well be argued that, if this deed is in fact the outcome of a conspiracy engineered by persons who could command the services of some one capable of producing a passable imitation of Mir Kazim Husain's ordinary signature when in good health, it might be regarded as superfluous to have recourse to a fraud of the kind involved in my theory of the case. I could say a good deal by way of rejoinder to this argument, but it seems to me unnecessary to go into further detail. The essential conclusion at which I have arrived is that numerous circumstances have been established tending to throw doubt on the genuineness of the deed Exhibit 1 and on the circumstances under which its registration was effected. In view of all those circumstances, I look to the plaintiffs to satisfy me, by evidence which commends itself to my mind as independent, straightforward and reliable, that Mir Kazim Husain with his own hand affixed the signature which appears in the margin of Exhibit 1 and wrote the words which appear underneath that signature, that he tendered the document for registration and admitted its execution with a full knowledge of its contents and effect. The evidence of Sheoratan Lal, Ali Haidar and Jafar Ali fails to satisfy me on these points. I think it highly probable that one of the signatures on the reverse of Exhibit 1 is in fact Mir Kazim Husain's and that a fraud of a particular description was committed, involving the execution and registration of one genuine document, namely the missing original of Exhibit 2; but my finding does not depend necessarily on the accuracy of this theory. I consider Sheoratan Lal, Ali Haidar and Jafar Ali unreliable witnesses and I regard their evidence with profound distrust. On one important point, namely the state of Mir Kazim Husain's eyesight on the 14th of November 1893, I feel convinced that they have deliberately perjured themselves. The

surrounding circumstances of the case are, on the whole, much against the plaintiffs, the one substantial point in their favour being the admissions made by or on behalf of *Musammat* Taiyaba Begam to which I have already referred. Taking the evidence of Sheoratan Lal, Ali Haidar and Jafar Ali as it stands, and reading it in the light of the surrounding circumstances and of the evidence in the case as a whole, I disbelieve those witnesses. I concur in the finding of the Court below that the execution by Mir Kazim Husain of the deed Exhibit 1 and its registration according to law are not proved.

I thought it convenient to discuss in an earlier portion of this judgment the question of the effect of this deed, Exhibit 1, on the Will of January the 15th, 1887, supposing the execution of the former document to be proved. I return for a moment to take up this point again in the light of what I have said since. Even if it were proved (as in my opinion it is not proved) that, not only the signature "*Mir Kazim Husain afi anhu*" in the margin of Exhibit 1, but the succeeding words, which purport to show that the executant was aware of the fact that he was executing a deed of adoption, were actually written by Mir Kazim Husain with his own pen, I would still dismiss this appeal. I would do so, not only on the ground that the legal effect of the document as it stands is not to supersede or nullify the Will of January the 15th, 1887, but more particularly on the ground that I was not satisfied that Mir Kazim Husain ever intended to revoke that Will or to nullify its provisions, in so far at any rate as they related to the immediate succession of *Musammat* Taiyaba Begam to the Waira Kazi estate after his death.

If I were satisfied that Mir Kazim Husain in fact executed and caused to be registered the deed Exhibit 1 on 14th of November 1893, I would hold that his object and intention in so doing was to confer upon Mir Saiyid Ali the status of an adopted son and an eventual heir to the estate, while at the same time maintaining his disposition of the estate by Will in favour of *Musammat* Taiyaba Begam as his immediate successor.

On both these grounds I would dismiss this appeal with costs.

LINDSAY, A. J. C.—I agree generally with the conclusions which have been reached by my learned colleague in his judgment and with the reasons which he has adduced in support of them. But I think it desirable to add a few observations of my own with respect to certain important points in the case. The principal matter for determination is in connection with the execution of the document which constitutes the foundation of the plaintiffs' case. Is it proved that this deed of adoption was duly executed, as alleged, by Kazim Husain on the 14th of November 1893?

Before proceeding to discuss this question, it is proper to consider the nature and the quantity of the proof which should be demanded from a party who claims under a document of the kind in suit. The deed is a deed of adoption purporting to have been executed under the special power conferred upon Muhammadan *talukdars* in Oudh by the provisions of a special Statute, the Oudh Estates Act (I of 1869). The policy of that Act was to prevent the disintegration under the operation of the ordinary Hindu or Muhammadan Law of the estates which were conferred by the British Government in Oudh after the annexation of the Province, and for this purpose it was declared that a Muhammadan should have a right of adoption (a right which he does not possess under his personal law) in order that he might in case of failure of natural issue be able to provide a successor to his estate. A deed of adoption is consequently a deed of a special nature and although it could not be accurately described as being *per se* a Will, it may nevertheless be properly deemed to be a document of a testamentary character. It is a document which by conferring upon the person in whose favour it is made a definite status places him in the line of succession laid down in section 22 of the Oudh Estates Act, the section which regulates the devolution of *talukdari* estates in cases of intestacy. In the present instance it is claimed on behalf of the plaintiffs that this deed upon which they rely is not merely a document of a testamentary character in the sense just described, but is so in the stricter sense of the term by virtue of certain language contained in it the effect of which, it is said, is to revoke the Will executed by Kazim Husain in his wife's favour, assuming, that is to say, that this Will is a valid instrument which satisfies the requirements of section 13 of the Oudh

Estates Act (I of 1869). For these reasons it appears to me that in dealing with the question of the proof of execution of this deed of adoption we are justified in placing the plaintiffs in the same position as the Courts assign to a person who comes forward to propound a Will, and in demanding from them the discharge in the same degree of the duty which the Courts impose upon such a person. Indeed the learned Counsel for the appellants has in the course of his arguments assented to this proposition. Now the nature of the duty which rests upon a party setting up a Will has been declared in numerous cases decided both in England and in India, but I shall content myself with a reference to the case of *Tyrrell* v. *Painton* (7) decided by the Court of Appeal in England. I take this ruling to lay down the following principles, namely (1) that the *onus probandi* lies in every case upon the party propounding a Will and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator, and (2) that in all cases in which circumstances exist which excite the suspicion of the Court, it is for those who propound the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document. It is only where this is done that the onus is thrown on those who oppose the Will to prove fraud, or undue influence, or whatever else they rely on to displace the case made for proving the Will. To quote the words of Davey, L. J. "The principle is that wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."

Applying these principles to the case in hand, it is obvious that the duty of the plaintiffs is not fully discharged merely by proving that the deed of adoption bears a genuine signature of Kazim Husain. Even if this point be found in their favour, it is for them to remove any suspicion arising out of the circumstances surrounding the preparation of the instrument, that is to say, any suspicion that the document does not express the mind of Kazim Husain. That circumstances of the nature described do exist in the present case is abundantly clear from the evidence and they have been enumerated and commented upon by my learned colleague in his judgment. I do not propose to touch upon all of them, but content myself with referring to one or two of the more important of them.

In dealing with the events of the 14th November 1893, it is necessary to bear in mind the state of health in which Kazim Husain was at or about that time. There is, of course, a conflict of evidence as to the actual state of his health on that particular date, but at any rate it is clear that Kazim Husain had for many years been afflicted with syphilitic rheumatism and had been under constant medical treatment. It is proved that by reason of this disease he had become practically unable to move about and was to all intents and purposes bed-ridden. He had lost the sight of one eye completely several years before the date in question, and if he had not totally lost the sight of the other (the defendants say he had), it is at any rate a fair inference from the evidence that the remaining eye had lost its power to a substantial extent. I have no doubt whatever that if Kazim Husain could see at all on the 14th November 1893, he could see only with difficulty.

I turn now to the first of the suspicious circumstances upon which I desire to comment, namely, the execution on the 14th of November 1893 of the document which is called a *supurdnama* in the evidence. According to the certified copy of the document which is on record, it purports to be a "declaration of trust" (*istiqrar-i-amanat*). It has been pointed out by my colleague in his judgment that the original of this document has not been produced, and so far as the evidence adduced by the plaintiffs goes it cannot, I think, be said that there is any adequate explanation of this failure to produce the original. All we have on this point is to be found in the statements of two witnesses, Muhabbat Husain and Nadir Husain, whose evidence merely amounts to this, that some sort of search was made among Saiyid Ali's papers before the institution of the suit but without success. Muhabbat Husain in his evidence declared that Nadir Husain the other witness, had stated in his presence

(7) (1894) Pro. Div. 151; 6 R. 540; 70 L. T. 453; 42 W. R. 343.

that the deed had disappeared in the lifetime of Saiyid Ali and was probably in the possession of Taiyaba Begam, but this is not borne out by the statement in Court of Nadir Husain himself.

Had the original deed been produced, it would have afforded valuable evidence in the light of which we might have been able to decide definitely as to the genuineness of the various signatures of Kazim Husain which appear on the deed of adoption.

However, we must take it that this *supurdnama* is a document which was presented for registration on the 14th November 1893 and registered in due course. It is said to have been executed on that date and the question arises as to why it was executed. Admittedly its execution was not in any way a matter of necessity, something that was required in order to give full effect to the deed of adoption which had already been prepared. What then was the purpose of its execution? According to the language of the instrument itself the object was to put Saiyid Ali in such control of the estate as would give him the opportunity of acquiring experience in the matter of estate management (*ba gharaz husuli-i-qabiliyat wa takmil-i-waqifiyat-i-intezam-i-umur-i-riyasat wa talukdari*). Now this is a somewhat extraordinary statement, having regard to the language to be found in the deed of adoption which had been executed, it is said, only a few minutes before. The deed of adoption sets out that Kazim Husain had been training and educating Saiyid Ali from his childhood and that he had made him (Saiyid Ali) an expert in the art of estate management. If this latter statement be true, it is hard to see how there was anything left for Saiyid Ali to learn. It is an admitted fact that Saiyid Ali had been managing the entire estate for more than three years before the time of which we are now speaking, and there is on record a copy of a power-of-attorney (Exhibit A2) executed in favour of Saiyid Ali by Kazim Husain on the 18th June 1890, under which Saiyid Ali had the fullest possible powers of management. It seems to me, therefore, impossible to treat the professed object of this *supurdnama* as being the real object. It may be, as suggested by my learned colleague, that Kazim Husain had some notion of placing Saiyid Ali in a situation in which he might be able to act as a substitute for himself in the discharge of any formal duties resting upon him as a *talukdar*, but I find some difficulty in accepting this theory, for I think Kazim Husain must have known well enough that he could not delegate his position as a *talukdar* without a surrender of his estate. Another curious point about this document is that although it purports to create a trust and to constitute Saiyid Ali a trustee, it makes no mention whatever of the duties which Saiyid Ali was to perform. In this respect it is in remarkable contrast with another document which is on record, namely Exhibit 140, which is said to have been executed by Kazim Husain on the 3rd of October 1893. This deed, as explained in my colleague's judgment, never took effect for want of registration, the story being that the Sub-Registrar had advised that it could not be registered for want of a sufficient stamp. The document cannot, of course, being unregistered, operate as a transfer of property, or as a deed of adoption, but it is permissible to look at its contents in order to ascertain the state of Kazim Husain's mind at or about the time the *supurdnama* now before us is said to have been executed. In this deed (Exhibit 140) Kazim Husain, after declaring that he has adopted Saiyid Ali, goes on to say that he has divested himself of all responsibility in connection with the estate which he has made over to Saiyid Ali. The document declares that Saiyid Ali is to be responsible, not only for the management of the estate, but also for the payment of the revenue and of all the debts due from the estate, and in addition to this there is a definite direction that Saiyid Ali is to pay him (Kazim Husain) Rs. 5,000 a year for his private expenses. It would seem, therefore, that if on the 3rd October 1893 Kazim Husain was minded to hand over the estate to Saiyid Ali, he was sufficiently alive to the importance of protecting his own interest by imposing definite duties on Saiyid Ali and by securing a respectable income from the property for his own use. And it is certainly a curious fact that in this later deed, said to have been executed a few weeks after, we find no conditions defining the liabilities of Saiyid Ali in his position as a trustee. Altogether I have been unable to find any satisfactory explanation which would account for execution of this *supurdnama* on the 14th

November 1893, and I am still left with the suspicion that the real purpose of its preparation was to provide some evidence of the execution of the deed of adoption. The *supurdnama* contains a recital that Saiyid Ali had been adopted under a deed written on the 9th November 1893 and registered on the 14th of the same month.

The next matter which excites suspicion and which calls for explanation is the affidavit which was prepared at the time; both deeds were registered on the 14th November. There can be no dispute as to the extraordinary nature of the procedure followed by the Sub-Registrar in this connection. While it is true that section 63 of the Registration Act enables a registering officer to administer an oath to any person whom he may examine under the provisions of the Act and to record his sworn statement, it does not appear that in the present case there was any legitimate occasion for resorting to the power conferred by this section. According to the language of the affidavit it was prepared by way of precaution, in order that there might be on record evidence to show, *firstly*, that the terms of the deeds had been explained to Kazim Husain by reading them out to him, and, *secondly*, that Kazim Husain was at that time of sound health and understanding. And so we find a long statement subscribed to by most of the attesting witnesses to the deeds declaring:—

(1) that the adoption deed was read over by Kazim Husain "with his own eyes;"

(2) that the deed was read out to him;

(3) that he admmitted execution;

(4) that he was in good health and in his right senses;

(5) that he caused some additions to be made in the terms of the *supurdnama*; and

(6) that he had made the signatures underneath the registration endorsements with his own hand.

A clause was added in the affidavit to make it clear that the sworn statement applied both to the registration of the deed of adoption and the *supurdnama*. So far as the evidence in this case goes the plaintiffs' witnesses are unable to explain why this affidavit was drawn up. All that appears from their statement is that the Sub-Registrar acted of his own motion: it was not suggested to him by Kazim Husain or any one else that there was any need for such a step; and according to them there was no necessity, for the Sub-Registrar himself saw Kazim Husain and was able to satisfy himself by the evidence of his own senses that Kazim Husain knew perfectly well what he was doing. On the other hand the story of Muhammad Raza, a defendants' witness, is to the effect that the Sub-Registrar, having seen Kazim Husain in private, refused to proceed with registration at first, declaring that Kazim Husain was unconscious, and only consented in the end to make the registration after he had been paid or promised a bribe. Muhammad Raza is an unsatisfactory witness, and his evidence to my mind could not safely be accepted without the strongest possible corroboration. But leaving his evidence and that of other defence witnesses out of consideration, can it be said that the plaintiffs have given any convincing explanation of the preparation of this affidavit? The best case that can be made out for them upon this point is that the Sub-Registrar, though not acting within the scope of the law, was nevertheless moved by a *bona fide* desire to secure reliable evidence of the voluntary execution of an important deed so as to forestall any dispute which might arise thereafter. This explanation might conceivably be accepted were there anything to show that the preparation of the affidavit had been suggested to the Sub-Registrar by Kazim Husain himself or any one acting on his behalf. Kazim Husain himself might well desire that every precaution should be taken in order to prevent the deeds being questioned later, but it is difficult to imagine why the Sub-Registrar, whose only concern at the time was to satisfy himself that the deeds were genuine and had been executed by a person of sound mind, should have gone out of his way of his own accord to obtain the very emphatic declaration of a number of witnesses with respect to matters on which he could have been thoroughly satisfied by his own observation. When all is said that can be said, we still have the undeniable fact that the registering officer was a

close neighbour of Kazim Husain and knew him intimately. He must have been well acquainted with Kazim Husain's state of health. If Kazim Husain was on the 14th of November capable of doing all he is represented to have done with respect to the execution and registration of these two deeds, it seems in the highest degree unlikely that the Sub-Registrar would have demanded this evidence of Kazim Husain's mental capacity. After giving this portion of the case my most earnest consideration, I feel unable to rid myself of the suspicion that the registration proceedings of the 14th November 1893 were not honest and above board.

I proceed now to say a few words with respect to the appearance of the deed itself and to consider whether, in regard to the signatures purporting to be those of Kazim Husain which appear upon it, there is any ground for suspecting their genuineness.

My learned colleague has in this connection referred to the case set up on behalf of the principal defendant, *Musammat* Taiyaba Begam, in the pleadings. There can be no doubt whatever that the proceedings started with an explicit admission on this defendant's behalf that the adoption deed was executed by Kazim Husain. The validity of the deed was not challenged by Taiyaba Begam on the ground that it was a forgery, but on the ground that it was not, in law, of any effect. At a later stage an attempt was made to get rid of the admission relating to execution by putting forward a disingenuous interpretation of the expression "*khilaf mansha.*" The first position had been that the document, though executed by Kazim Husain, had been executed "*khilaf mansha,*" that it is to say, the plea was that the document did not represent the real intention (*mansha*) of the executant. It was then sought to be made out that the plea first taken amounted to an allegation that the document had been prepared without Kazim Husain's knowledge, the argument being that the expression "*khilaf mansah*" meant "without knowledge," a sense which it cannot possibly bear. It is, unfortunately, no new experience with us to find cases conducted in this fashion in the subordinate Courts. The sole object of every system of pleading is, as explained by their Lordships of the Privy Council in *Sayad Muhammad* v. *Fatteh Muhammad* (8), "that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues;" but from cases which are brought to our notice from time to time, it would appear that the notion here is that the system of pleading has been invented in order to provide an opportunity to a party to embarrass his adversary by unworthy artifices of evasion and equivocation. It would, in the present case, perhaps be unjust to hold Taiyaba Begam responsible for the way in which her case was conducted; she is a *pardanashin* lady and for reasons which have not been satisfactorily explained, she found it necessary or convenient to withdraw from the jurisdiction of the Court in or about January 1907, before her written statement of defence was lodged in the Court. She took her departure to Turkish Arabia where she remained all the time the case was at trial. But I think it is proper, speaking for myself, to express my condemnation of the manner in which her case was handled by those responsible for its conduct.

But leaving aside the defence set up by Taiyaba Begam, we have it that the other defendants denied execution of the adoption deed by Kazim Husain, and the matter of execution was, therefore, in issue. Coming now to the question of the signatures on the deed of adoption, it would, I think, be difficult to say either way whether any particular one of them was not made by the hand of Kazim Husain. The hieroglyph adopted by Kazim Husain as his form of signature is a peculiar one and its outline would naturally alter with the advance of old age, accompanied by total or partial blindness. But as my learned colleague has pointed out, it is fair to assume that three signatures made by the same person on the same day, two of which must have been made within a minute or two of each other, and the third only an hour or so before, ought to correspond fairly closely in form.

(8) 22 C. 324; 22 I. A. 4.

MIR SYED HASAN v. TAIYABA BEGAM.

Now the signature in the margin of the deed, purporting to have been made by Kazim Husain at the time of executing the deed, is in a bold and clear hand, as are also the words "*talukdar ba qalam khud*" which immediately follow the signature. Underneath this signature we have certain other words ("*tabniyat nama haza hamne ba khushi apni likha ba qalam khud*"). The appearance of the writing of these words is peculiar. Some of them would seem to have been the production of a shaky hand, on the other hand the words "*apni*" and "*ba balam khud*" are in what might be described as steady writing.

Turning to the two signatures on the back of the deed under the registration endorsement, they differ considerably in character from the marginal signature above described. The signature under the first endorsement is particularly straggling and feeble and presents a marked contrast to the signature in the margin, so marked indeed that it is almost impossible to believe that they were produced by the same hand on the same day and within an hour or so of each other. The fact that there is such a difference between the two signatures is bound to give rise to a grave suspicion as to the genuineness of one or other of them, and this suspicion is not cleared by anything in the evidence.

I have only to mention one other matter in this connection. I have already quoted the words which appear below tho marginal signature, the translation of which is "I have executed this deed of adoption of my own free will." I consider the presence of those words where they are as a circumstance which, apart from all others, would justify a serious doubt as to whether this is an honest document. I cannot in my experience recall any case in which the executant of a deed has recorded a declaration of this kind in the margin. It may be such a course of action is not without precedent, but it is at any rate extremely rare. To my mind the document "protests too much." Indeed the whole of the transactions of the 14th November savour of too much protest. Why do we find the executant at so much pains to declare that he had made the deed of his own free will? Why do we find the affidavit with its emphatic assurances that Kazim Husain read the deed with his own eyes, that the document was read out and explained to him and that Kazim Husain was in full possession of his faculties? Why was the deed read out to him if he was able to read it for himself? And last of all, why was it needful to execute the *supurdnama* containing a recital to show that a deed of adoption had just been executed? I can only say that all these circumstances taken together have inspired a suspicion which the plaintiffs' evidence has been unable to remove, and I agree, therefore, with my learned colleague that we should not pronounce in favour of the deed of adoption set up by the plaintiffs. I have hitherto said nothing with regard to another curious circumstance in connection with the deed of adoption, namely, the fact that Saiyid Ali on some date between the 25th November and the 9th December made an endorsement on it declaring that it had been cancelled by the execution of another deed of adoption and was being returned to the executant. Strictly speaking, this is not a circumstance attending the execution of the instrument and does not perhaps fall within the category of facts referred to in *Tyrrell* v. *Painton* (7) as requiring explanation by the person who propounds the document. But obviously the fact is one of grave importance when we come to examine the probabilities of the case with a view to forming a conclusion as to the genuineness or otherwise of the instrument. It is not necessary for me to refer in detail to the evidence on this part of the case; it has been fully criticised by my learned colleague. It is sufficient to state that such evidence as we have is extremely meagre, and without suggesting that it is untrue, it is fair comment to say that it leaves us with the impression that the whole truth has not been revealed: possibly the witnesses whose statements relate to the writing of this endorsement by Saiyid Ali were not themselves aware of all the facts. Why, if this document of adoption executed by Kazim Husain on the 14th November 1893 was an honest document, did Saiyid Ali make this endorsement upon it within a fortnight or three weeks of its execution? It seems to me that the evidence gives us no convincing answer to that question. On the face of it the endorsement contains two untrue state-

ments of fact, one that a second deed of adoption had been executed, and the other that the document was being returned to the executant. No second deed is proved to have been executed, nor is it the case of either party that there was a second deed. And the document was never returned to the executant, Kazim Husain, after the making of endorsement: it was left in the custody of the *Mujtahid*, who produced it in Court some ten or eleven months after. The plaintiffs' case with respect to this endorsement is that it was obtained from Saiyid Ali by a trick played upon him by his uncle, Shafi Haidar, who was the own brother of Taiyaba Begam. The defendants' theory is that Kazim Husain got Saiyid Ali to make the endorsement and to hand the document over to the *Mujtahid* in order to cover up a scandal, and that Shafi Haidar took a part in the transaction because his son Ali Haidar who attested the deed was liable to be implicated if any case of forgery came into the Courts. I cannot say that either of these explanations satisfies me. I do not think that Saiyid Ali was likely to be duped by his uncle whom he regarded as his enemy. On the other hand the evidence fails to satisfy me that Kazim Husain knew anything about the making of this endorsement. The fact remains that Saiyid Ali a few days after the execution of this deed in his favour recorded a statement on the deed that it had been set aside, and that his conduct in so doing is inconsistent with the hypothesis that the deed was an honest one which Kazim Husain had executed of his own free will, and has not been satisfactorily explained. Indeed the whole of the conduct of Saiyid Ali from the time this deed is said to have been executed till the time of his death is difficult to reconcile with the theory that the deed of adoption represented a *bona fide* transaction. We are told that Saiyid Ali was first deceived into making this endorsement and surrendering the deed. A few months later we find him setting the document up again in the Criminal Court. Then we arrive at a stage of compromise: he comes to terms with Taiyaba Begam and is again deceived by Shafi Haidar, who foists a false document on the Court setting out conditions other than those which were really accepted by the parties. Again the dispute is opened in the mutation proceedings and Saiyid Ali complains of the fraud practised upon him and once more puts forward the deed of adoption. His case is lost in the Revenue Court aud possession is given to Taiyaba Begam, who claimed under her husband's Will. And there the matter ends so far as Saiyid Ali is concerned. He subsides entirely and though he lives for six or seven years after Taiyaba Begam's being put in possession of the estate, he makes no attempt to approach the Civil Courts and ask them to give him the rights out of which he had been defrauded. Surely this supine attitude is incompatible with any honest belief in the mind of Saiyid Ali that he was the lawful owner of the Waira Kazi estate from the time of Kazim Husain's death. With regard to the Will under which Taiyaba Begam claims title to the estate of her deceased husband, I have but little to add to the arguments of my learned colleague. He has described in his judgment how the Will was executed in 1877 and how, after being left in deposit for nearly ten years in the office of the Sub-Registrar of Lucknow, it was taken out and registered on the 15th January 1887 by Kazim Husain in person. It is shown that at the time of registration Kazim Husain admitted in the presence of three witnesses that the Will was his act and deed, that the registration endorsements were signed both by Kazim Husaim and by those witnesses. Assuming that the Will is one to which section 13 of the Oudh Estates Act would apply so as to render it necessary that registration should take place within one month from the date of execution, I am of opinion that this condition was fulfilled. I do not think it can be contended that the Will was "executed" on the 12th May 1877, the date on which Kazim Husain first signed it. Execution of a Will means something more than the act of the testator in affixing his signature to the document, as was laid down by their Lordships of the Privy Council in the case of *Anne Casement* v. *John Williamson Fulton* (9). At page 406 of the report their Lordships say:—"It (*i.e.* the word "execute") is employed plainly to designate the whole

(9) 3 M. I. A. 395; 5 Moore P. C. 130; 1 Sar. P. C. J. 293; 70 R. R. 19; 18 E. R. 549; 13 E. R. 439.

operation, including both the signature or acknowledgment of the testator and the attestation of the subscribing witnesses, and it is not used at all to designate the testator's part alone."

It appears to me, therefore, that the Will in this case was not executed in the strict sense of the term until the 15th January 1887, and as registration was effected on that very day it must be taken that there was registration within one month from the date of execution.

I agree with the Judicial Commissioner that the Will is a valid Will.

There remains only one other point upon which I desire to comment. It has already been stated that the plaintiffs have claimed for this deed of adoption that it had the effect of revoking any valid Will made by Kazim Husain previous to the date of its execution, and in support of this contention reliance is placed upon those words in the document which declare that Saiyid Ali has been appointed the successor (*ja nashin aur qaim muqam*) of Kazim Husain, as also upon the other words which set out that Saiyid Ali will discharge the duties of a *talukdar* after his (Kazim Husain's) death. Section 57 of the Indian Succession Act, which is incorporated in the Oudh Estates Act except in so far as it provides for the revocation of a Will by marriage, lays down that a Will may be revoked by another Will or codicil, or by some writing declaring an intention to revoke the same. Plainly there is no language in this deed of adoption declaring expressly the intention of Kazim Husain to revoke the Will he had already made in his wife's favour, and I am unable to hold that any such intention can be gathered from the expressions in the document upon which the plaintiffs have relied. I cannot think that the description of Saiyid Ali as "*ja nashin*" and "*qaim muqam*" contained in a deed of adoption necessarily means that the person so described is to take the property of the executant after his decease. Adoption by itself would not affect the operation of any testamentary disposition already validly made and I should say that the use of the words above-mentioned was intended merely to emphasise the nature of the status which had been conferred upon Saiyid Ali by his being adopted. Adoption brought him within the line of succession laid down in section 22 of the Oudh Estates Act in case Kazim Husain should die intestate, and in this sense Saiyid Ali was potentially the successor of Kazim Husain. As for the other words, it is very difficult to ascribe any definite meaning to them: "*aur hamesha bad mere tamam umur talukdari ke anjam deta rahega.*" Literally translated, they mean, "and after me he will always continue to perform all matters pertaining to the status of a *talukdar*." It may, of course, be said that Saiyid Ali could not possibly perform the functions of a *talukdar* without having a *talukdar's* estate, and there is something to be said for such an argument. At the same time, if Kazim Husain intended to let Saiyid Ali have the estate after his death, nothing could have been easier than for him to say so. Why resort to all this circumlocution and ambiguity?

We may have it that so far back as 1877, Kazim Husain intended that his wife should have the estate absolutely after his decease. That he was still of the same mind nearly ten years later is clear from the fact that he registered the Will in January 1887. We have not been referred to any evidence which would lead us to the belief that Kazim Husain's relations with his wife had so altered, as to render it likely that he would in 1893 have changed his intentions so as to leave his wife without any provision whatsoever; and in these circumstances, we should be slow to infer from vague expressions in the deed of adoption that Kazim Husain definitely intended that his estate should pass to his wife's nephew to the exclusion of his wife, who had claims upon him for her support. I agree accordingly with may learned colleague that, even if the execution of this deed of adoption had been satisfactorily proved, we should still have been unable to decree the plaintiffs claim. The Will in favour of Taiyaba Begam stands good and was not revoked by the deed of adoption which the plaintiffs have put forward. In my opinion the appeal has failed and should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 573 OF 1911.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Aiyar.

ZAMINDAR OF KAPILESWARAPURAM —PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE—DEFENDANT—RESPONDENT.

Presumption—Implied engagement—Anicut irrigation, construction of, by Goverment—Right of owners of land whose supply is cut off to receive free supply—Cause of action—Government, liability of.

Where on the introduction of the anicut system of irrigation into a certain district, the Government allowed free irrigation from the anicuts to all lands which, owing to the construction of several anicut channels and other works connected therewith, were found to have lost, wholly or partially, their pre-existing sources of supply, the owners of such lands, who did not enter into litigation with the Government for interfering with the old sources of supply and who took the water supplied by the Government from the Government anicuts, must be taken to have accepted the offer of Government in satisfaction of their claims against Government and where the Government supplied water for 37 years, a natural and irresistible presumption arises that there was an implied engagement between the parties for the free supply of water and if the Government interferes with such supply the owners of such lands have a good cause of action against the Government.

Where since a Settlement a land-holder has improved his *zemindari* and brought a large extent of land under wet cultivation by improving his irrigation sources and where the Government by their new anicut system cut off sources of irrigation supply to those large extents of land, it cannot be said that the Government did not undertake liability to supply water free to all those lands whose then existing irrigation sources were interfered with by the Government's constructions but only to those lands which were irrigated at the Settlement.

JUDGMENT.

SANKARAN NAIR, J.—The appellant is one of the Nuzvid *zemindars* whose judicial history will be found in *Raja Venkata Rao* v. *Court of Wards* (1) and *Sri Raja Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* (2). The *zemindar* alleged that the defendant, the Secretary of State, constructed in 1863 the Ellore canal to carry the anicut water through the *zemindari* and thereby obstructed the flow of water into one of his tanks, Voddu Cheruvu, from his other three tanks, and since that time the Government have been supplying him with water free of charge for the cultivation of his lands, about 507 acres 14 cents, which depended on these tanks for their irrigation. From 1889 they allowed water-supply free of charge only for 427 acres 91 cents, and on his appeal from such reduction it was still further reduced to 202 acres 67 cents. He prays for a declaration of his right to the supply of water as before and for certain reliefs consequential on such declaration. The Governmant filed their written statement and issues were framed which covered all the questions of fact relied upon by the plaintiff. But without taking any evidence, the question whether the plaint discloses a cause of action was first argued and decided against the plaintiff.

The Subordinate Judge held that no express "engagement" under Act VII of 1865 having been alleged, all lands irrigated by Ellore canal water must pay cess. The Judge in appeal held that a promise by the Government in 1863 to supply water may perhaps be implied in the plaint, though the issues according to him show that the claim was based on a letter of a Deputy Collector of May 1891, which, it may be remarked, however, is not referred to in the plaint. He was of opinion that unless there was an express agreement, the Government are entitled to levy water-cess at pleasure.

The decisions of the lower Courts go beyond the claim set up by the Government, who concede the plaintiff's right to water free of charge for 200 odd acres in their written statement. The Subordinate Judge states that the plaintiff's Pleader in argument before him relied on a contract with the Government and the Judge states that the plaint apparently implies it. Issues Nos. 1 to 4 were necessary only if an implied agreement formed the basis of the claim. They certainly include it. In these circumstances as the evidence had not been taken and the plaintiff relied only on the facts alleged in the plaint and raised by the issue, an amendment of the plaint setting forth that the plaintiff relied on an "engagement" with Government should have been allowed, if necessary. I do not think the omission to mention it is fatal to the suit. However, to remove any difficulty, we have allowed the plaint to be so amended. The question whether the facts set forth disclose a cause of

(1) 2 M. 128 (P. C.); 6 C. L. R. 153; 7 I. A. 38; 3 Suth. P. C. J. 725; 4 Ind. Jur. 138; 3 Shome L. R. 175; 4 Sar. P. C. J. 81.

(2) 29 M. 437; 16 M. L. J. 178.

action has been fully argued before us. As the plaintiff relies upon an "engagement" in 1863 with the Government in the sense in which that term is used in Act VII of 1865, it is necessary to refer to the events which led to the passing of that Act. We assume that the facts on which the plaintiff relies are true. When it was proposed in 1856 or thereabouts to undertake a general survey and re-assessment of the lands in the Madras Presidency, the question arose how those lands irrigated from the Godavari and Kistna anicuts were to be assessed. Till that time the practice in the Presidency when water was supplied from irrigation works was to charge a consolidated wet assessment when water was permanently available and to levy a water-rate only when it was temporarily required for cultivation. The lands were classified as either "irrigated" or "non-irrigated." The Secretary of State suggested that this classification of lands, according as they were capable of irrigation or otherwise from the Government sources, should be abolished and all land should be classified with reference to its soil and productiveness without irrigation; a water-rate being charged when water is used or permanently available.

After a long correspondence which showed that different views were put forward and various difficulties pointed out, among them the practical impossibility of fixing the assessment to which the land which has been long under wet cultivation would be liable as unirrigated land, it was finally resolved to accept the suggestion of the Secretary of State and orders were issued by the Government of Madras on the 12th March 1858, that "a water-cess calculated with reference to the additional irrigation canal communications, drainage and embankments is to be levied invariably on all lands irrigated from the Godavari and Kistna channels from the second year of irrigation, without any reference to whether they are Government lands, *inam* lands or belonging to proprietors and if in the latter two cases the Acting Collector (Masulipatam) has neglected to take *engagements* and opposition is made, he is forthwith to stop the supply." These instructions received the sanction of the Secretary of State, and one of his reasons was that this would be the easiest and most equitable mode of obtaining a fair contribution from the *zemindars* towards the re-payment of the expenditure incurred in the construction of "drainage irrigation and other works undertaken by Government and benefiting the lands of those proprietors as well as of Government." This is how the term "engagement" (see proviso to section 4 of Act VII of 1865, of which the draft bill was then under consideration) was used, so far as I know, for the first time.

These instructions were communicated to the Revenue Board and officials to be carried out.

From this the following conclusions may be deduced.

Water-rate was intended in re-payment of the cost of those irrigation works which supplied the water. It was not intended to assess lands which received their supply from sources, as in this case, completely under the *zemindars'* control with which the Government had nothing to do. No "engagements" with *ryots* were contemplated obviously for the reason that it could be included in land revenue, the only mode at that time of recovering the water charge from proprietors, as distinguished from *ryots* of Government lands was to enter into *engagements* with them, and if they refused to do so, the remedy suggested was to stop the supply of water. It is clear that the *zemindar* was not bound to enter into any engagement with Government to take water when he was the owner thereof, as when it was confined in tanks or reservoirs or in virtue of his riparian or easement rights from rivers, it was not open to Government to prevent him from doing so. The Government were not in those cases supplying him with water; nor could they, therefore, stop the supply.

It is probable, therefore, that where the Government continued the supply it was under some engagement.

With reference to these two classes there was no difficulty. In the first class of cases in which the irrigation was carried on without any cost to Government and in exercise of the proprietors' rights of easement by vicinage, of ownership, no water-cess was levied or, in fact, could be claimed. In the second class of cases where irrigation was carried out with water supplied from the anicuts and only by means of Government irrigation works, channels, etc., the Govern-

ment were entitled to dictate their own terms for the supply of water. If they were not accepted, they were entitled to stop the supply. The result was that, between the construction of the anicut and the passing of the Act of 1865, water was supplied to the proprietors on terms.

There were, however, other cases which it was more difficult to deal with.

Inams were exempted from permanent *sanads* and the *nanja inams* were irrigated from Government sources. Similarly where there were *zemindaris* (and those formed out of *havelli* lands in which water sources were retained under Government control would be such) which were irrigated from Government sources. As they were entitled to Government water, the following rule for water assessment was passed for their benefit on the 26th October 1861 :—

"Lands granted as *nanja inams* and fully irrigated accordingly at the Government cost will not be charged with water assessment."

The same rule was applied to *zemindars*.

There was a fourth class. Water from the Government anicut works was often carried to the *ryotwari* lands by means of the old channels which passed through *zemindaris* and were for that purpose improved, enlarged and extended by the Government. The *zemindar* who obtained his water through these channels naturally claimed the ancient water which flowed through his channels. Some of the Government channels flowed through the tanks or reservoirs which were *zemin* property, and the *zemindar* was thus deprived of his tank water. Some channels, as the Ellore canal in the case before us, cut off the supply to the tanks on which the cultivation of *zemindari* lands depended. It is obvious that the *zemindar* in all these cases had a just grievance. The Government, however, considered that the water-supply before the days of the anicut was precarious and irregular and they issued the following rule on the 26th October 1861 : —

No. 12. "Such *nanja inams* as were formerly imperfectly irrigated and have since been fully supplied with water from the anicut works, will be charged at half the above water rates." The rule was made applicable to *zemindaris* also. There was a proposal sometime afterwards that even the rule which allowed the full supply without any charge should be altered to allow half rate on the ground that there was never any adequate supply before. On account of the strong protest of the Board of Revenue, the Government altered the half rate rule and allowed water free of charge even where the half rate had been levied on lands which "owing to the construction of the several anicut channels and other works connected therewith were found to have lost wholly or partially their pre-existing sources of supply." See Government Order No. 101, Revenue, dated the 16th January 1864. For determining what lands lost their sources of supply, the order states "the real criterion is the rate of assessment which the accounts show the land is liable to." The order further says: "If this indicates the title of the land to water or if other reasonable proof can be adduced, then no charge should be made for irrigation, as the *engagement* to supply water manifestly implied a full and not an imperfect supply."

There is only one further order to be referred to. The Secretary of State, in considering whether a cultivator should have the option to refuse Government water, said: the 16th January 1864 "with reference to your questien, 'whether the *ryot* should be allowed the security against an excessive charge which the option of deciding, by a stated period of each year, whether he will have water or not, will give him,' I am clearly of opinion that such option should be permitted. There is little ground for apprehension that the option would be exercised by the cultivator in the way of declining to use the means of irrigation when they are supplied to him at a moderate price, and the possession of it would in no respect limit the right which the Government, acting on your own behalf or on that of the Irrigation Company, must retain, the right of declining to supply any particular tract of country with water, unless the cultivator should be prepared to enter into engagements to take the water at the stipulated rate in such numbers and for such terms of years as might warrant the required outlay. Although few would probably reject the opportunity, yet no compulsion to take the water must be exercised towards the dissentients, and they must in no way be disturbed in the possession of their lands, so long as they desire to hold

them, and continue to pay the ordinary rate of assessment."

This despatch makes it clear that the Secretary of State wanted to give the *ryots* the same option of taking anicut water as the *zemindars* and *inamdars* had. This order was communicated by the Madras Government to the officers concerned and it was pointed out by the Government that "as regards lands which have been fitted for irrigation by the owners and have actually been irrigated for at least one season, it may fairly be held that *such preparation and acceptance of water imply acquiescence* with the usage of the country which does not require any formal engagement." That realy means, in other words, an engagement will be implied between the Government to furnish water and the *ryots* to receive this supply. In those cases where the water was forced on the *ryots*, the option was allowed and agreements were directed to be taken from them for any further supply of water. And they added: "The same rule must, of course, apply equally to the holders of lands in *zemindaris* until the *zemindars* come to terms with the Government and collected cess." In accordance with those directions rules were framed in 1864 ; the bill which subsequently became Act VII of 1865 was directed to be prepared in accordance with these orders of the Secretary of State. I extract below two of the rules :—

Rule (7).—"Where *royts* desire to convert dry land into wet, application is to be made to the Collector either directly or through the Tahsildar on or before 31st March, and the Collector will arrange with the Public Works Department for the supply of water. *Where the means of irrigation for such land already exist*, the *ryot* shall, as a rule, have the option of continuing or ceasing to use the water at his pleasure, provided that where water is taken, etc." This shows clearly no water-cess was intended where the *ryot* uses only the means of irrigation he already had.

Rule (10).—"These rules shall apply to *zemindari* and *inam* lands except in the case of *zemindaris*, a composition shall have been made either for fixed yearly payment or according to the quantity of water supplied. Provided always that no charge whatever shall be made under these rules for a single crop for *zemindari* or *inam* lands where such lands are proved to have been customarily cultivated with wet crops *under old tanks, channels, or by any means of irrigation* whatever prior to the construction of anicuts, or to have been charged in the accounts with such a rate of assessment as indubitably indicates the title of such land to water or by the terms of the grant to have been given as *nanja inam*."

There were thus three circumstances recognized as conferring a right to exemption from water rate otherwise leviable :—

(1) The existence of any means of irrigation, including tanks, channels, whatever prior to the construction of anicuts ;

(2) lands being charged with *nanja* assessment ; and

(3) the title-deed showing that an *inam* was granted as *nanja*.

Two conclusions follow :

That it was not intended to levy any charge on cultivation carried on with *any* pre-existing source of supply, tanks, channels and rivers ; and that in these instances the Government were only carrying out a legal obligation created by interference with such pre-existing source of supply which would have been enforced by the Courts.

An Act was necessary to collect the cess in the same way as land revenue and perhaps to remove the difficulties that might be caused by taking water through *zemindari* and *inam* lands. It was first intended only for the districts which used the Godavari and Kistna water and power was reserved in the original draft to extend it to the other districts. But finally the bill was drafted for the Presidency.

Before considering what the relations of the parties were or whether there was an engagement between the parties at this time, *i.e.*, in 1863 and 1864, I shall finish my review of the proceedings which led to the Act.

In forwarding the draft Act to the Government Pleader, the Government asked his opinion whether it was necessary to specify *zemindari* and *inam* lands in order to enforce the special cess "on land *newly* irrigated from *Government sources* at *Government expense*." The opinion of the Govern-

ment Pleader was in the affirmative and he drafted the section in these terms: "This Act shall extend to all lands held by *zemindars* or *inamdars* for the irrigation of which water may be, *after the passing of this Act, newly* supplied or used from any such river, stream, channel, tank or work as specified in section 1." On its being pointed out that this might preclude the levy of any water-rate for irrigation newly supplied to such land since the construction of the anicut but prior to the passing of the Act and which supply may hereinafter be continued, the Government modified it by omitting the words "after the passing of this Act, newly" and the section then ran in the form in which it was finally passed by the Legislative Council thus: "This Act shall extend to all lands held by *zemindars*, *inamdars* or any other description of landholders for the irrigation of which water may be supplied or used from any such river, stream, channel, tank or work as is specified in section 1, provided always that where a *zemindar* or *inamdar* by virtue of engagements with the Government is entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of such right and no more."

In the case before us, the water is supplied to the lands in suit from a Government source, to wit, Ellore canal and Government anicut works, and, therefore, unless the plaintiff proves the 'engagement' that he sets up, the Government are entitled to levy water tax. The word 'engagement' in the section is no doubt used in the same sense in which it was used in the proceedings to which I have already drawn attention. Now, what was the state of things when the Act was passed? When the Government intercepted the flow of the water from the other three tanks mentioned in the plaint into Voddicheruvu, they undoubtedly inflicted an injury upon the plaintiff, and if the plaintiff had enforced his claim in a Civil Court he would have obtained a decree for compensation payable to him for such interference, which would probably have been a direction to supply him with that water which his tank was usually getting before the interruption or some equivalent compensation. Now, it is not to be presumed that the Government did a wrongful act if the facts are consistent with any other supposition. The natural presumption is that they compensated him in some form. We find that the Government had issued orders that where their irrigation works had interfered with a pre-existing source of supply, water was to be supplied free. We see here there was such interference and the consequent free supply. The orders also show that in other cases water was to be supplied to *zemindars* under engagements to pay at certain rates. We see here no such payment received or demanded. We further find that even as to the *ryotwari* lands the Government proceedings directed that engagements should be entered into and that the Government presumed that, when the *ryots* prepared their lands for irrigation and received water from such irrigation sources, an engagement might be implied. Under these circumstances, unless the free supply of water from 1863 is explained by Government, it appears to me the presumption, not only natural but almost irresistible, is that there was an implied engagement between the parties for the free supply of water. The Judge rightly observers: "the Act was an embodiment of the Government order;" but he holds that "it was for the *zamindar* to have entered into an engagement with Government as to the extent of irrigation to which he was entitled." In my opinion he is wrong in holding that an express agreement is necessary. That the plaintiff was irrigating the lands in suit with Government water free of charge is clear evidence that he was entitled to water sufficient to irrigate them, either because they were then being irrigated with his tank water or could have been so irrigated or it was only on those conditions that he permitted any interferences with his property.

The Government Pleader contends that, though there may be an engagement, it is only to the effect that the *zemindars* are entitled to receive from the Government water necessary for the old customary irrigation of their lands, that is to say, they are only entitled to water sufficient to irrigate that area which is entered as wet in the Permanent Settlement accounts, and, in the absence of any allegation in the plaint that the land

for which they claim free supply of water is land so entered as wet in the old accounts, the plaintiff is not entitled to maintain the suit. If the argument is that the 'engagement' in 1863 with reference to this estate had reference *only* to the old Settlement accounts to the knowledge of both the parties, it is open to the Government to plead it and prove the same. That would be an express agreement. Otherwise it cannot be used to limit the plaintiff's claim based on the state of things in 1863. For, the *zemindar* may have improved the capacity of his tank or increased the area of his wet cultivation since the *sanad* and the supply of water must have been made to compensate him for his loss then sustained. If the argument is that an 'engagement' referred to is to be implied from the conditions that existed at the date of the permanent *sanad*, it is not an answer to plaintiff's claim; because, if the facts imply an engagement in 1863 when the supply was obstructed, that there was another engagement in 1802 or afterwards when the permanent *sanad* was granted, unless it is shown that that is the only engagement which is intended by the Act of 1865, is not material. The section itself is not restricted to any engagement at the time of the Permanent Settlement. And I have no doubt it was open to the parties to enter into any engagement at any time they liked. The plaintiff may be entitled to say that if the old Gudigat wet area according to the Permanent Settlement accounts entitled him to more land than what he now claims, then he should be entitled to the free cultivation of lands to that extent in addition. He may also be entitled to say, if he was getting water sufficient to cultivate more lands than the area he now claims, he is entitled to such quantity of water and cultivate more lands with it, as it is reasonable to presume that the Government could not have intended to deprive a man of his property without compensation. This is apparently the effect of Government Order No. 2416, 17th June 1895, "where the *mamul* wet areas to be allowed are found of be in excess of the highest recorded areas under wet cultivation in the village concerned, the maximum area *irrigable* should be allowed." It is unnecessary, however, to consider this question as he makes no such claim in the plaint. The rules, already extracted, in force at the time the Act was passed, support this conclusion. He is entitled to exemption if his pre-existing source of supply is interfered with *or* if the accounts show a *nanja* assessment *or* if the title-deed supports the claim. The one is not exclusive of the others. The Act, as rightly pointed out by the Judge, being only an embodiment, so far as this matter is concerned, of the pre-existing rule, an engagement will be implied if any of these grounds exist. The tanks, if any, in the *zemin* undoubtedly belonged to the *zemindar*. The Government lay no claim to them. It is not probable that there was, therefore, any engagement by the Government to supply water for the irrigation of such lands under those tanks. From where could the Government supply such water? Not from these tanks with which they had nothing to do, and it is not shown there was any other source of water-supply. No engagement can, therefore, be implied. An engagement can only be implied in those cases in which it was in the power of the Government to stop the supply of the water claimed or when they undertook to supply such water themselves. Otherwise I see no reason for any implied contract so far as the lands irrigated with any pre-existing source of supply, which did not belong to the Government, are concerned. For these reasons I am unable to accept the Government Pleader's argument that the engagement to be proved has reference only to the wet area as shown in the Permanent Settlement accounts. If, however, it is necessary to prove what the area was so entered, then, the fact that these lands were under cultivation from 1863 to 1889, and it is not shown by the Government that the lands were brought under cultivation only some time after the permanent *sanad* was granted, would be evidence to show that they were *mamul* wet even at the date of the Permanent Settlement. The Permanent Settlement accounts are with the Government and if the extent of wet cultivation under these tanks is referred to in those accounts,

it is for the Government to produce them, if it is material.

The only case that has been cited in argument before us is against the Government Pleader's contention. *Secretary of State* v. *Kameswaramma* (3) was a similar case and the learned Judges, Benson and Miller, JJ., stated the question for decision in these terms: "The question for decision in this appeal is in effect, what is the extent of land in the village of Ravipad which was irrigable from the irrigation works existing before the construction of the Godavari anicut irrigation system?" I entirely agree. It appeared that various accounts showed the various extents of lands under cultivation, but they adopted the greatest area irrigated which, no doubt, showed those lands were capable of irrigation works before the days of the anicut. They did not put the plaintiff to proof of what the Settlement area was. I am, therefore, of opinion that, if the facts relied upon by the plaintiff are proved, a cause of action is disclosed. The Judge is, therefore, directed to return findings on the issues in the case. It will be open to him to direct the Subordinate Judge to submit findings to himself.

Six months are allowed for findings, and seven days for objections.

SADASIVA AIYAR, J.—I concur in the decision just now pronounced by my learned brother, and if I add a few words in my own language, it is merely on account of the importance of the questions involved in this case. This is one of those cases arising out of the Government's having constructed anicut channels and other works connected therewith in the Godavari and Kistna deltas. Some of these channels interfered with the sources of irrigation to the lands of certain landholders or interfered with flow of water to the tanks which formerly supplied water for irrigation to such lands. The proceedings of the Board of Revenue, dated the 11th February 1898, contain the following:—

"When the system of anicut irrigation was introduced into the Godavari and Kistna deltas, Government allowed free irrigation from the anicuts to all lands which, owing to the construction of the several anicut channels and other works connected therewith, were found to have lost, wholly or partially, their pre-existing sources of supply (Government Order No. 101, Revenue, dated 16th January 1864)."

This shows that about 1864, the Government offered to allow free irrigation from the anicuts to such lands as were deprived of their former sources of supply. The owners of such lands who did not enter into litigation with the Government in order to prevent Government fom interfering with the old sources of supply and who took the water supplied by the Government from the Government anicuts, must be taken to have accepted the offer of Government as satisfaction of their claims against Government. The fourth paragraph of the plaint in this case says that the Government supplied the plaintiff's land with water from the year 1863 to *Fasli* 1900 and that the plaintiff accepted such water. There was, in my opinion, therefore, a clear, completed engagement between the Government and the plaintiff set out in the plaint and hence the plaint shows a good cause of action. Similar suits to this were instituted by the proprietrix of the village of Ravipadu, the proprietor of Chinchinada and by two other proprietors in 1902 in the District Court of Godavari. Mr. Hamnett, the learned District Judge, who decided those suits, acted upon the Government Order of 1864 and found an implied engagement between the Government and the proprietors of those estates and gave effect to the engagement as against the Government. On appeal to the High Court by the Government, it was contended as the very first ground in the appeal memorandum [see the appeal memorandum in *Secretary of State* v. *Kameswaramma* (3)] that the District Judge erred in law in finding that there was an implied contract between the plaintiff and the Government to allow free irrigation for the extent of land, the irrigation sources of which had been cut off by the anicut works. The learned Judges (Benson and Miller, JJ.), who decided that appeal and connected Appeals Nos. 183 and 184 of 1904, saw nothing in that contention and begin their judgment at once with the sentence: "The question for decision in this appeal is *in effect*, what is the extent of land in the village of Ravipad which was irrigable from the irrigation sources

(3) Appeal No. 182 of 1904.

existing before the construction of the Godavari anicut irrigation system?" Following the decision in those appeals, we must in this case set aside the decisions of the lower Courts which held that the plaint discloses no cause of action. I may add that in *Secretary of State* v. *Kameswaramma*(3) it was assumed that, if there was an engagement between the Government and the proprietor, that engagement was to supply water free of tax on the extent of land which was irrigable from the irrigation works existing *just before the construction of the Godavari anicut irrigation works*, and not merely on the lands which were irrigable as wet lands *at the time of the Permanent Settlement*. The contention of the learned Government Pleader before us, that the engagement mentioned in Act VII of 1865, section 1 (*a*), relates to the engagement at the time of the Permanent Settlement, cannot be accepted in the face of the decision in *Secretary of State* v. *Kameswaramma* (3). It seems unreasonable to hold that after a landholder has improved his *zemindari* and brought between 1802 and 1864 a large extent of land under wet cultivation by improving his irrigation sources, when the Government by their new anicut system cut off the sources of irrigation supply to those large extents of lands, they intended to arrange with the *zemindar* to supply him water free of charge only to the wet area which existed in 1802, but not to the area which had begun to be permanently cultivated as wet at the time when they constructed the anicut channels. The Government Order of 1864 and the Board's Proceedings of 1898 already referred to are against the contention that the Government did not undertake liability to supply water free to all those lands whose then existing irrigation sources were interfered with by the Government's constructions. In the result I agree in the order proposed by my learned brother.

Case remanded.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 397 OF 1914.

November 23, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ANUPA KUER—DECREE-HOLDER—APPLICANT

versus

ACHCHAIHAR SINGH AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Declaratory decree—Revenue Court decree allowing maintenance, enforcement of—Decree—Execution proceedings or suit in Civil Court.

A decree passed by a Revenue Court in accordance with an award entitled a woman to receive a fixed sum as maintenance in half-yearly instalments and provided that if the maintenance was not paid, she might enforce its payment by taking proceedings in a competent Court:

Held, that the decree was merely a declaratory decree as to the right to receive maintenance, and could be enforced by a suit in the Civil Court, and not by an application for execution of the decree.

Reference submitted by the Officiating District Officer of Benares, as per his letter No. 102, dated 13th June 1914.

Dr. *S. N. Sen*, for the Applicant.

The Hon'ble Mr. *Gokul Prasad*, for the Opposite Party.

ORDER.—A suit for ejectment brought by Achchaihar Singh and others against Anupa Kuer in a Revenue Court came up to this Court in second appeal and was settled in accordance with an arbitration award. The award provided that a decree for possession of the land should be passed in favour of Achchaihar Singh and others and that Anupa Kuer should receive from Achchaihar Singh and others 11 maunds odd of grain and Rs. 14 in cash by way of maintenance to be paid in half yearly instalments. Anupa Kuer has now applied to the Revenue Court to execute so much of the decree mentioned above as relates to the maintenance payable to her. The Revenue Court, being doubtful whether it has jurisdiction to entertain this application, has referred this case to this Court under section 195 of the Tenancy Act. The award which is incorporated in the decree of this Court provides that if the maintenance due to Anupa Kuer is not paid she may enforce payment by taking proceedings in a competent Court (*ba charajoi adalat majaz hasb-i-zabita*). It seems to us that the persons who drew up the award knew that there would be difficulty in executing a decree for maintenance

in a Revenue Court and, therefore, instead of providing that enforcement of the decree should be by proceedings in the execution department, they provided that Anupa Kuer should take proceedings in a competent Court. We regard this portion of the decree as merely declaratory of Anupa Kuer's right to receive maintenance. In our opinion she should bring a regular suit in the Civil Court to enforce her right to maintenance. Section 195, sub-section (3), of the Tenancy Act provides: "On any such reference being made, the High Court may order the Court either to proceed with the case, or to return the plaint, application or appeal for presentation to such other Court as it may declare to be competent to try the same." It seems to us that we should not take either of these courses. In our opinion the application for execution should be dismissed. With this expression of opinion we direct that the papers be returned to the Court which has made this reference.

Papers returned.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 121B OF 1913.

January 27, 1914.

Present:—Mr. Mittra, Offg. A. J. C.

RAMCHANDRA—DEFENDANT—APPELLANT

versus

Musammat RADHA—PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by widow of husband's estate—Interest—Dam dupat, *rule of.*

As according to Hindu Law recovery of more than double the sum lent on interest is not allowable, the payment of more than double the principal is not a pious duty. Therefore, in Berar where the rule of *dam dupat* is in force, a Hindu widow is not justified in alienating her husband's property for the payment of a sum over and above double the principal.

Appeal against the decree of the Second Additional District Judge, East Berar, Amraoti, dated the 31st March 1913, modifying that of the Mansif, first Class, Amraoti, dated the 30th April 1912.

The Hon'ble Sir *Bipin Krishna Bose* and r. *J. C. Ghosh*, for the Appellant.

MMr. *F. H. Dillon*, for the Respondent.

JUDGMENT.—The plaintiff is the daughter of one Ganaji, whose widow, *Musammat* Sarja, having re-married in 1904, the plaintiff became entitled to Ganaji's estate. On the 14th September 1889 Ganaji had executed a mortgage-deed in favour of the defendant for Rs. 300 carrying interest at the rate of one rupee eight annas per cent. per mensem. On the 3rd January 1900 Sarja sold the mortgaged field for Rs. 926. It is not dispated that there was legal necessity for rupees seventy borrowed by Sarja herself. As to the balance of Rs. 856, this was the amount due under Ganaji's mortgage-deed. The Courts below have held that as under the rule of *dam dupat*, which is enforced by the Courts in Berar, only rupees six hundred could have been claimed by the mortgagee, there was no necessity for re-paying Rs. 856 arithmetically due under the mortgage-deed. The plaintiff has been given a decree for possession of the field sold subject to the payment of Rs. 670. The defendant has filed this appeal. The main ground urged is that the widow was justified in paying the full amount due under her husband's mortgage, irrespective of the rule of *dam dupat*. The argument is based on the analogy of a widow's power to pay a barred debt.

The following cases have been cited before me on behalf of the appellant :—*Kondappa* v. *Subba* (1); *Chimnaji* v. *Dinkar* (2); *Udai Chunder* v. *Ashutosh Das* (3). All these cases recognise that a Hindu widow may alienate property inherited from her deceased husband in order to pay his debts, even though they are barred by the law of limitation, for it is a pious duty on her part to pay such debts. She is also not bound to take advantage of the provisions of a Statute, like the Dekkan Agriculturists' Relief Act, which might enable her to evade the obligations contracted by her husband. *Bhau Babaji* v. *Gopala* (4). But these cases do not appear to me to be in point. Here we are dealing with a rule laid down by the Hindu sages themselves limiting the amount recoverable under an agreement to pay interest—not

(1) 13 M. 189.
(2) 11 B. 320.
(3) 21 C. 190.
(4) 11 B. 325.

THOMAS G. G. FRENCH JULIA FRENCH.

an artificial rule created by the Legislature which leaves untouched the moral or religious obligation to pay the debt. What we have to find out is whether the payment of a sum over and above double the amount of the principal is a pious duty on the part of the debtor or his widow. No text expressly bearing on the question has been cited before me, and I am, therefore, not prepared to take a different view from that taken by the Courts below.

In Mandlik's Translation of the Mayukha (Edition of 1880, at page 104), the rule of *dam dupat* is thus explained. In the first place, there is the following quotation from Manu (Chapter VIII, Sloka 151): "Interest on money received at once (not month by month, or day by day, as it ought) must never be more than double the debt (that is more than the amount of the principal paid at [one and] the same time)." "But in any one transaction where it is realised at various times, more than the highest (allowable) interest may be levied according to Vijnaneswara (Mitakshara, Chapter II, l. 18, page 2) and the other Sampradayikas." In other words, recovery of more than double the principal is not allowable, according to Hindu Law. It is a fair inference that the debtor commits no sin if he re-pays no more than what is allowed under the text of Manu. It must be remembered that the text of Brihaspati relating to the consequences of a debtor not paying his debt speaks only of the sum lent and not of interest, and much less of interest beyond what is allowed by the text of Manu. That text of Brihaspati has been translated as follows :—"He who having incurred a sum lent or the like, does not re-pay it to the owner, will be born hereafter in his creditor's house, a slave, a servant, a woman or a quadruped." On the whole the appellant has failed to make out that the widow was justified in alienating her husband's property for payment of interest in excess of what was legally recoverable under the text of Manu in Berar.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 6 OF 1914.

August 28, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, Mr. Justice Davar and Mr. Justice Beaman.

THOMAS G. G. FRENCH—PLAINTIFF

versus

JULIA FRENCH—DEFENDANT

Bombay Civil Courts Act (XIV of 1869), s. 16—Suits under Divorce Act for dissolution of marriage, whether District Judge competent to refer to Assistant Judge for decision—Nature of such suits—Divorce Act (IV of 1869), s. 10.

Section 16 of the Bombay Civil Courts Act does not authorize a District Judge to refer for trial to an Assistant Judge suits under the Divorce Act for dissolution of marriage. Such suits cannot appropriately be described as applications under a special Act. They are suits, but not suits the subject-matter of which is capable of valuation.

Civil reference made by the Assistant Judge of Dharwar.

JUDGMENT.—This is a decree passed by the Assistant Judge of Dharwar for dissolution of marriage under the Divorce Act. The Assistant Judge presumed that he had jurisdiction, believing that the suit had been referred to him for trial by the District Judge under section 16 of the Bombay Civil Courts Act. We have referred to the District Judge and we find that, as a matter of fact, the case was not referred by him to the Assistant Judge, but it seems to have been sent to the latter by the Clerk of the Court, as though it were a mere matter of administrative routine, and the question of referring it under section 16 was never brought before the District Judge at all.

We are of opinion, however, that even if it had been referred by the District Judge to the Assistant Judge, the latter would have had no power to deal with the case under section 16 of the Bombay Civil Courts Act ; for though section 16 empowers the District Judge to refer to the Assistant Judge suits, where the subject-matter does not exceed a certain amount or value, and applications or references under special Acts, it does not, in our opinion, authorise him to refer suits for dissolution of marriage, for we think that such suits cannot be appropriately described as applications under a special Act. They are suits (see sections

4, 6, 7, 8 and 15 of the Divorce Act), but not suits the subject-matter of which is capable of valuation. Being of opinion that section 16 does not authorise any reference to an Assistant Judge to decide a suit under the Divorce Act, we must decline to confirm the decre.

Under section 115 of the Civil Procedure Code, we set aside the decree which has been passed and remand the case to the District Judge for trial.

Decree set aside; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 226 OF 1913.

November 4, 1914.

Present:—Mr. Lindsay, J. C.

SURAJPAL SINGH—DEFENDANT—APPELLANT

versus

GAJRAJ SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Separation of one member—Jointness of remaining members—Presumption—Burden of proof.

Once it is admitted that one of the members of a joint Hindu family separated, the legal presumption is that there is a complete separation between all the members of the family, and the person who asserts that any members of the family remained joint after the separation, must prove his allegation.

Balabux v. *Rukhmabai*, 30 C. 725; 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I. A. 130 (P. C.), referred to.

Appeal from the decree of the Subordinate Judge, Partabgarh, dated 28th April 1913, reversing that of the Munsif, Kunda, dated 14th January 1913.

Pandit *Gokaran Nath Misra*, for the Appellant.

Syed *Ali Muhammad*, for the Respondents

JUDGMENT.—This appeal appears to me to be without merit and must be dismissed. The defendant-appellant, Surajpal Singh, was the defendant in the suit which was brought by the two plaintiffs, Gajraj Singh and Mata Bhikh Singh, for possession of a half share in certain property left by one Sampat Singh. In order to understand the nature of the claim it must be stated that there were four brothers, Jagrup Singh, Beni Singh, Bandhu Singh and Sampat Singh. The two plaintiffs in the case are the sons of Jagrup Singh. The defendant, Surajpal Singh, is the grandson of Bandhu Singh. The case set up by the plaintiffs was that Sampat Singh being a separated member of the family, after his death without issue they were entitled to one-half of the property left by him. Surajpal Singh defended the suit. He put up a two-fold defence. In paragraph 7 of the written statement it was said that Beni Singh one of the four brothers, had separated 30 years ago, that Jagrup Singh, another of the brothers, had separated 25 years ago and that Bandau Singh and Sampat Singh, had remained joint. The case, therefore, in this aspect was that Surajpal Singh was entitled to the property of Sampat Singh by right of survivorship. He also set up another case, that he had been adopted by Sampat Singh. The case of adoption failed in the Courts of first instance and was not argued in the lower Appellate Court, nor is it before me for discussion. The Court of first instance dismissed the suit on the finding that Bandhu Singh and Sampat Singh constituted a joint family. In appeal the Subordinate Judge found that defendant had failed to prove that Bandhu Singh and Sampat Singh were joint. He found that there was evidence to support the plaintiffs' case that Sampat Singh's property was separate. The decree of the first Court was, therefore, reversed and the claim of the plaintiffs was decreed, except with respect to a portion of some house-property. The defendant comes here in second appeal and the correctness of the conclusions of the lower Appellate Court is contested on a variety of grounds.

It is said that there is no evidence on the record of any actual partition ever having taken place between Bandhu Singh and Sampat Singh or any agreement to separate from each other. It is also said that the lower Appellate Court has misunderstood the law as to separation of a joint family. Other points are raised relating to particular items of evidence to which it is said the lower Appellate Court did not devote due attention and to which the learned Subordinate Judge did not attribute the proper weight. On the pleadings the case seems to me to be a perfectly clear one. The defendant,

Surajpal Singh, in the seventh paragraph of his written statement having admitted that two brothers of this family had separated, it lay upon him to prove that the other two brothers, Bandhu Singh and Sampat Singh, remained members of a joint family. That this is a correct statement of the law seems to me to be proved by the judgment of their Lordships of the Privy Council in *Balabux* v. *Rakhmabai* (1). At page 736 of the report it is said: "It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united.....must be proved like any other fact." On the pleadings as I have referred to them, it lay upon the defendant to prove the case which he was setting up, namely that Bandhu Singh and Sampat Singh had remained joint or had become joint by an agreement after the separation of the two brothers. The lower Appellate Court has stated that the defendant has failed to prove this fact and this being a finding of fact, it is binding on me here in a second appeal. I agree with what has been said in the memorandum of appeal that the Subordinate Judge has not taken a correct view of the Hindu law. In his judgment he states as follows:—" The respondent's Pleader argued that it was not necessary that if one of the members of the family separated all the members will be considered to have separated, and referred to certain rulings, but no one disputes this proposition." This statement of the law does not appear to me to be accurate. From the observations of their Lordships to which I have referred, it seems that once it is admitted that one of the members of the joint family separated, the legal presumption is that there is a complete separation between all the members of the family and the person who asserts that any members of the family remained joint after the separation, must prove his allegation. I have no doubt, therefore, that the decision of the lower Appellate Court in this case is perfectly correct, although perhaps I am not in agreement with all the reasons which the learned Subordinate Judge has given for his decision.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 30 C. 725 (P. C.); 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I. A. 130.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 477 OF 1911.

August 31, 1912.

Present:—Mr. Stanyon, A. J. C.

KHEMCHAND—PLAINTIFT—APPELLANT

versus

MALLOO—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 58 (b), 59, 100—*Attestation—Simple mortgage—Charge—Distinction between the two—Deed of mortgage not completed for want of formalities, whether can be used to establish charge*—'Rehn,' *use of the word, whether sufficient guide to distinguish between mortgage and charge.*

The execution of a deed creating a charge can be duly proved by the witnesses who signed it upon the executant's personal acknowledgment of his signature thereon, but such a witnessing is not the attestation of a mortgage-deed within the meaning of section 59, Transfer of Property Act.

The distinction between a simple mortgage and a charge lies in the fact that the mortgage imports, while the charge does not import, an agreement, express or implied, governing the disposal of the property in some way on default being made in payment of the debt.

Where a person enters into a transaction involving a particular statutory obligation, the presumption is that he has impliedly agreed to submit to that obligation.

The statutory obligation of the debtor under a simple mortgage is exactly the same as it is under a charge, namely, an obligation, in default of payment, to have the security sold and the proceeds applied in payment of the debt. The debtor in each case must be presumed to know of his liability as an element of the transaction he enters upon, whether it be a simple mortgage or a charge. But it is necessary to distinguish between an implied agreement to sell and a mere tacit acceptance of a contingent statutory liability to the sale of a security, inasmuch as a statutory obligation to have a security sold in a certain eventuality is not the same thing as a transfer of a right to sell that security on the happening of that eventuality. The form of realising the debt from the security, namely, by sale thereof, is necessarily the same, but where

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there is no transfer by agreement of the right to sell, that right does not come into existence at the time of the contract. In other words, in the case of a simple mortgage the right to sell the security on default of payment of the debt is created when the mortgage is effected, while in the case of a charge the statutory right and obligation to have the security sold arises only when default in payment of the debt is made and, not till then.

Where a document is in terms a deed of mortgage but has not been completed by proper attestation or other formality prescribed by law as indispensable for a valid mortgage, the instrument cannot be used to establish a charge. But where an instrument embodies the true contract between the parties, and is in terms an instrument which only creates a charge, then an erroneous belief of the parties that they have created a simple mortgage, and their conduct in calling it a mortgage and having it attested in that belief, would not affect the true nature and validity of the transaction. In such a case the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge.

As in vernacular the word '*rehn*' is used to denote every form of transaction in which immoveable property is bound as security for the payment of a debt, the name given to a document by the parties is not a sufficient guide as to whether the document creates a mortgage or a charge.

Appeal against the decree of the District Judge, Hoshangabad, dated the 9th August 1911, reversing that of the Munsif, Hoshangabad, dated the 14th October 1909.

Mr. *G. L. Subhedar*, for the Appellant.

The Hon'ble Sir *Bipin Krishna Bose*, for the Respondent.

JUDGMENT.—This case raises the difficulty of distinguishing between a *simple mortgage* in which there is no express agreement of the mortgagee's right to sell, and a *charge* as defined in section 100 of the Transfer of Property Act, 1882. This difficulty is enhanced by the circumstance that the difference between a mortgage and a charge, adopted by the Indian Legislature from English Law, is so little known to the people that no word can be found in the vernacular to signify this technical use of the word *charge*. Every transaction whereby immoveable property is made security for the payment of money is called by the common name of *rahn*. It is customary in our Courts, and generally, to translate this word as "mortgage," but there is no other vernacular word which is in use, or which would be likely to be used, to denote a charge under section 100 aforesaid created by agreement of parties.

The document, upon which the present suit is based, is signed by two witnesses whose signatures have been proved. But it has also been proved that these persons did not see Tika touch the pen of the scribe in token of the mark appended thereto being his signature of execution, but merely witnessed his subsequent acknowledgment of execution. In *Pandurang* v. *Balaji* (1), it was held by this Court that such a witnessing did not amount to the attestation required by section 52, Transfer of Property Act, 1882.

* * * * * * *

The facts being now beyond dispute, the only questions before me are—

(1) Was the attestation, as made, valid for the purposes of section 59, Transfer of Property Act, 1882?

(2) Is the security, created by the deed in suit, one by way of simple mortgage, as defined in section 58 (*b*), or a charge, as defined in section 100, of the said enactment? and

(3) If the parties intended to effect a simple mortgage, can the transaction be treated as a charge upon the plaintiff's failure to establish its validity as a mortgage?

With regard to the first of these questions. The case of *Pandurang* v. *Balaji* (1) has been the accepted law in these Provinces since 1901, and it was expressly affirmed by this Court in *Jhama* v. *Deobux* (2) after considering the conflict of opinions in other High Courts. Under such circumstances I must decline to disturb that law, and I accordingly hold with the lower Appellate Court that the attestation in this case was not such as is required by section 59, Transfer of Property Act, 1882. Therefore, if the deed does not create a charge expressly by its terms, or as a result of the failure of attestation in an intended mortgage, then this appeal must fail.

I now come to the more difficult question whether the transaction embodied in the deed in suit is a simple mortgage or a charge.

In my remanding judgment abovementioned I wrote as follows :—

"The lower Appellate Court has yet to come to a legal finding on the question whether or not there was a valid attestation of the deed which purports to be, and, if duly completed and registered, undoubtedly is, an instrument of simple mortgage."

(1) 14 C. P. L. R. 142.

(2) 2 N. L. R. 10.

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This observation was more or less *obiter*, and, in any case, upon a fuller consideration of the matter than was given or was necessary for the purposes of my remand order, I am of opinion that it was incorrect.

In section 58 (*b*), Act IV of 1882, we have the following definition :—

"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage * *."

So much of section 100 of the same enactment as is now relevant runs thus :—

"Where immoveable property of one person is by act of parties * * * * * made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

In the Commentaries on the Indian Transfer of Property Act by Messrs. Shephard and Brown, 7th Edition, at page 369, and the Law of Transfer in British India by Dr. Gour, 3rd Edition, at page 1031, this distinction between a mortgage and a charge is stated to lie in the fact that a mortgage imports, and a charge does not import, the transfer of an interest in immoveable property, and support for this view is claimed to exist in some of the decided cases in England and India. But, with due respect, I am doubtful if the words as to the transfer of an interest have any distinctive significance in connection with mortgages. Where a charge is created by agreement between the parties, it would be difficult to understand that there was no transfer of any interest in the property bound as security. It seems to me that the answer to the question mortgage or charge turns in India upon whether there is, or is not, an agreement, express or implied, governing the disposal of the property in some way which comes into existence on default being made in payment of the mortgage-money. In every form of transfer there is a transfer of all or part of the transferor's interest in the property transferred. I have no doubt that the definition is worded as we read it in section 58 so as to distinguish it from the nature and effect of a mortgage under English law. But, in order to be a mortgage, the transaction must in terms satisfy the requirements of section 58 of the Transfer of Property Act. That is to say, that it must govern the disposal of the mortgaged property in one of the several ways described in that section. If it is not either a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage, or a combination of two or more of these forms, then it is not a mortgage at all. The distinctive characteristics of a simple mortgage are—

(1) non-delivery of possession of the mortgaged property; and

(2) an agreement, express or implied, that, in default of due payment, the mortgagee may sell the mortgaged property and apply the proceeds in payment.

In his said work at page 1034, Dr. Gour has written, "Of all charges, those created by the act of parties are most liable to be mistaken for simple mortgages." And the learned author goes on to say that though it is evident that the Legislature intended to discriminate between the two classes of securities in giving effect to this intention, the Court have often made a distinction without a difference. He, however, concedes that in India it is sometimes difficult to define "when a mortgage ends and a charge begins." This is not quite consistent, however, with the remark at page 1031, that section 100 "now draws a clear distinction between a 'mortgage' and a 'charge.'" In *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (3) (the judgment in which can be recognized as the handiwork of that well-known legal author, Caspersz, J.), the following passage occurs at page 843:

"The distinction between a mortgage and a charge is keenly appreciated by an English lawyer, though the inclusion of simple mortgages in the definitions given in section 58 of the Transfer of Property Act has somewhat obliterated the distinction in India. The result has been a divergence of opinion between the High Courts—*Khemji Bhagvandas Gujar* v. *Rama* (4), *Motiram* v. *Vital* (5),

(3) 35 C. 837; 12 C. W. N. 849; 7 C. L. J. 492.
(4) 10 B. 519.
(5) 13 B. 90.

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Rangasami v. *Muthukumarappa* (6), *Nabin Chand Naskar* v. *Raj Coomar Sarkar* (7), *Pran Nath Sarkar* v. *Jadu Nath Saha* (8), *Kishan Lal* v. *Ganga Ram* (9). A charge, which owes its existence to the operation of law, may be easily discovered, such as a rent charge. A charge created for payment of a legacy or annuity or maintenance money by a Will or trust-deed is not difficult to distinguish from a mortgage, but the difficulty that arises in cases of liens created by other acts of parties, specially for payment of debts, must be solved in each case from the terms and expressions used in the instruments creating them and the formalities actually observed in execution. If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge. *Tancred* v. *Delagoa Bay and East Africa Railway Company* (10)."

These remarks appear to me to be a correct statement of the law, subject to this that the name given to the transaction will not be a sufficient guide where the document is written in a vernacular language which makes a customary use of the single word *rahn* to denote every form of transaction in which immoveable property is bound as security for the payment of a debt.

The distinguishing characteristics of a simple mortgage seem to be those already stated, namely, the non-delivery of possession and the agreement to sell. Where the agreement to sell is expressly stated there is no difficulty. The definition, however, extends to the case of an implied agreement; and this is unfortunate for the cause of clearness, because where a person enters into a transaction involving a particular statutory obligation, it is an easy presumption that he has impliedly agreed to submit thereto. Now the statutory obligation of the debtor under a simple mortgage is exactly the same as it is under a charge, namely, an obligation, in default of payment, to have the security sold and the proceeds applied in payment of the debt. The debtor in each case must be presumed to know of this liability as an element of the transaction he enters upon, whether it be a simple mortgage or a charge. If the mere fact that he possesses this knowledge when he makes his contract, is to justify the conclusion that he impliedly agrees to the sale of the security, then every charge for the purpose of securing a debt is also a simple mortgage, and there can be no transaction between a debtor and creditor of the kind dealt with by section 100, Transfer of Property Act. I do not think that this can have been the intention of the Legislature and, therefore, I am of opinion that it is necessary to distinguish between an implied agreement to sell and a mere tacit acceptance of a contingent statutory liability to a sale of the security. That is to say, that the terms of the agreement between the parties must contain words which point with certainty to the fact that the parties had the sale of the security in default of payment of the debt present before their minds, when making the contract, as a part and consequence thereof. The mere knowledge by the one of his right and by the other of his obligation created by Statute will not suffice. There must be agreement, even though such agreement may be practically superfluous. A statutory obligation to have a security sold in a certain eventuality is not the same thing as a transfer of a right to sell that security made by a mortgagor to a mortgagee. The form of realizing the debt from the security, namely, by sale thereof, is necessarily the same, but where there is no transfer by agreement of the right to sell, that right does not come into existence at the time of the contract. A subsequent transferee of the security, though taking *bona fide* for valuable consideration, will be postponed to a prior mortgagee to whom a right of sale has already been transferred; but he will not be bound by any mere charge, in which there is nothing but a statutory right and obligation still to arise, to have the security sold: *Kishan Lal* v. *Ganga Ram* (9).

(6) 10 M. 509.
(7) 9 C. W. N. 1001.
(8) 32 C. 729; 9 C. W. N. 697.
(9) 13 A. 28; A. W. N. (1890) 216.
(10) (1889) 23 Q. B. D. 239; 58 L. J. Q. B. 459; 61 L. T. 229; 38 W. R. 15.

Applying this reasoning to the present case, it is clear that the document* sued on embodies nothing but a mere lien on the property mentioned therein. It expressly contemplates the possibility of a failure to pay. In a simple mortgage the remedy for such a default would be the grant of a power of sale, expressly, *e. g.*, "You may sell the mortgaged property", or impliedly, *e.g.* "I will pay out of my own pocket any balance which the sale-proceeds of the mortgaged property may fail to satisfy:" *Datto Dudheshvar* v. *Vithu* (11). But the terms in the document now before me are these :—

"I mortgage my absolute occupancy field * * * * and lay down * * * that the same shall stand mortgaged so long as the money is not paid off, * * * If re-payment is not made at the time sitpulated, the interest due shall be added to the principal and I will pay compound interest year after year until liquidation."

I do not think that any agreement that the creditor may sell the land can be implied from these or any words in the deed. I, therefore, hold that the deed in suit creates a charge, and that the execution thereof has been duly proved by the witnesses who signed that deed, upon the personal acknowledgement of his signature thereon made to them by the executant.

In this view of the matter it is not necessary to decide the third of the questions postulated by me above. Nevertheless it may be well to do so. I am of opinion that where a document is in terms a deed of mortgage, but has not been completed by proper attestation or other formality prescribed by law as indispensable for a valid mortgage, the instrument cannot be used to establish a charge. I concur generally in the view propounded in *Pran Nath Sarkar* v. *Jadu Nath Saha* (8) and followed in *Roy Zuddi Sheikh* v. *Kali Nath Mookerjee* (12); *Samoo Patter* v. *Abdul Sammad Saheb* (13)and *Narayan* v. *Lakshmandas* (14). But where an instrument embodies the true contract between the parties, and is in terms an instrument which only creates a charge, as defined in section 100 of the Transfer of Property Act, 1882, then an erroneous belief of the parties that they had created a simple mortgage, and their conduct in calling it a mortgage and having it attested in that belief, would not, in my opinion, affect the true nature and validity of the transaction. In such a case the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge. This view is in accordance with the principle laid down in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (15). In the persent case, the plaintiffs appear to have been under the impression that the deed sued on created a simple mortgage, and they claimed to enforce it as such. It so happens that the relief claimed by them, namely, the sale of the security to satisfy the debt, was correctly demanded, being also the legal relief on a charge. But as they have fought the case on erroneous lines, I do not think they should get more than their costs in the first Court.

For the above reasons I allow the appeal, and reversing the decree of the lower Appellate Court, I restore the decree of the first Court. I extend the *dies datus*

(11) 20 B. 408 (F. B.).

"* (This) document—a mortgage-deed—(has been) executed in favour of Khemchand, son of Parasram, and Nandlal, son of Khemchand, *Malis*, residents of Sangakheda Kalan, Tehsil and District Hoshangabad, by Tika, son of Ganesh, caste *Mali*, resident of Sangakheda, Tehsil and District Hoshangabad, to the following effect: On accounts being made of a previous bond, and after credit given for re-payments, a balance of Rs. 80 British currency has been found due. I will pay interest on this at Rs. 2 per cent. per month. For this money I mortgage my absolute occupancy field No. 60, area 1·98 (acre), rent Rs. 6, situated within *Patti* 4 of Sangakheda, Tehsil and District Hoshangabad, and lay down in writing that the same shall stand mortgaged so long as the money is not paid off. The agreement as to re-payment is that I will pay up the principal, together with the interest, on *Baisakh Sudi* 15th, *S.* 1960. If re-payment is not made at the time stipulated, the interest due shall be added to the principal, and I will pay compound interest year after year untill liquidation. I will take receipts for (such) payments (as) I may make. I will get no credit without a receipt. This bond executed by me is genuine. *Mitti Aghan Sudi* 11th, *S.* 1958, dated 22nd December 1901.

"Mark of Tika, son of Ganesh *Mali*, of Sangakheda (Mark made by touching the pen).

"Written by the pen of Makhulal, *Mukhtiar* of Sangakheda Kalan, at the instance of Tika *Mali*."

(12) 33 C. 985; 4 C. L. J. 219.

(13) 31 M. 337.

(14) 7 Bom. L. R. 934.

(15) 6 M. I. A. 393; 18 W. R. 81 *note*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

o the 15th February 1913. Each party will bear his own costs as incurred in the two Appellate Courts.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 10 OF 1914.

September 4, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

SITARAM MORAPPA NAWALE—DEFENDANT—APPELLANT

versus

SHRI KHANDOBA—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists Relief Act (XVII of 1879), ss. 3 (w), 10, 53—Suit falling under s. 3 (w)—Revision, who can entertain.

Against the decision of a first Court in a suit falling under section 3 (*w*) of the Dekkhan Agriculturists' Relief Act, a First Class Subordinate Judge cannot entertain a revision, though a District Judge can do so, under section 53 of the Act.

Second appeal from the order passed by the First Class Subordinate Judge at Satara, in Appeal No. 345 of 1912, reversing the decree passed by and remanding the suit to the Subordinate Judge at Karad, in Suit No. 1883 of 1910.

Mr. *M. V. Bhat*, for the Appellant.

Mr. *J. R. Gharpure*, for the Respondent.

JUDGMENT.—This was a suit falling under section 3 (*w*) of the Dekkhan Agriculturists' Relief Act. That being so, according to the provisions of section 10 no appeal lay from the decision of the first Court. The appeal, however, has been entertained and disposed of by Mr. Rahurkar, the first Class Subordinate Judge. We think it is clear, having regard to the terms of section 53, that the first Class Subordinate Judge was not authorised to pass any decree or order in a matter which could be entertained under section 53, and if it were necessary to pass any order in revision, such order should have been passed by the District Judge. The most we can do here is to set aside the decree of the first Class Subordinate Judge and remit the application of the appellant from the decision of the first Court to the District Judge, who may, if he thinks fit, treat it as an application in revision under section 53,

and pass such order as he thinks necessary under the circumstances. Costs to be dealt with by the District Judge.

Decree set aside; Application remitted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 518 OF 1912.

October 27, 1913.

Present:—Mr. Mittra, A. J. C.

CHOWBE JAIGOPAL—PLAINTIFF—APPELLANT

versus

RAMESHWAR—DEFENDANT—RESPONDENT.

Lambardar—*Agent—Power to consent to transfer of occupancy holding—Partition proceedings, effect of instituting.*

The mere institution of partition proceedings does not put an end to the customary authority of the *Lambardar*, as representative of the proprietary body, to consent to a transfer by an absolute occupancy tenant of his holding.

Appeal against the decree of the District Judge, Hoshangabad, dated the 8th July 1912, confirming that of the Munsif, Harda, dated the 13th May 1912.

Mr. *G. L. Subhedar*, for Appellant.

The Hon'ble Mr. *V. R. Pandit*, for the Respondent.

JUDGMENT.—The plaintiff has a 5-annas 4-pies share in *Mouza* Bairagarh and one Sadaseo was owner of the remaining 10-annas 8-pies and *lambardar*. On the 31st July 1908 the plaintiff applied to the Revenue Authorities for partition of the village. The partition was sanctioned in January 1911 and it took effect from the 1st June 1911. One Gangaram, an absolute occupancy tenant, sold his holding to the defendant on the 31st May 1910. The registered sale-deed bears the attestation of the *lambarbar* Sadaseo. The plaintiff sues for possession of the holding on the ground that the transfer in favour of the defendant is void as against the plaintiff. The Courts below have dismissed the plaintiff's suit on the ground that the transfer was with the consent of the *lambardar*. The plaintiff has filed this second appeal. The first point taken is that the institution of the partition proceedings put an end to the customary authority of the

lambardar. There is no suggestion of fraud or collusion against the *lambardar*, nor is it the plaintiff's case that the consent to the transfer was improperly given, having regard to the *nazarana* taken by the *lambardar*. The plaintiff's sole contention is that he was not consulted. The plaintiff never gave any notice revoking the authority of the *lambardar* to represent the proprietary body. No ruling has been cited to show that the mere insititution of partition proceedings would put end to the powers of the *lambardar*. At the date when the consent was given, it was not known to whose share the plot would go. The fact that the plot is now in the plaintiff's *patti* does not entitle him to repudiate the act of the *lambardar*, unless his customary agency is *ipso facto* determined by the institution of the partition proceedings. Such a contention is opposed to the ruling of this Court in *Ram Chandra* v. *Tatya* (1), where it was held that even after a partition the *lambardar* does represent the proprietary body for certain purposes. The second ground taken is that the consent to the transfer was a dealing with the property within the meaning of section 52 of the Transfer of Property Act. It is unnecessary to consider this point, as on the view I have taken the dealing with the property was one by the plaintiff's agent and it cannot be questioned as against the present defendants. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 19 Ind. Cas. 549; 9 N. L. R. 46.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 30 OF 1912.

September 7, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

RAMDAS GOPALDAS SADHU—PLAINTIFF—APPELLANT

versus

BALDEVDAS KAUSHALYADAS—DEFENDANT NO. 1—RESPONDENT.

Hindu Law—Mitakshara—*Succession*—Sanyasi—Bairagis, *whether can be classed as* Sanyasis.

The declared heir of a *Sanyasi*, under the *Mitakshara* School of Hindu Law, is a virtuous pupil.

It is doubtful whether the *Bairagis* can be classed as *Sanyasis*, because the order of *Bairagis* is not confined to the members of the twice-born castes.

First appeal from the decision of the Additional first Class Subordinate Judge, at Ahmedabad, in Suit No. 815 of 1910.

Mr. *I. N. Mehta* (with him Mr. *N. N. Mehta*), for the Appellant.

Mr. *Setlur* (with him Mr. *N. K. Mehta*), for the Respondent.

JUDGMENT.—The plaintiff sued to recover possession from the 1st defendant of certain temple properties at Dakore, claiming to be the Pitrai Chela of the deceased Bajrangdas, who was a Mahant of the Dakore temple. The first defendant disputed his claim and called upon the plaintiff to prove the claim he asserted. The parties, it is not disputed, are Bairagis belonging to the sect of Vaishnavas of the Ramanandi class. It has been laid down in *Ram Dass Byragee* v. *Gunga Dass* (1) that in that class of Bairagis, on the demise of the superior of the Math, when there is no Chela to succeed, the heads of the Maths ordinarily elect a successor from pupils of some other teacher. (Compare replies 39 and 40 relating to Bairagis, in Borrodaile's Caste and Customs in Gujerat). That has not been done in the present case, nor has the plaintiff proved the existence of any special custom relating to the Dakore Math. It is contended on his behalf that Bajrangdas under whom he claims was a Sanyasi, and that he is entitled by virtue of a certain passage in the Mitakshara, Chapter II, section 8, paragraph 2, to succeed to the property of that Sanyasi. The passage is as follows:—"The heir as to the property of a hermit, of an ascetic, and of a student in theology are, in order (that is, in the reverse order), the preceptor, the virtuous pupil, and the spiritual brother belonging to the same hermitage," and the three following paragraphs make it clear that the expression "in the reverse order" means that the heir of a student in theology is a preceptor, the heir of an ascetic is a virtuous pupil, and the heir of an hermit is a spiritual brother belonging to the same hermitage. But as I understand the argument which has been addressed to us on behalf of the

(1) 3 Agra H. C. R. 295.

appellant, it is contended that the plaintiff is a spiritual brother of the deceased Bajrangdas, but the deceased Bajrangdas was not a hermit, and, therefore, that class of heirs cannot be resorted to in the present case. Putting the position of Bajrangdas at its highest he was a Sanyasi and, therefore, the declared heir of the Sanyasi under the Mitakshara would be a virtuous pupil. But the plaintiff was not a pupil of Bajrangdas, therefore, he does not take as his heir according to the Mitakshara. It is, however, extremely doubtful whether the Bairagis can be classed as Sanyasis, because the order of Bairagis is not confined to the members of the twice-born castes. As to this, reference may be made to Mitakshara, Prayashchitta, Book III, Chapter IV, clause 201, of the Allahabad translation. It appears to us, therefore, that both on the ground of custom and on the ground of Hindu Law the plaintiff has failed to make out his case. We, therefore, affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 365 OF 1913.

March 2, 1914.

Present:—Mr. Hallifax, A. J. C.

HAIJNATH—DEFENDANT—APPELLANT

versus

RAGHUNATH—PLAINTIFF—RESPONDENT.

Landlord and tenant—Surrender of tenancy, who can accept—Agent—Lambardar—*Presumption.*

It is only the landlord that can accept a surrender or create a tenancy. Where the "landlord" is a body of two or more persons, anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body acting together or by an agent acting on behalf of them all.

The custom of appointing the *lambardar* as agent by implication and acquiescence is so nearly universal that it may be presumed that the *lambardar* has been appointed the agent of the proprietary body in every village, until the contrary is shown. But the presumption does not extend to the case of a minor *lambardar*, nor to that of his guardian.

Second appeal against the decree of the District Judge, Raipur, dated the 25th March 1913, reversing that of the Sub-Judge, Raipur, dated the 16th July 1912.

Dr. *H. S. Gour*, for the Appellant.

The Hon'ble Sir *Bepin Krishna Bose*, for the Respondent.

JUDGMENT.—The plaintiff, Raghunath, who is the respondent here, and the defendant-appellant Haijnath are co-sharers in the village of Mendrakka. There is one other co-sharer, but we are not concerned with him in any way. Haijnath is the *lambardar* of the village. He is still a minor, and his mother is his legal and actual guardian. The co-sharer Raghunath sued the *lambardar* and two ordinary tenants of the village for joint possession to the extent of his share in the village, or separate possession of a part, proportionate to his share in the village, of a certain piece of land. He sued Haijnath as a minor and his mother was duly appointed his guardian *ad litem*. In the plaint he stated that the land had been surrendered, by a person who had been holding it as an ordinary tenant, "to the *lambardar*, defendant No. 1," and he claimed, therefore, a right to a share in that land proportionate to his share in the village. He went on to say that "the first defendant" let out that land to the other two defendants and made them ordinary tenants thereof on his own authority and without the plaintiff's permission or knowledge. He asserted that "the first defendant had no right or authority whatsoever to transfer to anybody rights or privileges in land belonging jointly to the plaintiff which has been surrendered." He, therefore, made the claim set out above.

The written pleading filed on behalf of the first defendant opens with these words: "The defendant Haijnath files the following written statement." He then went on to admit most of the facts stated in the plaint, but pleaded that the surrender was in consideration of a sum of money "received from this defendant," that he had created the new tenancies with the consent of all the co-sharers, and that in any case he had authority as *lambardar* to create them without consulting the co-sharers. He further pleaded that "the land in suit was surrendered to this defendant, not in his capacity as *lambardar*, but in his capacity as a co-sharer and for value," so that for that reason also he had a right to create the new tenancies without consulting the other co-sharers.

The plaintiff replied that if the first defend-

ant had really paid the amount alleged, he was willing to contribute his share of it, but he demanded an account of the *nazarana* which he believed the defendant had received from the new tenants. He denied that the surrender had been accepted with the consent of the co-sharers and then said, "that as *lambardar*, the defendant No. 1 can act as agent of the other co-sharers with their consent, and not do acts at his wish without their consent and against their will." In the first Court it was found that the surrender was made to the *lambardar* represented by his guardian and the new tenancies were created by the same person on the same day. The learned Subordinate Judge went on to hold, on the authority of certain unpublished rulings of this Court, "that in the absence of express repudiation of his authority, the *lambardar* is the representative of the entire proprietary body in such transactions as accepting of surrender from one tenant and the re-letting to another of tenancy land." Finding that there was in this case an absence of express repudiation of the authority of the *lambardar* declared before the transaction, he held that the *lambardar* had acted as agent of the whole proprietary body, and dismissed the suit.

In appeal to the Court of the District Judge the plaintiff pleaded for the first time that the new tenancies had been created not by the *lambardar*, who was a minor, but by his guardian whose acts were not binding on the other co-sharers. On this point the learned District Judge wrote as follows in his judgment :—"The defendant No. 1 is still a minor and it is admitted that his guardian mother, who is said to have constituted new tenancies was neither the *lambardar* nor *lambardar gomashta*. A guardian as such has no power of a *lambardar* or *lambardar gomashta*. Truely the plaintiff's claim for possession was not opposed on this ground in the lower Court, but the point involved seems to be purely a question of law and not a mixed question of fact and law. It was never pleaded that there was any *lambardar gomashta* and that the consent of such a person had been obtained. All that was alleged was that the consent of the other co-sharers had been obtained and this plea has negatived by the lower Court. The correctness of that finding was not challenged for the plaintiff-appellant and that finding stands final. I, therefore, dissenting from the lower Court hold that defendants Nos. 2 and 3 were not validly constituted tenants and that the plaintiff is, therefore, entitled to joint possession of the land in suit."

As will appear later, the point raised involved more questions of fact than of law. The decision of them is, however, covered by the plaintiff's own admissions in the first Court. I fail to understand the reference to the *lambardar gomashta*. Such a person would seem to have about as much to do with the matter as the *mukaddam* or the *kotwar*. They all, like the guardian of a minor *lambardar* or indeed any outsider, are equally capable with the *lambardar* of being appointed agent of the proprietary body. The only difference is that the implied appointment of the *lambardar* or the *lambardar gomashta* is ordinarily very much easier to prove than that of any of the others. In any case, no question of the consent of the *lambardar gomashta* could possibly arise here. Further, as an alternative to the plea of the express consent of the co-sharers it was very distinctly pleaded that the *lambardar* had in this case the power to create the tenancies without consulting them. This was stated in the following words:—"This defendant contends that as a *lambardar* of the village he had power to create tenants in respect of such lands which were surrendered to him in his capacity of *lambardar* of the village without the consent of the co-sharers." It would seem to be a mere slip that the learned Judge mentioned the plaintiff-appellant in place of the defendant-respondent, as the person who would be likely to object to the finding that the express consent of the co-sharers had not been obtained.

The law on this point is clear and well settled. It is expounded in the rulings of this Court in *Pratap Singh* v. *Umrao Singh* (1); *Gopal* v. *Govind* (2) and *Murlidhar* v. *Jagannath* (3). It is only the landlord that can accept a surrender or create a tenancy. Where "the landlord" is a body of two or more persons, anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body acting together or by an

(1) 11 C. P. L. R. 1.
(2) 13 C. P. L. R. 113.
(3) 23 Ind. Cas. 20; 10 N. L. R. 5.

agent acting on behalf of them all. The appointment of this agent need not be express, and it very seldom is. It is customary to appoint the *lambardar* as agent by implication and acquiescence, and this custom is so nearly universal that it may be presumed that the *lambardar* has been appointed the agent of the proprietary body in every village, until the contrary is shown. That presumption might perhaps extend to the case of a *lambardar gomashta*, but no further. It would not cover the case of the guardian of a minor *lambardar*. Nor can it cover the case of a minor *lambardar* himself. He could act as agent for the other members of the proprietary body so that his acts would bind them, but he himself would not be bound by them. One member of the proprietary body would thus be unrepresented by the agent.

But though there can be no presumption that any person other than the *lambardar* has been appointed the agent of the proprietary body, there is nothing to prevent any person in the world being so appointed and when that appointment is admitted or proved, that person will represent the proprietary body and bind it by his acts just as effectively as the *lambardar* could. In this case the plaintiff has from the very beginning admitted the implied appointment of the *lambardar's* mother as agent of the proprietary body. This is the matter of fact involved in his plea taken for the first time in the Appellate Court, which the learned Judge of that Court overlooked. The admission seems to me necessarily implied in all the plaintiff's pleas in which he speaks simply of the *lambardar* and the first defendant, when he sued him as a minor with his mother as his guardian and knew that the surrender was accepted, and the leases granted, by his mother. But even if that could not be called a necessary implication, the admission is to be found made almost expressly in the plea, on which both in the plaint and in all the subsequent stages of the suit he has insisted most, that the surrender made to the guardian of the *lambardar* was a surrender to the whole proprietary body. By admitting that she was the agent of that body for the purpose of accepting the surrender, he also admitted that she was the agent for the purpose of granting fresh leases.

The leases were, therefore, made by an authorised agent of the whole proprietary body and are valid against all the members of that body. The decree of the lower Appellate Court is, therefore, set aside and that of the first Court dismissing the suit is restored. The plaintiff-respondent will pay all the costs in all three Courts.

Decree set aside.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 39 AND 53 OF 1913.

April 17, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Oldfield.

Messrs. CROMPTON AND CO., LTD.,—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Cross-examination — Witness — Serious imputation made against witness but not substantiated—Imputation, whether ought to be withdrawn by Counsel.

In the course of the cross-examination of a witness a very serious suggestion was made, which imputed dishonourable, if not dishonest, conduct to the witness. The suggestion, however, was not substantiated:

Held, that the imputation ought to have been withdrawn.

Appeals against the judgments of the Hon'ble Mr. Justice Wallis, dated the 26th February 1913 and 16th April 1913, in the ordinary original civil jurisdiction of the High Court.

Mr. *Nugent Grant*, with him Messrs. *Sidney Smith* and *Branson & Branson*, for the Appellants.

The Advocate-General, with him Mr. *D. Chamier* and the Government Solicitor, for the Respondent.

FACTS.—In this suit the plaintiffs claimed payment for the work done and materials supplied, and damages for the breach of a building contract. Mr. Weston, the Chief Engineer in India, Civil Department, of the plaintiff Company was examined as a witness on behalf of the plaintiff before Mr. Justice Wallis, who tried the case on the original side. The Advocate-General on behalf of the Secretary of State for India put to him

certain questions in cross-examination as regards certain documents put in in evidence and made an imputation of forgery against the witness. Mr. Grant, the Counsel for the plaintiff, in re-examination put to the witness if he was a party to the forgery and the witness forcibly denied the charge. Mr. Grant took exception to the imputation before the original Court, but the Advocate-General neither substantiated nor withdrew it. In appeal their Lordships being expressly requested to make some statement on the point expressed the following

OPINION.

WHITE, C. J.—In the course of the Advocate-General's cross-examination of Mr. Weston certain suggestions were made which, Mr. Grant submitted on behalf of Mr. Weston, imputed dishonourable, if not dishonest, conduct to Mr. Weston. These suggestions were not substantiated and this being so, Mr. Grant on behalf of his client formally asked the Advocate-General to withdraw them. The Advocate-General did not do so. We were asked by the Advocate-General and by Mr. Grant to express our opinion as to whether in the circumstances, the Advocate-General ought to have withdrawn the suggestions. One matter was in connection with the alteration of the date at the foot of Exhibit J1. There is a pencil entry at the foot of Exhibit J1, which obviously was originally July 26 and which was altered in pencil into July 27. The suggestion as to this was, so far as I understand it, that July 26 was altered into July 27 so as to identify the specification which, according to the plaintiff's case, was the specification referred to in the Clibborn Contract. No attempt was made to conceal the date as originally written. Mr. Weston said he wrote July 26 in the first instance by mistake. I see no reason to suppose that the alteration, or correction, which Mr. Weston admits he made, was made with any sinister or dishonest intention. It seems to me a matter of small importance, and I am not prepared to say that it was the duty of the Advocate-General formally to withdraw any imputation which he intended to convey in connection with the alteration of July 26th into July 27th. The other matter to which Mr. Grant thought it necessary to call our attention seems to me to be more serious.

It would seem that the original of the specification with reference to which the contract of August 11th (Exhibit K) was signed should be in the possession of Government. This document has not been produced. Mr. Weston sent a copy of this specification to his London office. Exhibit HHH is a copy of the document sent to England. In the copy the letters M. B. (the initials of Mr. Brown) appear under date 11th August 1909, the date of the formal contract (Exhibit K). The suggestion made in the cross-examination of Mr. Weston, as I understand it, was that he was a party to adding these initials to the copy, knowing they did not appear in the original document. The Advocate-General was, of course, cross-examining on specific instructions.

In re-examination Mr. Grant put it to the witness, "It is suggested that you were a party to putting a signature on (the copy sent to England) in order to indicate that the original of which it is said to be a copy was signed by Mr. Brown. Were you a party to a forgery in respect of that?" The witness's answer was, "Certainly not." Mr. Grant's version, put in re-examination, of the imputation which he said the Advocate-General made on his client was not repudiated by the Advocate-General. The imputation, I suppose, is that Mr. Weston sought to manufacture evidence in the plaintiff's favour by adding words to a copy of a document which he sent to his principals in England, which to his knowledge the original document did not not contain. That, of course, is a very serious charge. It may or may not be criminal. It is certainly dishonest. The Advocate-General was not prepared to carry the matter further either by producing the original document or by putting Mr. Brown into the box. In these circumstances Mr. Grant says the Advocate-General ought to have withdrawn the imputation. This raises a question of the ethics of cross-examination of some delicacy and difficulty. My own view is—(we have no authority in the matter and it is only my "pious opinion")—that in all the circumstances and having regard to the character of the litigation and the parties to the suit, the imputation ought to have been withdrawn. I should not have thought it necessary to say anything

about this incident if we had not been expressly asked both by the Advocate-General and by Mr. Grant to make some statement on the subject.

OLDFIELD, J.—I concur in this expression of opinion.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3158 OF 1912.

August 11, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

GOLAK CHANDRA CHOWDHURY—DEFENDANT—APPELLANT

versus

PRABHAT CHANDRA RAY—PLAINTIFF—RESPONDENT.

Minor—Legal representatives of persons intermeddling with minor's estate—Liability, extent of.

The representatives of persons who had intermeddled with the estate of a minor, are liable to account in respect of the dealings of those whom they represent to the extent of the estate which came to their hands.

Appeal from the decree of the District Judge of Sylhet, dated the 17th July 1912, affirming that of the Subordinate Judge, Second Court of that place, dated the 29th January 1912.

Mr. *Rasul* and Babu *Jotish Chandra Sircar*, for the Appellant.

Babus *Basanta Kumar Bose* and *Prakash Chandra Sircar*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—In this case it has been found that after the death of the widow of Bagawan Chandra Ray, Gopi Charan Chowdhury instead of taking up the executorship, caused one Guru Das Goswami appointed an executor to do so and obtained an *am-muk tearnama* from him in his own name. This *swami* is described as a *guru* who lived in the district of Mymensingh. Most of the properties lie in the District of Barisal. Whether this Guru took any part in the administration of the property is not clear. It appears from the judgment that the real person who was administering it was Gopi Charan Chowdhury. It has been found on evidence, which the Subordinate Judge describes as clear and positive, that during the years mentioned in the judgment, Gopi Charan was really managing the affairs of the plaintiff's properties at Gamaitali. He continues: "The evidence adduced in the case, in my opinion, proves beyond doubt that Gopi Charan Chowdhury managed the plaintiff's estate during the period in suit and that several sums of money passed through his hands in the course of his management of that estate. Admittedly he never rendered any account either to the executor, Guru Das Goswami, or to the plaintiff. The defendant No. 5 is admittedly in possession of the assets of Gopi Charan Chowdhury as his heir." He has, therefore, held that as Gopi Charan did not render an account of the moneys that passed through his hands, the appellant who holds his estate must account to the respondent.

As I read the finding of the District Judge, it is this that Guru Das Gowswami was a mere executor by name. The Judge says: "It seems probable that Gopi Charan, fearing to take the responsibility of the executorship himself. put forward Guru Das as the nominal executor, continuing to do the real work himself." He points out further that the question of agent and sub-agent does not arise and that Guru Das was not the agent of the plaintiff during his minority.

The position appears to me to be one in which certain persons, namely, the defendants Nos. 2, 3 and 5 or rather the persons whom they represent have been so intermeddling with the estate of the plaintiff, formerly a minor, that they are, I think, liable to account in respect of the dealings of the persons whom they represent to the extent of the estate which came to their hands. The account has been directed to be taken from the 2nd May 1899 to the 1st October 1907, and is in respect of the dealings by Guru Das Goswami and Gopi Charan Chowdhury with the estate during that period.

The appeal, therefore, fails and must be dismissed with costs.

COXE, J.—I agree that the appeal must be dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL 163-B OF 1913.

March 31, 1914.

Present:—Mr. Stanyon, A. J. C.

AKOLA GIN COMBINATION—PLAINTIFF—APPELLANT

versus

NORTHCOTE GINNING FACTORY—DEFENDANT—RESPONDENT.

Companies Act (VI of 1882), *s.* 4—"*Persons,*" *meaning of—Repugnant to subject or context—General Clauses Act* (*X of* 1897), *s.* 3, *cl.* (39)—*Companies Act* (*VII of* 1913), *s.* 2, *cl.* (13)—*Association of more than* 20 *persons—Acquisition of gain—Registration.*

The word "persons" in section 4, Act VI of 1882, denotes individuals and does not include bodies of individuals, whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section.

An association of several firms consisting of more than 20 persons formed with the object of acquiring commercial gain is essentially within the purview of section 4 and requires registration.

Appeal against the decree of the District Judge, Akola, dated the 15th November 1912, confirming that of the Additional Subordinate Judge, Akola, dated the 28th July 1911.

Rao Bahadur *R. N. Mudholkar*, for the Appellant.

JUDGMENT.—It is necessary to state the facts of this case. On the 31st December 1908, at Akola in Berar, eighteen companies or firms, carrying on dealings in cotton and possessed of ginning factories, entered into a coalition or syndicate, which they named "The Akola Gin Combination," and drew up a memorandum of agreement, which is Exhibit P-1 on the record of this case. This document is headed "Ginning Combination Agreement, Season 1908-09, 1909-10 and 1910-11." The parties to this agreement are thus described in the memorandum:—

1. The Akola Native Cotton Ginning, Dressing and Spinning Company, Limited.
2. The New East India Press Company, Limited.
3. The Akola Cotton Ginning and Oil Manufacturing Company.
4. The Shrikisandass Shiokisandass Ginning Factory.
5. The Gulabrai Govindram Ginning and Pressing Factory.
6. The Gulabrai Hardayal Ginning Factory.
7. Ticomdas Tejmal Ginning Factory.
8. The Sangwidas Ramchandra Ginning Company.
9. The Khan Bahadur Chingalal Pooransing Ginning Factory.
10. The Manmar Manufacturing Company.
11. The Fakrudin Mulla Motabhai Ginning Factory.
12. The New Chingalal Trimbaklal Ginning Factory.
13. The Ayoobkarim Ginning Factory.
14. The Chingalal Trimbaklal Ginning Factory.
15. The Khatao Makanji and Company.
16. Messrs. Ralli Brothers.
17. The Northcote Ginning Factory.
18. The Guzrath Ginning, Ahmedabad.

The memorandum is a long one and it is only necessary to state the substance of it in this judgment. The object of the association was to work the ginning factories of its members jointly for the benefit of all, so as to prevent competition between them. The conditions laid down may be thus stated:—

(1) Each party was to work his Ginning Factory at Akola from the 13th November 1908 to 30th June 1911 at a gross charge of Rs. 4-1-3 per *bojha* of cotton ginned, the weight of each *bojha* being 280 lbs., avoirdupois, and the quantity ginned being entered up in the account books of each factory.

(2) Each factory to be entitled to charge Rs. 2-5-3 per *bojha* as expenses of ginning and the balance of Rs. 1-12-0 per *bojha* to be paid into the *pool* or General Fund of the association. These rates are declared to be subject to alteration.

(3) Correct accounts of cotton ginned and money received to be kept by each party and to be open to inspection by all other parties. The weights and scales of each party, to be under similar surveillance by the others. The *pool* account for each month to be submitted by the 15th of the succeeding month, and all payments into the *pool* to be made within 15 days of the issue of the *pool* account. Any factory in default to be subject to a fine of Rs. 5 per day in arrears, such fines also going to the *pool*.

"(4) Each party to furnish accounts to every other weekly, weighments of *bojhas* being made daily, and the aggregate weigh

of each week's ginning to be sent every Saturday to Messrs. Ralli Brothers. Default in this respect to be punishable with a fine of Rs. 5 for each day of delay, and every such fine to go to the *pool*.

(5) All bad debts, insolvency or failure of its customers to be borne by the factory concerned, such factory being liable to subscribe to the *pool* according to the weight of cotton actually ginned by it, and regardless of its own realization of charges for doing the work.

(6) Payments into the *pool* to be made monthly, collections being made by Messrs. Ralli Brothers' Agency at Akola, who are to divide and pay the same in proper shares to all the parties and who are expressly empowered to do all acts necessary for giving proper effect to this arrangement.

(7) All factories to be kept ready for work, but any one or more of the parties, on giving a fortnight's notice of such intention, to be entitled to close his or their factory, and dispense with the staff or staffs, for any period during the continuance of the agreement.

(8) Each party to be responsible for the cost of maintaining and working his own factory and to have no claim on the association for that purpose.

(9) In the event of a new ginning factory being set up, the agreement to remain in force only till reviewed by a meeting of the parties.

(10) No party, during the continuance of the agreement, to increase or reduce the number of his gins working at Akola, or to remove the same to places working in competition with Akola: but removal to places not working in competition with Akola, made with the previous consent of all parties, to be adjusted by reduction of the *pool* share of such party.

(11) Each party to supply to the others, if so required, details of his ginning machinery.

(12) The General Fund to be divisible into 739 shares, that being the number of gins, and the shares allotted to each being as stated in the memorandum of agreement.

(13) In the event of any injury to the ginning plant of any factory causing disablement of a gin for more than 12 hours, written notice of the block to be given to all other parties within 12 hours: and repair and resumption of work to be similarly notified.

(14) If any gin should become permanently disabled, a proportionate reduction in the *pool* share of its owner to be made.

(15) Any damage to machinery capable of repair to be promptly repaired at the cost of its owner, and if carried out with due diligence, such owner's right to his full share of the *pool* not to be affected thereby: but undue delay in repairing to involve forfeiture of share.

(16) In the event of any share being forfeited under the agreement, the same to be divided *pro rata* among the remaining share-holders.

(17) Meetings of the association to be called and conducted as laid down. (It is not necessary to produce details).

(18) Any dispute among the parties to be referred to arbitration. (Details given.)

(19) Out of the working expenses allowance of Rs. 2-5-3 per *bojha*, each party to pay six pies per *bojha* to any charity which commends itself to him."

One R. B. Deo Rao Winayek Digambar was appointed the Secretary and Treasurer of this syndicate, which, however, was not registered under the Indian Companies Act, 1882. Party No. 17, the Northcote Ginning Factory, failed to pay into the *pool* the money payable by it under the above Articles of Association, and became indebted to the Combination to the extent of Rs. 10,214-2-7 for the season 1908-09, comprising the period between the 13th November 1908 and 30th June, 1909. Being pressed for this money, Khatao Hemraj Bhate, the proprietor of the Northcote Ginning Factory, executed a bond for the above sum in favour of R. B. Deo Rao Winayek Digambar *qua* Secretary and Treasurer of the Combination, stipulating to pay the same as below:—

	Rs.	A.	P.
On the 31st May 1910 ...	3,404	11	10
On the 31st May 1911 ...	3,404	11	10
On the 31st May 1912 ...	3,404	11	11
TOTAL ...	10,214	2	7

This bond was executed on the 27th August 1909. Default was made in payment of the first instalment, and on the

10th December 1910, the Akola Ginning Combination by its above named Secretary and Treasurer filed the suit out of which this appeal has arisen, adding interest at 9 per cent. per annum to the original debt, and claiming Rs. 3,563-1-8] with costs and future interest. On the single ground that the plaintiff represents an Association prohibited by section 4 of the Indian Companies Act, 1882, the Sub-Judge of Akola dismissed the suit on the 28th July 1911, and for the same reason this decision was upheld by the District Judge of West Berar on the 15th November 1912. The plaintiff has, therefore, made this second appeal. During the pendency of the litigation the defendant Khatao Hemraj Bhate died, and *Musammat* Premabai, the widow of Nathoo Dharamsey Bhate, has been substituted as his legal representative. Owing apparently to a translator's mis-spelling, the name of the defendant's factory has been erroneously entered as the "North Coat" (instead of Northcote) Ginning Factory. This error must be corrected by the Courts below.

The case was well argued before me on behalf of the appellant; but neither in this Court nor in the lower Appellate Court was any appearance entered by or on behalf of the respondent.

The Courts below have applied to this case] section 4 of the Indian Companies Act, 1882, which reads as follows:—

"No Company, Association or Partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a Company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or by Royal Charter or Letters Patent; and no Company, Association or Partnership consisting of more than twenty presons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the Company, Association or Partnership, or by the individual member thereof, unless it is registered as a Company under this Act, or is formed in pursuance of some other Act or of Letters Patent."

The Courts below have held—

(1) that the Akola Gin Combination consists of more than twenty persons;

(2) that it was formed for the purpose of carrying on a business that has for its object the acquisition of gain by its members; and

(3) that, therefore, it is an Association prohibited by law, unless registered.

These findings are contested categorically in this appeal, it being urged (1) that each of the firms or factories forming the Combination is only one person for the the purposes of section 4, Act VI of 1882, and (2) that the acquisition of gain is not the object of the business carried on by the Combination, but a mere distribution among subscribers of the money subscribed by them to a *pool*. It will be expedient to decide each of these questions separately.

First then as regards the meaning of the word 'persons' in section 4 aforesaid. No definition is given in the Act itself, and the learned Advocate for the appellant claims, therefore, to apply section 3, clause (39), of the General Clauses Act, 1897, which reads thus:—

"3. In this Act, and in all Acts of the Governor-General in Council and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

* * * *

(39) 'person' shall include any Company or Association or body of individuals, whether incorporated or not."

This provision of law undoubtedly applies to assist interpretation of the word 'persons' in section 4, Act VI of 1882. Therefore, unless there is anything repugnant in the subject or context, the word will include Companies or Associations of individuals, and any number not exceeding twenty of such Companies or Associations may form a combination without registration under the Act to carry on any business other than banking.

But I am very clearly of opinion that both in the subject of the Indian Companies Act, 1882, and in the context of section 4 thereof, there is something repugnant to the interpretation of the word 'person' as meaning anything more than a single human being. The subject

of the Act is the making of legal provisions for the conduct of Companies, Associations, or Partnerships, formed of *individuals*, and the Act of 1882 at least did not contemplate the association of several Companies into one corporate body. I do not lose sight of the fact that in the recently enacted Indian Companies Act, 1913—which became law on the 27th March 1913— a further step has been taken. In the definition of "private company" given in section 2, clause (13), of this enactment we read:

"Provided that, where two or more persons hold one or more shares in a Company jointly, they shall, for the purposes of this definition, be considered as a single member.

But it seems to me that this only strengthens my view that the Legislature used the wrod 'persons' to represent individuals and not bodies of individuals. A single *member* is expressly made to include joint persons in one particular case, but *persons* remain individuals even in the new Act.

Then let us look at the context of section 4, Act VI of 1882. The members thereof are expressly referred to as individuals in the words "the acquisition of gain by the Company, Association or Partnership, or by the individual members thereof." The section does not contemplate any members who are not individuals: and of the meaning of individual there can be no doubt. Even in the definition of 'person' in the General Clauses Act, relied on by the appellant, the word 'individuals' is used to denote single human beings.

It would defeat the object of the Legislature in enacting section 4 aforesaid if the word 'persons' was interpreted to include corporations; because it is obvious that an indefinite number of individuals might associate for banking or other mercantile business without registration, by the simple device of previously forming themselves into "bodies," whether incorporated or not.

I hold, therefore, that the word "persons" in section 4, Act VI of 1882, denotes individuals, and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section.

Next, I have to decide whether this Combination was one which worked for gain. I am of opinion that this question also must be answered in the affirmative. Several authorities, both English and Indian, have been quoted in connection with this question, and I proceed to consider them.

In *In re London Marine Insurance Association* (1), it was held that a mutual assurance society, the object whereof was not to make profits, but solely to indemnify against losses from the risks insured against, must be taken to be a vaild Association, though unregistered, inasmuch as a winding-up order had been passed beyond which the Court could not go. This case is clearly not in point. In *Ex parte Day, In re Day* (2) a species of mutual benefit society, the members of which made small weekly payments, which when they amounted to a certain fixed sum were called a share, the funds of the society being lent out at interest to the members, was held to be illegal because unregistered as a company. In *In re South Wales Atlantic Steamship Company* (3), a Company for establishing a service of steamers, formed with more than twenty members, was held to have no legal existence for want of registration. In *Smith* v. *Anderson* (4), an Associtaion of more than twenty certificate-holders in an investment trust, being unregistered under the Companies Act, was held by the Master of the Rolls to be illegal; but this decision was overruled by the Court of Appeal which decided that the object of the deed of settlement was not to authorize the carrying on of a business within the meaning of section 4 of the Companies Act, 1862, but to provide for the management of a trust fund; and that, supposing the deed to authorize the carrying on of a business, such business was merely subsidiary, not forming any substantial part of the object of the Association; and was, moreover, carried on only by the trustees who were less than twenty in number. The ruling in *Sykes* v. *Beadon* (5) was disapproved, and that in *In re Arthur Average Association; Ex parte Cory* (6) doubted by the Court of Appeal.

(1) 8 Eq. 176; 20 L. T. 943; 17 W. R. 784.
(2) 1 Ch. D. 699; 45 L. J. Bk. 53.
(3) 2 Ch. D. 763; 46 L. J. Ch. 177; 35 L. T. 294.
(4) 15 Ch. D. 247; 50 L. J. Ch. 39; 43 L. T. 329; 29 W. R. 21.
(5) 11 Ch. D. 170; 48 L. J. Ch. 522; 40 L. T. 243; 27 W. R. 464.
(6) 10 Ch. 542; 44 L. J. Ch. 569; 32 L. T. 713; 23 W. R. 939.

In *Jennings* v. *Hammond* (7), a society of more than twenty members, being unregistered as a Company, was held to be illegal, the object of the society being to raise, by monthly subscriptions and payments payable by the members in respect of their shares, a fund for the purpose of making advances to members. It was also held that a promissory note given by a member to the trustee of the society, to secure a sum of money advanced to such member under the rules of the society, w s invalid and no action could be maintained thereon. In *In re Padstow Total Loss and Collision Assurance Association* (8), an unregistered Mutual Marine Insurance Association, by the rules of which it was provided that all persons who effected an insurance with the Association should be members, was held illegal: and that decision was approved in *Shaw* v. *Benson* (9), in which the Court of Appeal held that a loan society consisting of more than twenty members, the objects of which were to form a fund from which money might be advanced to enable share-holders to build or purchase a dwelling-house or other buildings or to lend money to each other on approved personal security, was an Association having for its object the acquisition of gain, and illegal unless registered. In *In re Thomas, Ex parte Poppleton* (10), an unregistered money club of more than twenty members was held to be nonetheless illegal because its business was carried on by a committee of seven members as agents of the society. *Crowther* v. *Thorley* (11) was distinguished. In *In re Siddall* (12) it was held, following *Crowther* v. *Thorley* (11) and *Wigfield* v. *Potter* (13), that an unregistered Association of more than twenty persons formed for the object of purchasing a free-hold estate and re-selling it in allotments to members of the Association was not made illegal by the Companies Act, 1862, section 4. In *In re Ilfracombe Permanent Mutual Benefit Building Society* (14), a building society which comprised more than twenty members and was never incorporated, was held to require registration under the Companies Act, 1862.

I next examine the Indian Authorities, the language of the law in England and India being substantially the same. In *Kraal* v. *Whymper* (15), it was decided that the subscribers to a General Family Pension Fund are not a Company, and the business of investing that fund and applying it in the payment of pensions was held not to be a business for the acquisition of gain within the meaning of section 4, Indian Companies Act. But in *Ramasami* v. *Nagendrayyan* (16), where more than twenty persons subscribed a fund from which loans were made to individual members, the Association was held to be illegal for want of registration as a Company. A similar view was taken by the same High Court in *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti* (17), the object of the Association being to lend money to members. In *Panchena* v. *Gadinhare* (18), the ticket-holders in a lottery were held not to be an Association governed by the Indian Companies Act. In *Neelamega Sastri* v. *Appiah Sastri* (19), where a chit fund was organized by two persons but subscribed to by more than twenty, who however entered into no contract with each other, it was held that there was no application of the Companies Act. In *Bipul Chandra* v. *Hazi Nasib Ali* (20), a partnership of more than twenty persons with the single license of an elephant-catching business, such partners having no voice in the management of the business and no liability *inter se* but merely being sub-sharers in the profits gained by the licensee, were held not to be a Company requiring registration.

It seems clear from the language of section 4 of the Indian Companies Act (VI of 1882) —and the remark equally applies to the present Act—and from the authorities

(7) 9 Q. B. D. 255; 51 L. J. Q. B. 493; 31 W. R. 40.
(8) 20 Ch. D. 137; 51 L. J. Ch. 344; 45 L. T. 774; 30 W. R. 326.
(9) 11 Q. B. D. 563; 52 L. J. Q. B. 575.
(10) 14 Q. B. D. 379; 54 L. J. Q. B. 336; 51 L. T. 602; 33 W. R. 583.
(11) 32 W. R. 330; 50 L. T. 43; 48 J P. 292.
(12) 29 Ch. D. 1; 54 L. J. Ch. 682; 52 L. T. 114; 33 W. R. 509.
(13) 45 L. T (N. S.) 612; 46 J. P. 485.
(14) (1901) 1 Ch. 102; 70 L. J. Ch. 66; 84 L. T. 146; 17 T. L. R. 44.
(15) 17 C. 786.
(16) 19 M. 31; 5 M. L. J. 237.
(17) 19 M. 200
(18) 20 M. 68; 7 M. L. J. 26.
(19) 29 M. 477; 16 M. L. J. 385; 1 M. L. T. 237.
(20) 1 Ind. Cas. 655; 13 C. W. N. 638.

cited, that to constitute an Association within the meaning of that section, there must be—

(1) a legal relation between more than twenty persons, giving rise to joint rights or obligations or mutual rights and duties; and

(2) the object of the Association must be to carry on business for the acquisition of gain for the benefit of the Association as a whole, or of individual members thereof.

In the present case I have already held that the Association comprised more than twenty persons, and the Articles drawn up by them make it plain that their contract gave them joint rights and obligations as well as mutual rights and duties. Then, what was the object of the Association? It was clearly to promote the business and enlarge the profits of ginning by stifling competition, and thereby securing a fixed rate—fixed by the syndicate according to its own views—which all persons seeking to have their cotton ginned in Akola would have to pay. The Association aimed at getting a monopoly of all the ginning business in Akola: and by a special clause the appearance of a competitor outside the 'ring' was to be the immediate cause of a re-consideration of the position. The whole transaction represents a ring formed for commercial gain—a gain in which every member was to participate, and which was secured by associating so as to eliminate competition in the rates of ginning. It does not seem to me to be open to serious argument that such an Association is essentially within the purview of section 4 of the Indian Companies Act. I hold accordingly.

That being so, no suit can be maintained on a bond given by one of the members to the Secretary of the Association, and the suit has been rightly dismissed. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 828 OF 1913.

October 27, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

AMBALAVANA PANDARA SANNADHI, THROUGH HIS AUTHORISED AGENT, DAKSHINAM KARWAR VYTHILINGA THAMBIRAN—PLAINTIFF—PETITIONER

versus

KUPPACHI JANAKI AMMAL—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 63—Translation of grant contained in official letter, whether public record—Secondary evidence—Admission in evidence—Madras Estates Land Act (I of 1908), s. 2.

The translation of a grant contained in a latter from one official to another does not come within the provisions of section 63 of the Evidence Act and so cannot be admitted as secondary evidence of the grant.

Adusumulli Suryanarayana v. *Acchutta Potanna*, 22 Ind. Cas. 339; 26 M. L. J. 99; 15 M. L. T. 268, *Kidambi Jagannathacharyulu* v. *Pidipiti Kutumbarayudu*, 25 Ind. Cas. 891; 27 M. L. J. 233, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly, in Small Cause Suit No. 2102 of 1912.

Mr. S. *Muthiah Mudaliar*, for the Petitioner.

Mr. S. *Ramasami Aiyar*, for the Respondent.

JUDGMENT.—The only question is whether the petitioner is the holder of both the *varams*, so as to take the case out of the Estates Land Act and confer jurisdiction on Civil Courts. There can be little doubt that the ordinary presumption is that the grant was only of the *Melvaram*, [*Adusumulli Suryanarayana* v. *Acchutta Potanna* (1)].

It is argued that Exhibit D shows that both the *varams* were granted. The original grant is not forthcoming, but Exhibit D, which is a letter from the Collector to the Board, contains a translation of what was produced before him as the original grant. The question is whether the translation contained in a letter from one official to another can be admitted as evidence of the terms of the original grant. It does not come within the provisions of section 63 of the Indian Evidence Act and so cannot be admitted as secondary evidence.

As the Collector simply gives a translation of a document which was produced before him and as there is nothing except his

(1) 22 Ind. Cas. 339; 26 M. L. J. 99; 15 M. L. T. 268.

opinion that it "seemed to be" genuine, it cannot be said that the letter Exhibit D set out any facts within his personal knowledge so as to make it admissible as proof of the terms of the original grant.

It is argued that it must be presumed that the plaintiff was the owner of the *Kudivaram* and that it is for the defendant to show that he was not the owner of the *Kudivaram* at the time of the grant. Reliance has been placed on *Kidambi Jagannathacharyulu* v. *Pidipiti Kutumbarayudu* (2). The Subordinate Judge finds that the *Kudivaram* right was not owned by Ragho Pandit or his successors-in-title in 1808 or subsequently. He presumes that it was not in them before 1808 or at the time of the grant. I cannot say he was not entitled to find that the *Kudivaram* was not shown to have been in the grantee at the date of the grant.

The Subordinate Judge is of opinion that Exhibit D does not show that both the *varams* were granted. As I do not think Exhibit D can be used to show the terms of the original grant, it is unnecessary to consider this question.

The petition fails and is dismissed with costs.

Petition dismissed.

(2) 25 Ind. Cas. 891; 27 M. L. J. 233.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 486 OF 1912.

May 18, 1914.

Present:—Mr. Justice Chapman and Mr. Justice Mullick.

Sheikh NEAMATULLA—DEFENDANT NO. 1—APPELLANT

versus

Sheikh BAJIULLA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—Res judicata—*Ejectment suit—Denial of landlord's sole title—Fresh suit for declaration against alleged landlord and tenant, if barred—Specific Relief Act (I of* 1877), *s.* 42—*Bengal Tenancy Act (VIII of* 1885), *s.* 25—*Denial of landlord's title, when operates as forfeiture.*

Where in a suit brought by an occupancy *raiyat* to eject an under-*raiyat*, it was held that the former was not the sole landlord, and then another suit was brought by the occupancy *raiyat* against the under-*raiyat* and the alleged co-sharer landlord for a declaration of right to the full share of the holding:

Held, that as between the occupancy *raiyat* and the under-*raiyat*, the question whether the former was the sole landlord of the holding was directly and substantially in issue in the previous ejectment suit, and under section 11 of the Civil Procedure Code, a decision on that issue must be held to be *res judicata* as between them, but that the section did not stand in the way of a declaratory decree against the alleged co-sharer landlord.

Where a tenant does not deny the whole title of his landlord but sets up the right of a third party as co-sharer, there can be no forfeiture.

Srimati Mallika Dassi v. *Makham Lal Chowdhury*, 9 C. W. N. 928, followed.

Appeal against the order of the District Judge of Rangpur, dated 13th August 1912, reversing that of the Munsif, Second Court, at Gaibanda, dated the 19th September 1911.

Babu *Surendra Chandra Sen*, for the Appellant.

Mr. *Z. R. Zahed*, Counsel, and Mr. *A. K. Fuzlul Huq*, for the Respondents.

JUDGMENT.—The plaintiff alleges that he is an occupancy *raiyat* and that defendant No. 1 is his under-*raiyat*. In 1905 the plaintiff sued this defendant in ejectment. The defendant pleaded that the plaintiff was not the 16-annas owner of the holding and set up the right of one Halu Sheikh as the plaintiff's co-sharer. One of the issues in that ejectment suit was, are the plaintiffs sole landlords in respect to the land in suit, if not, can they eject the defendants? The Court found that the plaintiff was not the sole landlord and dismissed the suit. The plaintiffs now sue the heirs of Halu Sheikh and defendant No. 1 for declaration of their 16-annas title to the holding, and they also ask for *khas* possession alleging that defendant No. 1 has forfeited his tenancy by his denial of the plaintiffs' title in the ejectment suit. The Munsif held, *firstly*, that there was no forfeiture, and *secondly*, that the suit was barred by *res judicata*. On appeal before the District Judge the suit was remanded, the Judge being of opinion that the previous decision in the ejectment suit did not operate as *res judicata* and that there should be a re-trial of the issue relating to forfeiture.

Against this decree the defendant No. 1 prefers the present second appeal. With

regard to the question of forfeiture, we think it is settled law that where a tenant does not deny the whole title of his landlord but sets up the right of a third party as co-sharer, there can be no forfeiture. The case of *Srimati Mallika Dassi* v. *Makham Lal Chowdhury* (1) is authority for this proposition. The learned District Judge was, therefore, wrong in ordering a re-trial of this issue. The question of *res judicata* is a more difficult one. As between the defendant No. 1 and the plaintiffs the question whether the plaintiffs were the sole landlords of the holding was directly and substantially in issue in the ejectment suit and under section 11, Civil Procedure Code, a decision on that issue must be held to be *res judicata* as betweeen these parties. In this suit, therefore, the plaintiffs are not entitled to a declaration as against the defendant No. 1 that they are 16-annas owners of the holding. Therefore, so far as the defendant No. 1 is concerned he must be dismissed from the suit.

There remains the question whether, as against defendants Nos. 2 and 3, the alleged co-sharers of the plaintiffs, the plaintiffs are entitled to a declaratory decree in respect of their share. We think section 11 does not stand in their way for this purpose, and it is within the discretion of the Court to give the declaration such as the plaintiffs require, if the Court is satisfied that it should do so under section 42 of the Specific Relief Act. We think, therefore, that the remand order should stand and the case go back for disposal of the issues affecting the defendants Nos. 2 and 3.

The defendant No. 1 will get his costs in this Court. The costs of the remaining Courts will abide the result. We asses the hearing fee in this Court at two gold *mohurs*.

Order varied.

(1) 9 C. W. N. 928.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 113 OF 1914.

November 25, 1914.

Present:—Justice Sir George Knox, KT.

EAST INDIAN RAILWAY COMPANY—DEFENDANTS—PETITIONERS

versus

BINDA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Cause of action arising in part—Jurisdiction.

The plaintiff contracted with the defendant Company for carriage of grain and seed from Cawnpore to Jagganath Ghat *via* Howrah. He paid for the conveyance of several consignments certain sums of money which, he subsequently discovered, were in excess of what he should have paid. He sued for the recovery of the excess sum at Cawnpore:

Held, that the cause of action having arisen in part at Cawnpore, the Cawnpore Court had jurisdiction to entertain the suit.

Revision against the decree of the Small Cause Court Judge of Cawnpore, dated 9th March 1914.

Mr. *Ladli Prasad Zutshi*, for the Petitioners.

Mr. *Kailas Nath*, for the Respondent.

JUDGMENT.—The suit out of which this application has arisen was brought by one Binda. Binda had contracted with the East Indian Railway Company, defendants in the Court of first instance, for the carriage of grain and seed from Cawnpore to Jagganath Ghat *via* Howrah. He paid for the conveyance of several consignments certain sums of money based upon a special rate, which was provided by the Company for the carriage of grain and seeds and which is known by the technical term of maund rate as opposed to another rate known as waggon rate. Apparently after he had paid the money, he discovered that the charge would have been lower if he had contracted with the Railway Company to carry consignments of grain at the rate known as waggon rate. He accordingly brought the present suit, asking for a refund of the amount which had been overcharged so far as a portion of the line of the defendant Railway Company was concerned. The consignments had to travel over the Railway of the defendant Company and also over the Eastern Bengal Railway. For the carriage of the consignments over that portion which belonged to the Eastern Bengal Railway he made no claim. He sued in the Court of Small Causes at

Cawnpore. That Court granted him a decree in part for Rs. 165-9-6, out of the claim which had been laid at Rs. 214-1-11. It is now contended before me that the Court of Small Causes at Cawnpore had no jurisdiction to entertain this suit, and the Railway Company base this contention upon a decision of this Court in *Amolak Ram* v. *Bombay, Baroda & Central India Railway Company* (High Court Decisions on Indian Railway Cases by Teruvenkata Chariar, page 477). In answer the learned Vakil who appears for Binda refers me to the change which has taken place in section 20 of the Code of Civil Procedure. There is no doubt that that section is considerably changed from what it was in the former Code of Civil Procedure. The portion which concerns the present case is clause (*c*) of section 20 of the present Code. In the old Code clause (*a*), section 17, ran thus: "The cause of action arises." In the present Code the words now used are: "The cause of action, wholly or in part, arises." The case of *Amolak Ram* v. *Bombay, Baroda & Central India Railway Company* was a case decided under the Code which was in force in the year 1888. Looking to the argument and reasoning given in that judgment, I am of opinion that that case would have been differently decided if it had been a case brought under the new Code. I find that the Court at Cawnpore had jurisdiction to entertain the suit inasmuch as the cause of action, at any rate in part, had arisen in Cawnpore. This being so, the plea of want of jurisdiction fails.

With reference to the second contention that the plaintiff is not entitled to alter the contract which he originally made with the defendant company, as this is a Small Cause Court case, I am not prepared to interfere. The application is dismissed with costs.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 408 OF 1912.

September 8, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

RAJMAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BRAHM SURAT—PLAINTIFF—RESPONDENT.

Mahant *of* math *or* sangat, *right to acquire property by—Subsequent treatment of property, effect of—Endowment, sufficient evidence of.*

A Mahant of a *math* or *sangat*, though required to observe celebacy, is not disqualified from acquiring property for his own personal benefit if he has funds of his own.

The evidence afforded by the subsequent treatment of the property for several generations by the parties concerned may in certain cases be legitimately used for determining the nature of the interest sought to be created.

Where there was no sufficient evidence to establish that the particular property in dispute was purchased from the income of the *sangat* or was dedicated to it by the founder of the *sangat* after his purchase and the succession to the property had not been consistent with its being endowed property:

Held, that the land in dispute did not form part of the endowed property.

Appeal against the decree of the District Judge, Fyzabad, dated 13th June 1912, upholding that of the Subordinate Judge, Fyzabad, dated 23rd March 1912.

Mr. *J. K. Banerji*, for the Appellants.

Babu *Salig Ram*, for the Respondent.

JUDGMENT.—The dispute in this case relates to groves Nos. 675, 726 and 757 *Khasra*, which were purchased by Madho Das, a Fakir of the Nanakshahi sect, sometime between 1883 and 1900. It appears that Madho Das had founded a *sangat* for the ownership of the *Granth* or the sacred book of the *Sikhs* and for the maintenance and shelter of the Sadhus of that sect at Bhikhapur. The *Granth* was formally installed there by Mahants of the same sect, who had come from Allahabad for the purpose in the Nawabi time, and the *sangat* was maintained thereafter by Madho Das as a public religious institution for the benefit of the people of the Nanakshahi sect and of others who might like to avail themselves of it. Subsequent to the foundation of the *sangat*, Madho Das acquired certain properties, including the groves now in dispute, and the question for consideration in this case is whether those groves were endowed properties and

whether the successors of Madho Das had any right to transfer or alienate the same. Madho Das died nine years ago, leaving three disciples, Brahma Tej, Brahma Bali and Brahma Kishen. Brahma Tej was blind and had a disciple named Brahma Sagar, who is a defendant to this suit. His contention is that according to the direction of Madho Das he was to get 10 *bighas* 5 *biswas* of land, comprising the groves in dispute, after his death; that mutation of names was effected in his name on the death of Madho Das and that he had a right to transfer the same. The Courts below found that the land in dispute formed part of the endowed property and that the alienations made by Brahma Sagar were invalid and unenforceable.

The sale-deeds of the disputed property stand in the name of Madho Das, who is described in some of them as Baba Madho Das Fakir, Nanakshahi, residing at *sangat* Bhikhapur, and in others as Mahant Madho Dass Fakir, Nanakshahi, residing at that *sangat*. The Courts below held that the purchases were made from the income of the *sangat* or, in other words, from the offerings made there, but no direct evidence was produced on that point. In *Ganga Das* v. *Basant Das* (1), where a grant was made to the Mahant of a *sangat* and the village granted had passed from Mahant to Mahant for the last 150 years, it was held that there was a strong presumption that the grant was intended for the support of the *sangat* and not for the private benefit of the grantee. The evidence afforded by the subsequent treatment of the property for several generations by the parties concerned may in certain cases be legitimately used for determining the nature of the interest sought to be created [*Mahant Puran Atal* v. *Darshan Das* (2)]. But a Mahant of a *math* or *sangat* though required to observe celebacy is not disqualified from acquiring property for his own personal benefit if he has funds of his own. There are no circumstances indicating that the purchase was made for the benefit of the *sangat*. On the death of Madho Das, his disciple, Brahma Kishen, was installed as a Mahant by the Mahants of the other Nanakshahi *sangats* elsewhere, but the property in dispute was entered in the revenue papers in the name of Brahma Sagar on the statements of the disciples of Madho Das, including Brahma Kishen, the predecessor-in-office of the plaintiff, who admitted that Madho Das had given it to Brahma Sagar in lieu of his services. The conduct of Madho Das, the founder of the *sangat*, in giving this property to Brahma Sagar shows that he treated it as his separate property. In *Sree Mahant Kishora Dossjee* v. *Coimbatore Spinning and Weaving Co., Limited* (3) it was held that there was no presumption that money paid by the Mahant of a *math* for the purchase of certain shares belonged to the *math* and the onus lay upon the person, who alleged that it belonged to the *math*, to prove the same. There is no sufficient evidence in this case to establish that the particular property in dispute was purchased from the income of the *sangat* or was dedicated to it by the founder of the *sangat* after his purchase.

The appeal is, therefore, allowed and the plaintiff's claim dismissed in respect of groves Nos. 675, 726 and 757 *Khasra* and the profits appertaining thereto with costs throughout.

Appeal allowed.

(1) 2 O. C. 319.

(2) 14 Ind. Cas. 698; 9 A. L. J. 709; 34 A. 168.

(3) 12 M. L. J. 439; 26 M. 79.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1128 OF 1913.

October 14, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

RAMASAMI IYER—PLAINTIFF—APPELLANT

versus

SRIRANGARAJA IYENGAR—DEFENDANT No. 2—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 211 and Civil Procedure Code (Act V of 1908), O. XX, r. 12, difference between—Future mesne profits—Res judicata—*First suit for possession and future profits under old Code—Possession alone decreed after new Code—Second suit for mesne profits for same period, maintainability of*—Res judicata *pleaded in first Court as regards part of claim—Plea taken as to whole claim in appeal—Decree dismissing whole suit in appeal, if legal.*

RAMASAMI IYER *v.* SRIRANGARAJA IYENGAR.

Under section 211 of the Code of Civil Procedure (Act XIV of 1882), the grant of future mesne profits was purely discretionary with the Courts and could not be claimed as of right and no cause of action would accrue in respect of them. But under Order XX, rule 12, of the new Code (Act V of 1908) the Court's power to direct an inquiry into future mesne profits is put on a par with its power to pass a decree for possession or past mesne profits, and there is nothing in the latter to indicate that the one relief is more a matter of discretion and less of right than the other.

Kuppusamy Aiyar v. *Venktaramier*, 15 M. L. J. 462, (F. B.), distinguished.

Where, therefore, a plaintiff in 1907 sued for possession of certain lands and for future mesne profits from date of plaint till delivery of possession and possession only was decreed and no mesne profits were awarded:

Held, that a subsequent suit for mesne profits for the same period was barred by *res judicata*.

Where in the above suit the defendant in his written statement pleaded that the matter was *res judicata* as regards the claim for mesne profits up to the date of the decree in the first suit, but in the memorandum of appeal to the lower Appellate Court pleaded that the whole claim was barred and the District Judge, accepting the plea, dismissed the whole suit:

Held, that, subject to the limitations set forth in Order XX, rule 12 (*c*), the mesne porfits for the period subsequent to the date of decree in the first suit stood on the same footing as those accruing during the pendency of the said suit and that the District Judge was quite justified in dismissing the whole suit.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 172 of 1912, preferred against that of the Court of the District Munsif of Tirumangalam, in Original Suit No. 239 of 1911.

FACTS.—The plaintiff originally instituted Original Suit No. 408 of 1907 in the Court of the District Munsif of Tirumangalam for possession of certain lands and for future mesne profits from date of plaint till delivery of possession. On 12th April 1910 he got a decree for possession only. This decree was confirmed on appeal and also on second appeal. He then brought the present suit (Original Suit No. 239 of 1911) in the same Court for recovery of the mesne profits not granted by the previous decree. The defendant contended that the matter was *res judicata* as regards the profits up to the date of the previous decree. The District Munsif decreed the plaintiff's claim. On appeal the defendant contended that the whole suit was barred by *res judicata* by reason of the previous decision. The District Judge, agreeing with the defendant's contention, dismissed the whole suit. The plaintiff thereupon preferred this second appeal.

Mr. *K. R. Rangaswami Iyengar*, for Mr. *C. V. Ananthakrishna Iyer*, for the Appellant :— The suit is clearly not barred by *res judicata* by reason of the previous decision. *Kuppusamy Aiyar* v. *Venkataramier* (1). In any event the plaintiff is entitled to a decree for mesne profits subsequent to the date of the decree in the prior suit, as the defendant never contested that portion of the claim in the Court of first instance. The action of the District Judge in allowing the defendant to raise that plea for the first time in appeal is clearly illegal.

Mr. *S. Varadachariar*, for Mr. *K. V. Krishnaswami Iyer*, for the Respondent :— The case of *Kuppusamy Aiyar* v. *Venkataramier* (1) cited for the appellant does not apply, that being a decision under section 211 of the old Code. The present Order XX, rule 12, departs from section 211 (old Code) and gives the Court the same power as to future mesne profits as it had in respect of past profits. The decree in the prior suit not having given future mesne profits which were expressly claimed, the claim ought to be deemed to have been refused and so the matter is clearly *res judicata*. The mesne profits for the period subsequent to the date of decree in the first suit stood on the same footing as that for the anterior period and the District Judge was quite justified in dismissing the whole suit.

JUDGMENT.—The plaintiff brought a suit (Original Suit No. 408 of 1907 on the file of the District Munsif of Tirumangalam) for possession of certain lands, and for future mesne profits from the date of plaint till delivery of possession. He got a decree, dated 12th April 1910, for possession only, which was confirmed on appeal and second appeal. His present suit (Original Suit No. 239 of 1911) is for mesne profits from 1907 to 1910 : and the sole question for disposal is whether this claim is *res judicata* by reason of the decree in Original Suit No. 408 of 1907 which did not award mesne profits for this same period, though they were sued for. The appellant relies on a Full Bench decision of this Court [*Kuppusamy Aiyar v. Venkataramier* (1)]. This would

(1) 15 M. L. J. 462 (F. B).

undoubtedly be conclusive on the point, but for the changes introduced into the present Code of Civil Procedure which, as it seems to us, place the matter on a totally different footing.

The basis of the decision in that case was that under the old Code the plaintiff could not ask for future mesne profits as of right, and could not be said to have a cause of action in respect of them : if the Court gave him a decree for them, it was in the exercise of a purely discretionary power conferred by section 211 of the Code of Civil Procedure, 1882.

Now in the new Code, section 211 disappears altogether and in Order XX, rule 12, the power of the Court to direct an inquiry into future mesne profits is put on precisely the same footing as the power of the Court to pass a decree for possession or for past mesne profits. There is nothing to indicate that the one relief is more a matter of discretion and less of right than the others : and it could hardly be contended that where past mesne profits have been sued for, and not decreed, in a previous suit, a subsequent suit for the same past mesne profits would lie.

In our opinion, the Full Bench ruling above quoted had reference to the provisions of the law then in force and is not applicable to the case before us.

We observe that in his written statement, the respondent only pleaded that the matter was *res judicata* so far as mesne profits up to 12th April 1910 were concerned; although he asked for the dismissal of the suit altogether. In his appeal memorandum to the District Court, however, he pleaded (paragraph 6) that the whole claim was "not entertainable as *res judicata*." Mesne profits after 12th April 1910 (date of the decree in the first suit) stand on just the same footing as those accruing during the pendency of the suit subject to the limitations set forth in Order XX, rule 12 (*c*), and we think the District Judge was justified in directing the dismissal of the whole suit.

The second appeal is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVENCES.

REVENUE PETITION No. 18 OF 1913-14 OF KHERI DISTRICT.

March 25, 1914.

Present:—Mr. G. A. Tweedy, J. M.

COURT OF WARDS, ESANGAR ESTATE —DEFENDANT—APPELLANT

versus

GAURI SHANKAR—PLAINTIFF—RESPONDENT.

Favourable rate of rent, tenant holding at—Ejectment, notice of, contested—Resumption Chapter applicable.

A tenant holding at a favourable rate of rent cannot be ejected by notice. Proceedings under the Resumption Chapter of the Oudh Rent Act must be taken against him.

Appeal from the decree of the Commissioner, Lucknow, dated 28th November 1913.

Pandit *Gokaran Nath Misra*, for the Appellant.

Munshi *Harbans Rai*, for the Respondent.

JUDGMENT.—I agree with the findings of the lower Courts. They have found that the respondent holds at a "favourable rent" and that proceedings under the Resumption Chapter must be taken if appellant wishes to proceed further. It is clear that the rent is a favourable rent when compared with the existing revenue and cesses and if we have to go back to 1877, we have the finding of a competent Court that they held at what was according to the law then in force a "favourable rent." This finding is quite apart from the question of a "special agreement." It has not been shown that their rights under the special agreement are heritable, but their rent is just what it was in 1887 and is, therefore, a "favourable" one. The appeal is dismissed with costs. I may add that the Court of Wards was ill-advised to file this appeal. More care should be taken by District Officers to make absolutely sure of their ground when filing second or third appeal against the decision of the Commissioner.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 573 OF 1913.

December 13, 1913.

Present:—Mr. Justice Shah Din.

BEJA AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 401—*Habitual gang of thieves—Facts necessary to be proved in order to sustain conviction—Evidence of bad character*—"Agoo", *position of—Evidence Act (I of* 1872), *s.* 49—"*Usages of any body of men*", *whether cover* Panchayat's *inferences or conclusions—Relevant fact—Evidence as to admission and confession, whether admissible.*

In order to sustain a conviction on a charge under section 401, Indian Penal Code, it is necessary to prove

(1) that there existed a gang of persons;

(2) that those persons were associated for the purpose of committing theft or robbery;

(3) that theft or robbery was to be committed habitually; and

(4) that the accused was a member of such gang,

But it is not necessary that each individual member of the gang should be proved to have habitually committed theft in company with the other members. Once it is established that a gang, however small in number, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in one or more cases of theft come within the purview of section 401.

The fact that an accused person is of bad character or is reputed to be a thief or a habitual thief is no evidence against him for the purposes of a charge under section 401, Indian Penal Code.

In re Shriram Venkatsami, 6 M. H. C. R. 120; *Peera* v. *Crown*, 37 P. R. 1869 Cr.; *Afridi* v. *Empress*, 9 P. R. 1880 Cr.; *Empress* v. *Shibba*, A. W. N. (1886) 15; *Empress* v. *Jahangira*, A. W. N. (1886) 6; *Empress* v. *Kure*, A. W. N. (1886) 65; *Empress* v. *Naba Kumar Patnaik*, 1 C. W. N. 146; *Mankura Pasi* v. *Queen-Empress*, 27 C. 139; 4 C. W. N. 97; *Public Prosecutor* v. *Bonigiri Pottigadu*, 2 Ind. Cas. 307; 9 Cr. L. J. 567; 32 M. 179; 5 M. L. T. 100; *Walia* v. *Emperor*, 6 Ind. Cas. 492; 11 Cr. L. J. 364; 18 P L. R. 1910; *Ghulam Mustafa* v. *Emperor*, 10 Ind. Cas. 833; 68 P. L. R. 1911; 45 P. W. R. 1911 Cr.; 12 Cr. L. J. 260 and *Ishar Das* v. *Emperor*, 17 Ind. Cas. 543; 36 P. W. R. 1912 Cr.; 13 Cr. L. J. 799; 258 P. L. R. 1912, referred to.

The *agoo* (the receiver of stolen property in the interests of theives who form a gang) is a principal member of the gang and is within the purview of section 401.

The words "usages of any body of men", in section 49 of the Evidence Act, do not cover the inferences or conclusions which village *punchayats* are wont to draw on the basis of their experience from the behaviour of alleged thieves under certain circumstances; and the opinion formed by the members of a *panchayat* as to the guilt of suspects when the latter decline to prove their innocence in the manner laid down by the *panchayat*, is not a relevant fact. Evidence as to admissions and promises made by alleged thieves before a *panchayat* is admissible without there being proof of the actual words used by the suspects before the *panchayat*.

Appeal from the order of the Magistrate, first Class, Karnal, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 22nd May 1913, convicting the appellants.

Mr. *Kirkpatrick*, for the Appellants.

Mr. *Herbert*, for the Respondent.

JUDGMENT.— * * * * * * * * The 40 persons, who had been arrested on suspicion of being the thieves concerned in the very large number of cattle thefts in the district, were then *challaned* together at the end of January 1913, under section 401, Indian Penal Code, to stand their trial in the Court of Mr. F. L. Brayne, who had been specially invested by the Local Government with powers under section 30 of the Criminal Procedure Code to try these persons. After the case came into Court but before the evidence for the prosecution was begun, the accused persons were divided into three gangs, and each gang was separately tried for an offence under section 401, Indian Penal Code. * * * * In the first case, all the members of gang No. 1 have been convicted by the Magistrate under section 401, Indian Penal Code, and have been sentenced to undergo various terms of imprisonment and to pay heavy fines; in the second case, accused No. 11, Umrao Singh, *alias* Lala, was discharged on the 20th of February 1913 and accused No. 6, Albela, was acquitted, the remaining 10 accused persons being found guilty under section 401 and sentenced to imprisonment and fine; and in the third case, four of the accused persons were acquitted, namely, accused Nos. 2, 3, 4 and 6, and the remaining 8 accused were convicted and sentenced under section 401, Indian Penal Code.

Three separate appeals have been preferred in this Court on behalf of the convicted members of gangs Nos. 1, 2 and 3, respectively, and the three cases have been argued before me most ably and exhaustively by Mr. Kirkpatrick, who has appeared for the appellants in each case, and by Mr. Herbert, who has appeared for the Crown. The arguments have occupied altogether 12 days and every aspect of each of the three cases has been discussed at great length on both sides, and I have carefully gone through the bulky records with Mr. Kirkpatrick and Mr. Herbert, whe have spared no pains to

lay before me everything which they considered material to the decision of these appeals. I must express my obligations to these gentlemen for the assistance they have rendered me in unravelling the tangled skein of the evidence relating to certain material points in these cases; and I may also note in this place that some of the statements, which have been prepared under my direction by Mr. Macpherson, Superintendent of Police, who has been present in Court throughout the trial of these appeals, have also proved to be of great use to me in reducing to some sort of order the bewildering details deposed to by the witnesses for the prosecution.

* * * *

It would be convenient to state in this place that the introduction to the three judgments, which extends over no less than 58 manuscript pages, deals mainly with the following points:—

(1) The prevalence of the crime of cattle lifting in the Karnal District since a very long time, the ease with which owing to the physical features of the country the cattle lifters can commit their depredations and escape detection, and the extensive area which is covered by their thieving operations.

(2) The existence in the district of organized bands of cattle lifters and their relations with certain influential men of their fraternity who are called *agoos i.e.*, receivers or passers-on of cattle, who are said to be the mainstay of the gangs and their most active helpers and supporters in times of trouble.

(3) Various ways in which the villagers trace their stolen cattle to the haunts of the thieves and the means which they generally employ for recovering their cattle from the latter without having recourse to the Police or the Law Courts.

(4) The very large part played by what are called *panchayats* of villagers, improvised for the occasion, in the tracking and recovery of stolen cattle by bringing moral or social pressure to bear upon cattle thieves themselves or on the *agoos* with whom the thieves are believed to be associated, or by employing threats of a resort to the authorities.

(5) The very great weight which attaches to the conclusions arrived at by the *panchayats* as to the guilt or innocence of suspected persons in connection with cattle thefts, and the absolute trustworthiness of the evidence given in the present cases by persons who had acted as members of such *panchayats*.

(6) The identification of stolen cattle at the camping ground in Karnal out of the large herds of cattle which were seized and collected by the Police after the present appellants had been arrested on suspicion in January 1913.

(7) The value of the evidence given by the prosecution witnesses and the cumulative effect of that evidence.

(8) The value as evidence of the alleged admissions made by the appellants or some of them to *panchayats* on different occasions, and the inferences drawn by the *panchayats* from their acts or attitudes as regards their guilt or innocence.

* * * *

Reverting now to the 4th, 5th and 8th points noted above, I must say at once that, in my opinion, the Magistrate has gone wrong in attaching too much importance to the proceedings of the *Panchayats* referred to by the witnesses for the prosecution and has in this connection admitted evidence which is clearly inadmissible. The machinery of the *Panchayats* is thus described by the Magistrate (page 11), "once the owner of the lost cattle is satisfied that he has found the thief or the *agoo*, he takes a few friends, including, if possible, one or two influential men of his own or a neighbouring village, and visits him at his village."

* * * *

Mr. Kirkpatrick has referred to these passages in the introduction with a view to show that the Magistrate has seriously erred in admitting as evidence in these cases the opinions of the *Panchayats* as to the alleged guilt of some of the appellants in connection with certain cattle thefts when, according to the prosecution, on the *Panchayats* going to them the appellants refused to treat with the *Panchayat* or to take the oath of innocence or to get another man to take such oath. I think that this contention is correct. Mr. Herbert has relied on section 49 of the Evidence Act in support of his argument that the opinion of the members of the *Panchayat* in cases such as those referred to by the Magistrate is admissible. I cannot accept this contention. In my opinion the words "usages of any body of men"

which occur in section 49, do not cover the inferences or conclusions which *Panchayats* of the kind mentioned by the Magistrate are wont to draw on the basis of their experience from the behaviour of alleged thieves under certain circumstances; and the opinion formed by the members of the *Panchayat* as to the guilt of the suspects, when the latter decline to prove their innocence in the manner laid down by the *Panchayat*, is not a relevant fact under the said section 49. It will be observed that the Magistrate goes much further than Mr. Herbert would go, for whereas under section 49 of the Evidence Act the opinion of the *Panchayat*, according to the learned Pleader, would only be a relevant fact as to what the usage of the fraternity of the thieves is, the Magistrate holds that that opinion is conclusive of the guilt of the alleged thief or, in other words, is "proof positive that he is in fact guilty." For this view there is no warrant in law; and I, therefore, agree with Mr. Kirkpatrick that the Magistrate is seriously mistaken in treating as evidence, and as evidence of a most valuable kind, the opinion formed as to the guilt of some of the appellants by certain prosecution witnesses when they went to them as members of a *Panchayat* in connection with an alleged case of cattle theft. I have accordingly treated all such opinions as irrelevant and have excluded them altogether from consideration.

The value of admissions alleged to have been made before the *Panchayats* by suspected thieves is, of course, a different matter. Mr. Kirkpatrick strenuously contended that, except in cases in which the actual words of an admission of guilt said to have been made by one of the appellants have been proved, evidence as to such admissions having been made before *Panchayats* is not admissible. The answer to this argument is two-fold. In the first place, we find that very many of the prosecution witnesses have, in each of the three cases, given, if not the actual words, at least the substance of the admissions made before them, which, in my opinion, sufficiently complies with the requirements of the law. In the second place, the evidence given by some of the witnesses does not relate to the actual admissions of guilt, but is only to the effect that the thief concerned admitted that he or his friends or relations had the cattle which were the subject of inquiry and that he promised to restore then. How far such admission and promise can be treated as evidence of the man being actually guilty of theft is another matter, but there can be no doubt that the evidence as to such admissions and promises is admissible without there being proof of the actual words used by the suspect before the *Panchayat*.

* * * * *

So much for the Magistrate's introduction. Before dealing with the individual cases of the three gangs separately, it would clear the ground to notice briefly the law applicable to them, which is contained in section 401 of the Indian Penal Code. As to the proper interpretation of that section the following authorities were cited before me on both sides: *In re Shriram Venkatasami* (1); *Peera* v. *Crown* (2); *Afridi* v. *Empress* (3); *Empress* v. *Shibba* (4); *Empress* v. *Jahangira* (5); *Empress* v. *Kure* (6); *Empress* v. *Naba Kumar Patnaik* (7); *Mankura Pasi* v. *Queen-Empress* (8); *Public Prosecutor* v. *Bonigiri Pottigadu* (9); *Walia* v. *Emperor* (10); *Ghulam Mustafa* v. *Emperor* (11); *Ishar Das* v. *Emperor* (12). I have carefully considered all these rulings and have given every weight to the respective arguments of Mr. Kirkpatrick and Mr. Herbert as to how far the evidence on the record of each of the cases before me is sufficient for proving the necessary ingredients of the offence of which the appellants have been convicted by the Magistrate in the Court below. What the decisions of the various High Courts in fact lay down is this. To sustain a conviction on a charge under section 401, Indian Penal Code, it is necessary to prove (1) that there existed a gang of persons; (2) that those persons were associated

(1) 6 M. H. C. R. 120.
(2) 37 P. R. 1869 Cr.
(3) 9 P. R. 1880 Cr.
(4) A. W. N. (1886); 15.
(5) A. W. N. (1886 ; 16.
(6) A. W N. (1886); 65.
(7) 1 C. W. N. 146
(8) 27 C. 139; 4 C. W. N. 971.
(9) 2 Ind. Cas. 307; 32 M 179; 9 Cr. L. J. 567; 5 M. L. T. 100,
(10) 6 Ind. Cas. 492; 18 P. L. R. 1910; 11 Cr. L. J. 364.
(11) 10 Ind. Cas 833; 68 P. L. R. 1911; 45 P. W. R. 1911 Cr. 12 Cr. L. J. 260.
(12) 17 Ind. Cas. 543; 36 P. W. R. 1912 Cr.; 13 Cr. L. J. 799; 258 P. L. R. 1912.

for the purpose of committing theft or robbery; (3) that theft or robbery was to be committed habitually; (4) that the accused was a member of such gang. The habitual commission of theft necessarily implies an aggregate of acts by some members of the gang or by all of them, but it is not necessary that each individual member of the gang should be proved to have habitually committed theft in company with the other members. Once it is established that a gang, however small in number, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in one or more cases of theft come within the purview of section 401. There may be cases in which an accused person would be guilty under section 401 without proof of his having committed even one theft either by himself or in company with the other members of the gang, but in such cases there must be very clear evidence of his membership of the gang and of the fact that the gang consisted of persons associated for the purpose of habitually committing theft. The accused, whether he is himself a thief or not, must belong to a gang of persons who make it their business to commit theft; and though it is not essential for the purpose of conviction under section 401 that the evidence against the accused should show the same degree of particularity, accuracy or fulness of details as to the commission of each individual theft in a series of crimes as is required to support a substantive charge of that crime in a separate prosecution for one act of theft, it is necessary to prove that the person accused was associated with others who were all inspired with the common intention and purpose specified in the section, namely, the habitual commission of thefts. The fact of association and that of the habitual commission of theft have, however, to be proved by evidence which would be admissible according to the Evidence Act and, therefore, evidence of bad character or of general repute such as would be sufficient, for instance, in connection with proceedings under section 110 of the Criminal Procedure Code is inadmissible against persons who are tried under section 401, Indian Penal Code. The fact that an accused person is of bad character or is reputed to be a thief or a habitual thief is no evidence against him for the purposes of a charge under the aforesaid section [*Empress* v. *Naba Kumar Patnaik* (7); *Mankur Pasi* v. *Queen-Empress* (8); *Public Prosecutor* v. *Bonigiri Pottigadu* (9).]

The gist of Mr. Kirkpatrick's argument was that in none of the three cases before us had it been proved that there was a *gang* of persons *associated* for the purpose of *habitually* committing theft and that the individual appellants belonged to such a gang. The learned Counsel admitted that in order to bring his case within section 401 each individual member of the alleged gang need not have taken part in any single theft committed by the other members thereof; but he insisted that there must be clear proof of association among a reasonable number of persons (according to him generally more than two) for the specific purpose of habitually committing theft; that the association must have direct reference to that purpose and to no other; that the habitual commission of theft by the persons constituting the gang must be established by direct evidence as to the commission of individual thefts by some or by all of them jointly; and that if the fact of the association can be referred to some purpose other than the purpose specified in the section in question, then the mere fact of an accused person having been associated with a number of persons who are all inspired with the illegal intention would not make him liable under the section. In other words, it was contended that even in cases where thefts are proved to have been committed by more than one of the accused persons jointly, it must be shown, for the purposes of section 401, that they were committed, not as isolated thefts for the benefit of the thieves themselves, but for and on behalf of the whole gang who were on their trial under that section. As regards the *agoos*, whose position in the three gangs has been explained by the Magistrate, it was argued that, on the Magistrate's own showing, they were simply habitual receivers of stolen cattle; and that, although they may have received stolen cattle from the alleged members of the three gangs, such receiving must have been for their own benefit, and they had, therefore, no direct concern with the gang so far as the habitual commission of theft by the gang is concerned. Habitual thieves,

if they are associated together for the purpose specified in section 401, may come within its purview, but not habitual receivers of stolen property from those thieves, the case of the latter being specially provided for in section 413 of the Indian Penal Code. The latter part of the argument can be disposed of in a few words. The evidence in these cases, which I shall discuss in its proper place, sufficiently establishes, in my opinion, that the *agoo* is an important part of the machinery devised by the fraternity of the thieves in the Karnal District for the purpose of carrying on their depredations successfully. It is not correct to say that these *agoos* receive stolen property for their own benefit and on their own behalf; in some instances they keep the stolen cattle in their own possession, while in others they pass them on into other hands; but whether they adopt the one device or the other, the object in most cases is to have possession of, or control over, the stolen cattle in the interests of the theives who form a gang. Whenever the aggrieved owners succeed in tracing the stolen cattle to the *agoo* or to any of the other persons to whom he has passed on the cattle, the *agoo* himself takes a direct and prominent part in the negotiations for the restoration thereof in such a manner as to show by his conduct that he is not protecting his individual interests solely, but that he is moving in the matter as the representative member of a larger group. The evidence in these cases seems to me to show that the *agoo*, though not himself the thief, is a principal member of the gang of thieves, and but for his existence as part of the organization, the members of the gang would find it risky or difficult to habitually commit the crime of cattle lifting. He is so inextricably mixed up with an organized band of thieves that his alleged individual capacity of receiver of stolen property is indistinguishable from the part he plays in keeping possession of it or in passing it on into safer hands with the primary object of rendering it difficult for the original owners to trace it, the ultimate purpose almost always being to hold the property for the benefit of the thieves as well as of himself. I gather that the chief function of the *agoo* in connection with the crime of cattle lifting with which we are dealing in these cases, was to afford special facilities for the concealment or disposal of stolen cattle, thus effectually helping in the successful commission of thefts and, on the approach of village *Panchayats*, to hold negotiations with them as a spokesman of the thieves and, where necessary, to ward off or delay further action by the *Panchayats* by promising restoration of cattle and sometimes actually restoring them to the real owners. If this much be established by the evidence, I do not see how it can be rightly argued that the *agoo* is simply and solely a habitual receiver of stolen cattle, and that even if he has constant dealings with individual thieves or groups of thieves his case cannot fall within the purview of section 401, Indian Penal Code. As I have said above, in order to sustain a charge under that section it is not necessary that an accused person should have committed a single act of theft himself: all that is essential is that he should belong to a group of persons who are associted for the purpose of habitually committing theft. And this is precisely what, in my opinion, has been proved to be the position of the three appellants who have been convicted as the *agoos* of the three gangs in these cases.

As regards the first branch of Mr. Kirkpatrick's agrument, the prosecution have, of course, to prove that each of the appellants belonged to a gang of persons and that those persons were associated for the purpose of habitually committing theft. As laid down in *Public Prosecutor* v. *Bonigiri Pottigadu*(9): "The associating and the purpose of the association may be proved by direct evidence, such as evidence that the accused, or the accused and others, met and determined to join together for the purpose of habitually committing dacoity.....In the absence of direct evidence the associating and the purpose of the association may be established by proof of acts from which they may be reasonably inferred." It is proof of this latter character that the prosecution claim to have adduced in these cases, and it is a question in each case as to whether that proof is sufficient for the convictions of the appellants in that case under section 401, Indian Penal Code.

* * * * *

Before discussing the evidence in regard to each appellant, I may note in this place

that Umrao Singh *alias* Lala, *Lambardar* of Imritpur Kalan, who was *challaned* as accused No. 11 in gang No. 2, was, at the request of the Public Prosecutor, discharged by the Magistrate on the 20th February 1913 (see page 3 of the record in the case of gang No. 2). On the 12th of March, *i.e.*, about three weeks after he had been discharged, Lala was examined as a witness for the prosecution, first in case No. 1 which is the subject of the present appeal, and thereafter in case No. 2. His cross-examination was reserved, and it was not until the 5th of April that he was cross-examined by the defence in both the cases. Some reliance has been placed by the Magistrate on Lala's evidence in both the cases in respect of matters as to which that evidence has been corroborated by independent evidence. Mr. Kirkpatrick for the appellants has taken strong exception to the procedure of the prosecution in relation to Lala. He has urged that if the prosecution intended to examine Lala as a prosecution witness and his discharge in case No. 2 was procured simply with that end in view, his statement should have been taken down immediately after he was discharged. Instead of that, he was examined about three weeks later, and it is reasonable to presume that in the meantine he had been persuaded and tutored by the prosecution to give evidence on material points in their favour. In fact, the learned Counsel suggested that the prosecution must have won him over to their side and ascertained what he was going to say in their favour before asking the Magistrate to discharge him. This suggestion is not borne out by anything in the Police papers, as there is no trace of any statement having been made by Lala before the Police until after he had been discharged by the Magistrate. I think, however, that it was necessary in the ends of justice to examine Lala as a witness soon after he was discharged, and the fact that he was not so examined does, to a certain extent, detract from the value of his evidence. His evidence, however, cannot be wholly ignored in a case of this kind, and wherever it is corroborated in material particulars by independent evidence, it should, I think, be accepted as reliable.

* * * * *

No. 3, Munnakka. The evidence proves that this man is separate from his father, Beja, and has nothing to do with the Bahlolpur *baras*. The only owners who live jointly with Beja are Moola and Kabiz, and in order to make Munnakka liable as a member of Beja's gang very satisfactory evidence of his association with his father and brothers or with some of the other appellants in the habitual commission of thefts must be forthcoming. In my opinion there is no such evidence on the record. There is only one case against him alone, and of the eight cases which are said to be proved against him as showing his association with his father and his brother, I find that the evidence regarding cases Nos. 57, 102 and 104 is not very convincing so far as Munnakka's alleged share in the thefts is concerned. Beja figures prominently in those cases, and the mere presence of Munnakka when the *Panchayats* went to Beja does not necessarily establish the association of Munnakka with his father or his other brothers. I, therefore, hold that it is not proved that Munnakka belonged to this gang.

* * * * *

I have now dealt with each appellant in this case separately; and as a result of the findings recorded above I hold that Beja No. 1, Jhanda, Moola, Kabiz, Kundan, Ajab, Majnun, Beja No. 2, Niadar No. 1, Sheo Chand, Ramji Lal and Bhagwana all belong to a gang of persons associated for the purpose of habitually committing cattle theft; and I accordingly hold that they are all guilty under section 401, Indian Penal Code. I may note here that the learned Counsel for the appellants did not touch the evidence for the defence in his argument before me, nor did he urge that in the event of the appellants being held guilty under section 401 aforesaid the sentences passed upon them by the Magistrate were too severe. I think myself that such a contention on the part of the learned Counsel would not have been justified, as it is clear that in view of the great prevalence of the crime of cattle theft in the Karnal District and of the serious loss which has been suffered by the cattle owners by reason of the depredations of cattle thieves extending over a long time, persons who are found guilty under section 401 must receive deterrent sentences. I have, therefore, no hesitation

in maintaining the sentences of the above-mentioned appellants whom I have held guilty under section 401, Indian Penal Code, and I dismiss the appeal so far as they are concerned. As regards the remaining appellants, Munnakka, Abdulla, Kanahaya and Niadar No. 2, I hold that it is not satisfactorily established that they are members of a gang of thieves within the meaning of section 401; and accordingly accepting their appeal, I set aside their convictions and sentences and acquit them.

Appeal partly accepted and partly dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 458 OF 1912.
TAKEN UP CASE No. 12 OF 1912.
November 26, 1912.
Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.
In re S. SUPPAYA THARAGAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), *ss.* 476, 537 (b)—*Order to prosecute—No order directing accused to be taken to nearest Magistrate—Irregularity in proceedings, effect of.*

An order directing the prosecution of an accused, under section 476, Criminal Procedure Code, is not illegal but irregular if it does not at once direct the accused to be taken before the nearest first Class Magistrate, and the irregularity is such as is expressly cured by section 537 (*b*), Criminal Procedure Code.

In the matter of the petition of Bhup Kunwar, 26 A. 249; A. W. N. (1904) 15; 1 Cr. L. J. 73, dissented from.

Case taken up under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), by the High Court to revise the judgment of the Acting District Judge, in Criminal Appeal No. 27 of 1912, preferred against that of the Joint Magistrate of Palghat Division, in Calendar Case No. 19 of 1912.

Mr. *A. Sundaram*, for the Accused.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

ORDER.—We are unable to agree with the Sessions Judge that there was any illegality in the order of Thomas, the Magistrate, under section 476, Criminal Procedure Code, on the 15th January 1912.

His omission to at once direct the accused to be taken before the nearest first Class Magistrate was at most an irregularity, which was set right by the subsequent order directing him to be taken before such Magistrate. Such irregularity is expressly cured by section 537 (*b*), Criminal Procedure Code. We are unable to agree with the view taken by Stanley, C. J., in *In the matter of the petition of Bhup Kunwar* (1) with refernce to the construction of that clause.

We set aside the order of acquittal made by the Sessions Judge and direct him to restore the appeal to his file and dispose of it according to law.

Order set aside.

(1) 26 A. 249; A. W. N. (1904) 15; 1 Cr. L. J. 73.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 376B OF 1913.
January 30, 1914.
Present:—Mr. Justice Twomey.
PWA ME—APPLICANT
versus
SAN HLA *alias* LEONG FOKE SHU—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 488—*Maintenance—Wife—Husband.*

Under section 488, Criminal Procedure Code, a woman cannot be granted a maintenance order against a man unless she proves herself to be his legal wife according to *his* personal law.

Mr. *Wiltshire*, for the Applicant.

Mr. *Dawson*, for the Respondent.

JUDGMENT.—In this maintenance case under section 488 of the Criminal Procedure Code, the applicant Ma Pwa Me is a Burmese Buddhist and the respondent San Hla *alias* Leong Foke Shu is the son of a Chinese father by a Shan mother. The parties are proved to have cohabited for six or seven years and to have had two children, one of whom is living, but there was no marriage ceremony of any kind. The Magistrate has found that even if they were both Burmese Buddhists, the circumstances do not give rise to a presumption that there was a legal marriage. He has found further that the respondent, San Hla, was not a Burmese Buddhist and that there was no marriage according to the Chinese Customary Law applicable to the respondent.

As regards the latter finding, it is clear that a maintenance order could not be granted against the respondent unless it was proved that the applicant was his legal wife according to his own personal law. An

attempt was made to prove that San Hla was converted to the Burmese form of Buddhism, but the evidence is not sufficient. He paid reverence to *pongyis* and listened to their sermons, and when one of his children died he took part in ceremonies which are usually performed by Burmese Buddhists. He also became a member of a society for promoting Buddhism, but it is admitted that several other Chinese belong to this Society without abandoning their own special form of worship. One witness states that when San Hla was a boy he was *Shinpyu'd* during the April holidays. But this is denied by his father and the allegation cannot be regarded as proved. The respondent produced several witnesses who state that he has always followed Chinese forms of worship. I agree with the following remarks of Mr. Justice Parlett in *Maung Tun Tha* alias *Wong Kin* v. *Ma Pu* (1): "The grounds on which the Magistrate considered applicant a Burmese Buddhist are that he is commonly known by a Burmese name; that he worships at *pagodas*, pays reverence to Buddhist monks and keeps fast days at Buddhist monasteries; and that he built a Buddhist monastery and dedicated it according to the ritual observed by Burmese Buddhists in such cases. It is a matter of common knowledge and experience that Chinamen long resident or born in this country adopt a Burmese name. As regards the other points, they indicate that he is a Buddhist, as he admits he is, but there is nothing to show that the practices he followed differ from those followed by all Chinese Buddhists, whether in Burma or elsewhere, much less that they are the peculiar characteristics of Burmese Buddhists." I think the Magistrate was right in deciding against San Hla's alleged conversion to the Burmese form of Buddhism. Even if this conversion had been proved, I doubt whether it would follow that San Hla should be held amenable to the customs by which the marriages of Burmese Buddhists are regulated. But as I find that San Hla is a Chinese Buddhist, it is clear that the validity of the marriage alleged in this case must depend on the Customary Law applicable to Chinese Buddhists. It is admitted that there was not even the semblance of a marriage according to Chinese custom. It is not alleged that any of the preliminary steps enumerated in Parker's work on Chinese Family Law were fulfilled.

As I find that the respondent is a Chinese Buddhist and that there was no marriage according to Chinese Customary Law, it is not necessary to deal with the further question whether the relationship of the parties would have amounted to a legal marriage if they had both been Burmese Buddhists.

The application is dismissed.

Application dismissed

(1) 8 Ind. Cas. 452; 3 Bur. L. T. 67; 11 Cr. L. J. 654.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 588 OF 1914.

August 8, 1914.

Present:—Mr. Justice Piggott.

FARZAND ALI—APPLICANT

versus

HAKIM ALI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Nomination of jurors—Principle to be observed by Magistrates.

It is not illegal for a Magistrate to address any inquiry to the person who first came forward to draw his attention to the existence of an alleged public nuisance, with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury but it would be highly improper on his part to appoint to serve on the jury the friends or supporters of the person at whose instance the proceedings are being taken.

It is, however, expedient that in all proceedings, initiated under section 133, Criminal Procedure Code, the Magistrate should bear in mind that he is supposed to be acting purely in the interest of the public and should be on his guard against any tendency to use the section as a substitute for litigation in Civil Courts in order to the settlement of a private dispute.

Upendra Nath Bhuttacharjee v. *Khitish Chandra Bhuttacharjee*, 23 C. 499; *Kylash Chunder Sen* v. *Ram Lal Mittra*, 26 C. 869, *Mir Imam Abdul Aziz* v. *Queen-Empress*, 4 P. R. 1897 Cr., referred to.

Criminal revision from an order of the Magistrate of Meerut.

Messrs. *J. J. Simeon* and *Uma Shankar Bajpai*, for the Applicant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Opposite Party.

JUDGMENT.—This is an application in revision in respect of certain proceedings taken by a Magistrate under section 133 and the succeeding sections of the Code of Criminal Procedure. The matter appears to have

been brought to the notice of the Magistrate by a petition presented by a person of the name of Hakim Ali. That petition stated in substance that Farzand Ali, who is the applicant now before me, had recently enlarged his dwellin-ghouse by making certain constructions which had the effect of obstructing a portion of a public way used by the residents of two villages, and that serious inconvenience was thereby being caused to the petitioner and other residents of the neighbourhood. After notice had issued to Farzand Ali, the latter applied in accordance with law for the appointment of a jury to try the question whether the conditional order issued by the Magistrate for the removal of the alleged obstruction was a reasonable and proper order. Farzand Ali, as he was entitled to do, nominated two jurymen. I note that he nominated two co-religionists of his own. The Magistrate appears to have inquired from Hakim Ali whether he could suggest the names of two other suitable persons to serve on the jury and thereupon Hakim Ali presented a petition suggesting the names of two Hindu residents of another village. The Magistrate then proceeded to nominate a foreman. It has been brought to my notice in the course of argument that the foreman originally nominated by the Magistrate declined to serve, that the Magistrate thereupon nominated another gentleman, a Muhammadan, and that this nomination was objected to on behalf of Farzand Ali. I have not pursued the history of this objection further because no plea is taken in the petition before me with regard to the appointment of the foreman. After the majority of the jury had decided the question referred to them in a sense unfavourable to Farzand Ali, the Magistrate proceeded to make his order absolute in accordance with law. Objection is now taken before this Court that the entire proceedings before the Magistrate, from the date of the order constituting the jury, are illegal and void by reason of the fact that two of the jurors were appointed on the suggestion of the petitioner, Hakim Ali.

There is authority for this proposition in the cases of *Upendra Nath Bhuttachariee* v. *Khitish Chandra Bhuttacharjee* (1) and *Kylash Chunder Sen* v. *Ram Lal Mittra* (2), in some older cases of the same Court referred to in the above decision, and I have also been referred to the case of *Mir Imam Abdul Aziz* v. *Queen-Empress* (3). Now it is certainly expedient that in all proceedings initiated under section 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public, and should be on his guard against any tendency to use this section as a substitute for litigation in the Civil Courts in order to the settlement of a private dispute. In the present case the question before the Magistrate was whether there had been an obstruction to a public way, to the injury or inconvenience of members of the public entitled to use the same. Hakim Ali had no *locus standi* in the matter once he had performed what was perhaps his duty as a good citizen in calling the attention of the Magistrate to the existence of the nuisance. In so far, therefore, as the rulings to which I have been referred lay down the principle that it is expedient that Magistrates should be on their guard against allowing a proceeding of this sort to assume the character of a private litigation and allowing it to be treated as a dispute to which two private individuals representing opposite interests are the parties, I am in entire accord with the same. I still more emphatically approve of the principle laid down in the Punjab case above referred to, that it would be highly improper on the part of a Magistrate to appoint to serve on a jury of this sort the friends or supporters of the person at whose instance the proceedings under Chapter X of the Code of Criminal Procedure are being taken. At the same time it must be remembered that it is often not an easy matter for a Magistrate to secure the services of a foreman and two independent jurymen to undertake in the public interests an inquiry of this sort, it may be, in some village distant from headquarters. If the rulings to which I have been referred are supposed to lay down the principle that it is illegal for a Magistrate to address any inquiry to the person who first came forward to draw his attention to the existence of the alleged public nuisance, with a view to

(1) 23 C. 499.

(2) 26 C. 869.

(3) 4 P. R. 1897 Cr.

ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury, then I am unable to concur in any such principle. It clearly goes beyond anything which is to be found in the provisions of the Code of Criminal Procedure itself, and it also goes beyond the requirements of the effective and impartial administration of justice. The criterion, therefore, which I would apply to a case of this sort, is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he were a party to the litigation, and whether as a matter of fact the jurors nominated by the Magistrate could rightly be described as friends or supporters of the aforesaid person. Even in the cases to which I have been referred, it is sufficiently clear that the underlying principle that the revisional jurisdiction of the Court should be exercised only to correct a manifest failure of justice, was clearly recognized. The record before me does not show that Farzand Ali at any time objected in the Court below to the two Hindu jurors who were nominated at the suggestion of Hakim Ali. Even in his petition to this Court he has not suggested, much less proved by affidavit, that these persons could be regarded as friends or supporters of Hakim Ali. I have, therefore, no materials before me which would justify the conclusion that these Hindu jurors were other than respectable and impartial residents of the neighbourhood and suitable persons to have been called upon to act as such; on the contrary the silence of the applicant in revision justifies the opposite presumption. So far, therefore, from being prepared to hold that the Magistrate's proceedings were illegal or void, I do not find them to be vitiated by any such impropriety or irregularity as would justify the interference of this Court.

The application is, therefore, dismissed.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 681 OF 1914.

June 5, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

HARNARAIN SARDAR AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 353—Charge of rioting—Common object wrongly stated, effect of—Acquittal—Conviction under another section, whether sustained—Proper course—Procedure.

Where in an appeal against conviction for rioting, a Sessions Judge acquits the accused finding that there has been an error or omission in the statement of the common object as set out in the charge, but convicts them of an offence under another section, which the accused were not called upon to answer, he commits a manifest error and the conviction cannot be sustained, as the accused are prejudiced thereby.

In such a case the order of acquittal made by the Sessions Judge should also be set aside and the accused should be ordered to be re-tried on charges properly framed.

Mr. *Norton*, Counsel, and Babus *Jogendranath Mukerjee* and *Dharmodas Banerji*, for the Petitioners.

Babu *Probodh Chandra Chatterjee*, for the Crown.

JUDGMENT.—In this case it appears that on the 9th of December last, the day of the *Mohurrum*, there was a collision between two *Mohurrum* processions or between those processions or one or other of them and the Police Officers on duty at the time and place in question. Of the *Mohurrum* parties one was composed of the employees of the Budge-Budge Jute Mill and, one spoken of as the Katki Dol, of the employees of an oil depôt. In the occurrence it would seem that four of the Police Officers and three members of the Katki Dol were injured.

The nine petitioners before us and some others were, therefore, placed on their trial before the Joint Magistrate of Alipore. Having heard the witnesses for the prosecution the Joint Magistrate framed against the accused a charge of rioting and in the charge so framed, it was stated that the common object of the unlawful assembly which has culminated in the riot, was "to assault the Police." No charges were framed under section 353 or section 323 of the Code. Why this was not done does not appear from the record. It may be that

the Joint Magistrate thought it unnecessary to ascertain which of the accused before him, if any, were responsible for specific injuries. In the result the Joint Magistrate convicted the nine petitioners (and one other accused with whom we are not now concerned) and sentenced them under section 147 of the Code to various terms of imprisonment.

On appeal the Additional Sessions Judge of Alipore came to the conclusion that the attack made by the mill employees was made, not upon the Police, but upon the members of the Katki Dol, and that the injuries suffered by some of the officers were sustained in their endeavour to separate the two *Mohurrum* parties.

Finding, therefore, that the petitioners were not actuated by any common design to assault "the Police," that the injuries caused represented the independent acts of individuals, and that in respect of any such injury only the person inflicting it could be made responsible, the Sessions Judge held that the charges framed by the Joint Magistrate failed and, therefore, acquitted the petitioners of the offence of rioting.

When from the evidence on the record the Sessions Judge deduced, as he appears to have deduced, that the common object of the petitioners and their companions was to assault the members of the Katki Dol, and when he also found that in the attack thus made upon that party some of its members were injured, whether upon these findings, if the Sessions Judge had been able further to hold that by the error or omission in the statement of the common object as set out in the charge the petitioners had been in no way prejudiced or misled, the Sessions Judge should or should not have affirmed the convictions, is a matter we need not now discuss.

Having acquitted the petitioners of the offence of rioting the Sessions Judge next proceeded to convict the petitioners of an offence under section 353 of the Code in respect of the assaults committed upon the several Police Officers. Here the Sessions Judge has fallen into manifest error. The petitioners had not been called upon to answer to any such charge and it cannot be said that they have not been prejudiced, for the judgment of the Joint Magistrate appears to show that in his opinion in the case of some, if not all of the petitioners, the evidence going to show that they had individually inflicted specific injuries, though sufficient to establish general activity in the riot, was not sufficient to prove the commission of the definite act alleged.

Moreover, in convicting the petitioners of an assault or assaults upon the Police the Sessions Judge has not found which Police Officer was assaulted by which petitioner, though in the view taken by him of the case such a finding was essential.

We, therefore, set aside the conviction of, and the sentences imposed upon, the petitioners under section 353 of the Code. But having regard to the finding arrived at by both Courts, and having heard learned Counsel for the petitioners on this point as on other points, we think that in this case our proper course is to set aside also the acquittal of the petitioners under section 147, and to direct that they be re-tried on charges properly framed under sections 147, 353, 323 and any other appropriate section of the Penal Code. We order accordingly.

Re-trial ordered.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 767 OF 1914.

September 10, 1914.

Present:—Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

GHASITE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 439, 562—Revision—Power of High Court to set aside order under s. 562 and to pass sentence.

A High Court cannot set aside an order under section 562 of the Code of Criminal Procedure and of its own authority substitute for that order a sentence of whipping or of imprisonment.

Criminal reference made by the Sessions Judge of Jhansi.

FACTS of the case appear from the following reference of the Sessions Judge:—"I have the honour to forward for favour of submission to the Hon'ble High Court the record of *Emperor* v. *Ghasite*, section 379 of the Indian Penal Code. The findings of the Court are that Ghasite was found in the railway goods-shed with three bags

of *gur* in his possession. The evidence shows that he had two companions. The Court believing the evidence of Mr. Norton, a mail engine driver and master of the accused, was of opinion that Ghasite had been sent by his master on an errand to the loco-sheds to find if Mr. Norton would be wanted to drive an engine that night and being accosted by two thieves gave way to the sudden temptation to join them. He, therefore, ordered the accused to give security for good behaviour for six months by executing a bond for Rs. 30, with one surety in the same sum.

"Mr. Norton's evidence appears to me most unconvincing. As a mail driver he could only be put in charge of a mail train and all mail trains leave Jhansi between 1-50 P. M. and 4 P. M. The necessity for inquiries at 10 P. M. is not apparent.

"It is notorious that in Jhansi as elsewhere railway thieves are chiefly recruited from the lowest grades of railway employees and the servants of superior employees. The accused in this case appears to be a typical railway thief working in concert with two others. Thefts in railway goods-sheds are so persistent and shameless that deterrent sentences should always be passed on conviction. It is not right that the accused should get off practically scot-free because his previous good character is vouched for by his master, whose evidence does not appear to be worthy of credit.

"I, therefore, submit this case with the recommendation that the order under section 562, Criminal Procedure Code, should be cancelled and a more suitable sentence, either of whipping or imprisonment, should be awarded."

JUDGMENT.—I think there is good deal to be said for the view taken of this case by the District Magistrate, but I am inclined to doubt whether it is worth this Court's while to interfere. The District Magistrate seems to think that this Court in revision can set aside an order under section 562 of the Code of Criminal Procedure and of its own authority substitute for that order a sentence of whipping or of imprisonment. Under sections 439/423, Criminal Procedure Code, this Court certainly could not take the action suggested. The provisions of section 439 itself empower the High Court in revision to enhance a sentence, but it is clear that no sentence has been passed in the present case. The Court, *instead of sentencing* the accused, has ordered him to enter into a bond to appear and receive sentence when called upon. The point of law thus taken may appear a technical one, but it is closely connected with another question of considerable importance, *viz.*, the question whether an appeal lies against an order under section 562 of the Code of Criminal Procedure. I have recently followed the Punjab Chief Court in holding that an appeal does lie, and that question necessarily depends upon the soundness of the contention that in a case like the present no sentence has been passed. It follows, therefore, that if this Court interferes at all in this matter, it can only order the case to be re-tired. Under all the circumstances of the case I do not think it worth while to take this step. Let the record be returned.

Record returned.

LOWER BURMA CHIEF COURT.

CRIMINAL REFERENCE No. 93 OF 1913.
February 3, 1914.
CRIMINAL APPEAL No. 979 OF 1913.
December 23, 1913.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.

PO MYA—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 234, 239—Charge—Joint trial of two persons for two distinct offences—Misjoinder—Re-trial of appellant.

To enable more persons than one to be charged and tried together for more offences than one, the offences must all form part of the same transaction.

Where there is a misjoinder of charges, the convictions and sentences must be set aside and a re-trial ordered in the case of the accused who appeals, whether he has been prejudiced by the misjoinder or not.

ORDER OF REFERENCE TO A BENCH.

TOWNEY, J.—The appellant, Nga Po Mya, was tried jointly at one trial with another accused, Tun Lin, for two distinct offences of house-breaking by night and theft under section 457, Indian Penal Code, the first offence having been committed at the house of one Maung Lwin on the 30th August

1913, and the second at the house of one Maung Saung in another village on the 30th September 1913.

The joint trial was, in my opinion, illegal. Under section 233, Criminal Procedure Code, the general rule is that there shall be a separate charge and a separate trial for every distinct offence. Sections 234, 235, 236 and 239 state certain exceptions to this general rule. Sections 235 and 236 are clearly not applicable to the present case. Section 234 permits the trial of an accused person at one trial for three offences of the same kind committed within twelve months, but this section does not apply to the case of two persons being tried together. The section which governs such a case is section 239, and it is an assential condition for the joint trial of two or more persons under that section that the offences with which they are charged should have been committed *in the same transaction*. It is not sufficient for this purpose to show that they were afterwards in joint possession of the proceeds of the several offences with which they are charged.

It might be argued from the concluding part of section 239—"*and the provisions contained in the former part of this Chapter shall apply to all such charges*"—that section 239 and section 234 may be read together and that when two or more persons within the space of 12 months have been engaged jointly in more than one criminal transaction, they may be tried jointly at one trial for any number of the joint offences not exceeding three. It does not appear to me that this is the true meaning of the concluding part of section 239; I think the words "*the former part of the Chapter*" refer only to the part headed "Form of charges", sections 221 to 232 inclusive.

In view of the decision of the Privy Council in *Subramania Aiyar* v. *Emperor* (1) the question is one of great importance, for if the misjoinder is contrary to the provisions of the Code the convictions and sentences must be set aside and re-trials must be ordered whether the accused persons have been prejudiced or not by the misjoinder. It is desirable that there should be an authoritative ruling on the matter.

(1) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.); 2 Weir 271.

I, therefore, refer to a Bench of this Court the question whether the joint trial of the two accused persons in this case for two distinct offences was contrary to the provisions of section 239, Criminal Procedure Code.

Mr. *Eggar*, Assistant Government Advocate, for the Crown.

The Bench gave the following

OPINION.

HARTNOLL, OFFG. C. J.—I can see no reason for differing from the opinion expressed by Mr. Justice Twomey. The meaning and applicability of section 239 of the Code of Criminal Procedure was considered by a Bench of the Calcutta High Court in the case of *Budhai Sheik* v. *Emperor* (2) and I am in accord with the reasoning of the learned Judges who decided it. To enable more persons than one to be charged and tried together for more offences than one, the offences must all form part of the same transaction. Section 233 of the Code of Criminal Procedure lays down the general rule that there shall be a separate charge for each accused and that such charge shall be tried separately. The following sections lay down exceptions to the general rule. Sections 234 to 238 apply to cases where one person may be dealt with at one trial for more than one offence. Section 239 applies to the trial of more persons than one jointly. The last words of section 239 do not, in my opinion, mean that section 239 and section 234 are to be read together. I am of opinion that they only refer to sections 221 to 232 inclusive. The charges in the present case were not, therefore, authorized by law, as they relate to distinct offences not committed in the same transaction. It was urged that if this view be taken, a new trial need not necessarily be ordered. As I read the decision in the case of *Subramania Aiyar* v. *Emperor* (1), there must necessarily be a re-trial in the case of Maung Po Mya, who has appealed. I notice, however, that Maung Tun Lin pleaded guilty and has not appealed and that his case was called for on revision by Mr. Justice Twomey. Our revisional powers under section 439 of the Code of Criminal Procedure are discretionary and in the case of *Emperor* v. *Tha Byaw* (3),

(2) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126.

(3) 4 L. B. R. 315; 9 Cr. L. J. 15 (F. B.).

a Full Bench of this Court did not set aside a conviction where an accused pleaded guilty and had not personally applied for revision although there was a misjoinder of charges in his case. It will be open to the Assistant Government Advocate to bring this case to the notice of Mr. Justice Twomey when he finally deals with the case of Maung Tun Lin.

I would answer the question referred by saying that the joint trial of Mauug Po Mya and Maung Tun Lin in this case for two distinct offences was contrary to the provisions of section 239 of the Code of Criminal Procedure.

ORMOND, J.—I concur.

Question answered accordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 843 OF 1914.

October 14, 1914.

Present:—Mr. Justice Piggott.

BRIJNANDAN PRASAD AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Breach of public peace—Magistrate should base his order on evidence on record and not on personal knowledge outside record—Findings to justify order—When object lawful, order improper.

The final decision in a case should be based simply and entirely upon evidence legally brought on to the record. Therefore, a Magistrate who possesses outside knowledge of matters which are not evidence in a case under section 107, Criminal Procedure Code, should keep that knowledge out of his judgment and endeavour to base his decision entirely upon the relevant evidence in the case.

To justify an order under section 107, Criminal Procedure Code, the Magistrate should find that even the person proceeded against is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that probably may occasion a breach of the peace or disturb the public tranquillity.

Queen-Empress v. *Abdul Kadir*, 9 A. 452; A. W. N. (1887) 111; *Jagat Narain* v. *Emperor*, 8 Ind. Cas. 818; 7 A. L. J. 1161; 11 Cr. L. J. 719, referred to.

The Hindu residents of a town whose object was to take the *Daschra* procession, or to cause it to be taken, down a particular route, not forcibly and in defiance of any prohibition which might be issued by the authorities, but with the sanction and under the protection of the authorities, cannot be rightly bound over under section 107, Criminal Procedure Code, to keep the peace.

Criminal revision from on order of the District Magistrate of Bijnor.

Messrs. *Satya Chandra Mukerji* and *Rama Kant Malaviya*, for the Applicants.

Mr. *Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision against an order passed by the learned District Magistrate of Bijnor, directing the twelve applicants to furnish security for keeping the peace under section 107 of the Code of Criminal Procedure. One of the original applicants has since died and the petition has been prosecuted on behalf of the remaining eleven. I may add that the District Magistrate's immediate object in taking the proceedings resulting in the present order was to provide for the preservation of the public peace in the town of Najibabad during the last *Daschra* festival. This has now passed off quietly, and from one point of view it might be said that, even though the period for which the applicants were required to furnish security has not yet expired, it has ceased to be a matter of serious importance whether the Magistrate's order is now affirmed by this Court or set aside. The question, however, is one of some public importance and, if I may judge from the account of the state of public feeling in the town of Najibabad given in the Magistrate's order, it is unfortunately probable that the matter may come up again in one form or another before the District Courts and eventually before this Court. I think it advisable, therefore, to deal with the application as it stands, that is to say, I propose to consider whether the order under the revision was or was not a good and proper order, on the materials on the record, at the time when it was passed by the Magistrate on the 8th of September last.

One point taken in the petition of revision before me is that the District Magistrate has imported into his judgment a number of facts personally known to him, of which there is no legal evidence on the record. The District Magistrate frankly admits that he was necessarily in possession, at the time when he instituted this inquiry, of a great deal of information of one kind or another bearing on the question of the propriety or otherwise of binding over these applicants to keep the peace. He suggests that the parties before him were fully aware of this

fact, and that their acquiescence in his proceeding with the inquiry, instead of applying for a transfer of the case to some other Court, virtually licensed him to import his own personal knowledge into the decision of the case to such extent as he might think proper. I may say that I regard it as a very satisfactory feature of the case that these applicants, while fully aware that the Magistrate of their district had had occasion to make personal inquiries of various kinds into the question of the dispute pending between different classes of the community in their town, felt such complete confidence in his impartiality and his anxiety to do justice between all classes of the community, that they had no desire to get the inquiry into this particular matter transferred to any other Court. At the same time they were entitled to ask that the final decision should be based simply and entirely upon evidence legally brought on to the record. To some extent at any rate it seems to me that this has not been done. There are references in the Magistrate's judgment to confidential papers in his own possession and to other matters which cannot possibly have been in evidence in the case. It may, no doubt, have been inevitable under the circumstances that the District Magistrate should have possessed outside knowledge of these matters, but he would have exercised a sounder discretion if he had kept that knowledge out of the judgment and endeavoured to base his decision entirely upon the relevant evidence in the case.

Another and more important point raised by this application may be stated in this form, that the findings of facts arrived at, no matter how, by the District Magistrate are not such as to warrant the order which has been passed requiring those applicants to furnish security. The Magistrate's judgment is a long one and contains a most interesting exposition of the circumstances which led up to the institution of the present proceeding and of the existing state of parties and of public feeling in the town of Najibabad. I have found it a little difficult, however, to disentangle from this general exposition of the facts the precise findings on the strength of which the order requiring the applicants to furnish security has been passed. What the law requires to justify this order is a finding that these applicants were likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. These provisions have been interpreted by this Court in a number of rulings, beginning with the elaborate exposition of the law to be found in the case of *Queen-Empress* v. *Abdul Kadir* (1). Of later cases the one most in point is, in my opinion, that of *Jagat Narain* v. *Emperor* (2). It is not enough for the District Magistrate to record his opinion that, unless these persons are bound over to keep the peace, there is likely to be a breach of the peace or disturbance of the public tranquillity. He has to find in respect of each and all of these persons that they are likely to commit a breach of the peace or disturb the public tranquillity, or that they are likely to do some wrongful act which may occasion such a disturbance.

The point essentially in issue admits of being briefly stated. The Hindus of the town of Najibabad had expressed a desire to take the *Dasehra* procession along a route which appeared to the local authorities a highly objectionable one. The District Magistrate has evidently come to the conclusion that this desire on the part of the Hindu community of Najibabad, or on the part of some members of that community, is perverse and provocative. To put the matter bluntly, he obviously thinks that no Hindu can have any desire to take the *Dasehra* procession along that particular route except for the purposes of irritating and provoking his Mahomedan fellow-citizens. He finds it proved as against all these applicants that they have been working in various ways in order to secure for the community of which they are members a recognition of their right to take the *Dasehra* procession along this particular route. He argues that they are, therefore, likely to do something which will occasion a breach of the peace or disturb the public tranquillity. The position taken up by the applicants in arguing their case before me seems to be substantially that which was taken up by them in the Magistrate's Court.

(1) 9 A. 452; A. W. N (1887) 111.
(2) 8 Ind. Cas. 818; 7 A. L. J. 1161; 11 Cr. L. J. 719

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I am not satisfied that it has been properly appreciated or considered by the Magistrate. The applicants contend that they themselves and the members of their community are entitled, in the lawful exercise of their religion and of their rights as citizens of the town of Najibabad, to take the procession down this particular route. They desire to contend that, if any breach of the peace results from their doing so, the blame would not lie on them, but on any other residents of the town of Najibabad who may take it on themselves to use force in order to interfere with persons exercising their lawful rights. They desire to persuade the authorities responsible for keeping the peace in the town of Najibabad that this view is the correct one. However mistaken this view may prove to be, if it is held in good faith, the persons so holding it are entitled to combine together for the purpose of pressing it on the notice of the authorities. The question to my mind is whether the evidence on this record justifies the conclusion that the present applicants, either as members of the Hindu community of the town of Najibabad or as persons entitled by custom to take a particular part in the annual *Dasehra* procession, have done anything more than what has been suggested above. Is it correct to say that it is proved in respect of these persons that they are likely themselves to commit a breach of the peace, themselves to disturb the public tranquillity, or to do any wrongful act which may occasion such breach of the peace or disturbance? Indeed, I may put this point even more strongly, and ask myself whether, apart from any question as to the effect of the evidence on the record, there has been any finding by the District Magistrate himself which goes so far as this against the petitioners. The District Magistrate has discussed the proceedings of the Hindu committee in Najibabad to which the majority of these applicants belong. If that committee is a seditious or illegal association, it ought to be proceeded against under the ordinary law. The evidence on this record would not justify a finding that the mere fact of membership of that committee would be sufficient to render any person liable to be bound over to keep the peace, nor do I understand that the District Magistrate wishes to arrive at any such finding. The essential finding at which the District Magistrate has arrived seems to be embodied in the following words in his judgment:—"They (*i.e.*, the petitioners) wish to get what they want for the future, and with this idea they have instituted a committee which collects funds in order to obtain the object they failed in last year. The attainment of this object would inevitably mean a breach of the peace between Hindus and Muhammadans." I think the District Magistrate might have paused to ask himself more definitely what the "object" above referred to was. It does not seem a sufficient answer to this question to say that the object was that the *Dasehra* procession might be taken down a particular route. Was the object of the petitioners to take the *Dasehra* procession, or to cause it to be taken, down that particular route, forcibly and in defiance of any prohibition which might be issued by authorities; or was it to obtain the recognition by the authorities of their claim to be entitled to follow that route, and so take the procession along the same with the sanction and under the protection of the authorities? In the former case the applicants have been rightly bound over to keep the peace, in the latter case they have not. Now it does not seem to me that the District Magistrate has come to a finding that, if these applicants were not restrained by an order binding them over to keep the peace, they would be likely to take the *Dasehra* procession, or to cause it to be taken, down this particular route without the permission of the authorities, or in defiance of any prohibition which the local authorities might issue. Indeed the expression about obtaining "the object failed in last year" suggests a contrary conclusion. What was the object in which the petitioners are alleged to have failed in the previous year? So far as I can gather, it was an attempt to persuade the authorities to permit them to use this route and to enforce, as against any person who might desire to contest the same, the petitioners' alleged right to do so. That the object in question at last year's *Dasehra* festival was not to take the procession by this route forcibly, and in defiance of the wishes of the authorities, seems to be a matter of fair inference from the fact that, when the local authorities refused such permission, no attempt was actually made to take the procession by the objectionable

route. Those members of the Hindu community who were dissatisfied with the decision of the authorities in the matter no doubt protested against the same, and appealed to superior authority; but it does not seem that they made any attempt to override that decision by criminal force. There is, no doubt, another passage in the District Magistrate's judgment which, if it stood alone, might suggest a different conclusion and an intention on his part to hold that, if securities were not taken from these applicants, there might be an attempt, as he puts it, "to force the route which was refused last year." This expression, however, seems to me difficult to reconcile with other passages in the same judgment. Moreover, it is not as it stands a sufficient finding of fact to justify the order complained of. It is too vague. It only expresses an apprehension on the Magistrate's part that an attempt might be made by some person or persons unspecified. To justify the order which has been passed in this case I should require a clear finding, resting upon reasonable evidence, that these applicants, if not bound over to keep the peace, would have been likely to employ force, or to incite other persons to employ force, in order to take the *Dasehra* procession along the objectionable route without the permission of the local authorities, and in defiance of any prohibition which those authorities might see fit to issue. It does not seem to me that there has been any such clear finding against the applicants in the present case. For these reasons I accept this petition of revision. I set aside the order complained of and direct that the security bonds furnished by these applicants be discharged. If the applicants, or any of them, have failed to furnish the required security, they should be released from confinement.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 541 OF 1914.

August 6, 1914.

Present:—Mr. Justice Piggott.

G. W. DICK—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code Act (XLV of 1860), ss. 23, 415, 428—Wrongful gain and wrongful loss—Acting fraudulently or dishonestly.

D who was a horse-dealer was entrusted by *C* with a mare to be disposed of at the best possible price. He received an offer from *L* which he did not accept. Subsequently *D* showed *L* a telegram which purported to have been sent by *C*, and thereby induced *L* to give a higher price for the mare. *L* stated that the price which he paid was the price which he would have paid even if the mare belonged to *D*:

Held, that no wrongful loss was caused to *L* within the meaning of section 23 of the Penal Code, by reason of the fact that he was induced to give a higher price of the horse and *D* could not, under the circumstances, be held to have acted fraudulently.

Criminal appeal against the decision of the District Magistrate of Lucknow, dated the 18th June 1914.

Mr. *R. F. Bahadurji* (with him Mr. *G. W. Dillon*), for the Appellant.

Mr. *L. M. Banerji*, for the Crown.

JUDGMENT.—Mr. G. W. Dick, a horse-dealer, has been convicted by the City Magistrate of Lucknow on a charge framed under section 420 of the Indian Penal Code, alleging against him, that he, by deceiving Captain Laing, R.A.M.C., dishonestly induced that gentleman to pay over to him a sum of Rs. 200. The essential facts of the case admit of being briefly stated. The appellant, G. W. Dick, is a horse-dealer and he was entrusted by Captain Castle with a racing mare of the name of Tigress, which animal he was directed to dispose of for the owner's benefit at the best possible price. He received from Captain Laing an offer of Rs. 800 which he did not accept. Captain Laing insisted that the offer should be communicated to Dick's principal, that is to say, Captain Castle, and subsequently the appellant showed Captain Laing a telegram received by him from Captain Castle which purported to be, and was understood by Captain Laing to be, a refusal on the part of Captain Castle of the aforesaid offer of Rs. 800. Thereupon Captain Laing raised his offer to Rs. 1,000, which was accepted,

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and he became the owner of the animal at that price. It may be noted at once that there was no misrepresentation of any sort, or any sharpe practice, towards Captain Laing with regard to the quality of the goods purchased by him, *i. e.*, of the mare 'Tigress'. He was allowed every opportunity of examining the animal and he paid Rs. 1,000 because, after reasonable trial and examination, he was satisfied that the mare was worth that price to him. Nevertheless it is true that a deception was practised upon Captain Laing in the matter of the telegram. As regards the precise nature of that deception the record before me is, in my opinion, seriously defective. Captain Castle has not been examined as a witness in the case. Broadly speaking, the lines upon which the trial proceeded in the Court below may be stated thus. The accused, G. W. Dick, was examined at length and the City Magistrate purports to accept as correct the story told by the accused in his examination, except where he finds it to be clearly contradicted by reliable evidence. The practical result is that the statements made by Dick have been accepted as true wherever they tell against him, and have been rejected where he tried to justifiy his action. On his own showing, the appellant's conduct in connection with this affair certainly does him no credit nor has he been always consistent in his account of the matter. The position which I understand him to have finally taken up is somewhat as follows. As agent for Captain Castle he had full authority to dispose of the mare 'Tigress' to any purchaser, provided he could secure a certain minimum price. Whether he intended the Court to understand that this minimum price was Rs. 500 or Rs. 600, I am not quite clear, but it was not less than Rs. 600. He found that Captain Laing was prepared to give Rs. 800 for the mare and might possibly be induced to pay even more. Thereupon he purchased the mare himself for Rs. 600, and prepared to appropriate for his own benefit the difference between this price and any sum which he might induce Captain Laing to pay. When Captain Laing insisted that his offer of Rs. 800 should be communicated to Captain Castle, it is obvious that Dick was placed in a difficulty. If the story told by him in Court is true, it was useless communicating any such offer to Captain Castle, because he was at the time himself the owner of the mare; yet one can well understand that he might feel considerable difficulty about admitting this fact to Captain Laing, for reasons independent of his desire to force that gentleman up to the limit of the price he was prepared to offer. I cannot say that the statement made by the appellant when examined as an accused person, or any other evidence on the record, really explains to my mind how Captain Castle was induced to send the telegram which is on the record as Exhibit D. It is no part of the prosecution case that this telegram was a forgery, or was not in fact despatched from Meerut by Captain Castle. I have no doubt on the evidence that it was represented to Captain Laing as a refusal of his offer of Rs. 800, and that it was so understood by him.

These, so far as I am able to state them, are the essential facts of the case. It must be remembered that the appellant's conduct towards Captain Castle has not been made the subject-matter of complaint by the latter, and has not been in issue at the present trial. Captain Laing's grievance appears essentially to be that, if the mare 'Tigress' was in fact the property of Captain Castle when he made his offer of Rs. 800 and if that offer had been communicated to Captain Castle, it would have been accepted by the latter; hence he feels that he was induced to raise his bid from Rs. 800 to Rs. 1,000 by unfair means. The prosecution, however, has proceeded on the assumption that the accused spoke the truth when he said that the ownership of the animal had passed from Captain Castle to himself. If so, it is difficult to see what grievance Captain Laing has in the fact that an offer of Rs. 800 was not communicated to a person who was no longer the owner of the animal. The real reasons why Captain Laing had to pay the additional Rs. 200 were, *firstly*, that he thought the animal worth Rs. 1,000 and *secondly*, that Mr. Dick, the owner of the said animal, was not prepared to accept an offer of Rs. 800 when he shrewdly suspected that the refusal of that offer would call forth a higher bid from Captain Laing.

I have hitherto considered the matter in its broad aspects. It may be worth

while also to deal with it, so to speak, more technically, with reference to the actual terms of the charge and of the provisions of sections 415 and 420 of the Indian Penal Code. Practically speaking there are two points set forth in the charge with reference to which Captain Laing is alleged to have been deceived. One is that the appellant, G. W. Dick, concealed from him the fact that he had himself become the owner of the mare 'Tigress' and professed to be selling the animal as agent for Captain Castle. I am prepared to discuss this point for the sake of argument, on the assumption that the appellant was speaking the truth when he said that he had become the owner of the animal by purchasing it himself under his general authority as agent for Captain Castle; but I wish it to be distinctly understood that there is no evidence on the record which proves this to be true, but a certain amount of evidence calculated to throw doubt on the suggestion. I make these remarks in view of any action which Captain Castle may see fit to take in the matter hereafter. Assuming, however, that the appellant, G. W. Dick, in his dealings with Captain Laing falsely represented Captain Castle to be the owner of the mare 'Tigress' at a time when the true owner was G. W. Dick himself, this circumstance cannot be made the basis of a charge of cheating, in view of Captain Laing's express admission that it had no effect on the price offered or paid by him. He expressly deposed that he would have paid the same price if he had known that the animal belonged to G. W. Dick and not to Captain Castle. The other point in respect of which it is alleged that the deception was practised on Captain Laing is in connection with the telegram, Exhibit D, already referred to. No doubt, Captain Laing was induced to believe that his offer of Rs. 800 had been communicated to Captain Castle and had been refused by the latter. To my mind, something more than this would have to be proved before a conviction could be affirmed under section 415, to say nothing of the more aggravated section 420 of the Indian Penal Code. The definition in the former of these sections shows that in order to support a conviction the accused must be shown to have acted either fraudulently or dishonestly. In the absence of any evidence from Captain Castle, I am certainly not prepared to find that the accused acted fraudulently in laying before Captain Laing a telegram which, it would appear, Captain Castle had sent him for the express purpose that it might be shown to some intending purchaser, if not to Captain Laing himself. The definition of the word "fraudulently," contained in section 25 of the Indian Penal Code, does not carry one beyond the statement that "fraudulently" is equal to "with intent to defraud;" but in the present case, if Dick intended to defraud any one by his proceedings, it was Captain Castle and not Captain Laing. If the appellant had been acting in a straightforward manner as agent of Captain Castle in this matter, he would have been perfectly justified in informing his principal that he had an offer of Rs. 800, but believed that he could get a higher offer still if he could produce a telegram suggesting that his principal would not accept this price and was not anxious to sell at all. The definition of "dishonestly" in the Indian Penal Code refers one to the definition of the expressions "wrongful loss" and "wrongful gain" in section 23 of the same Code. Now I am certainly not prepared to hold that "wrongful loss" was caused to Captain Laing by reason of the fact that he was induced to bid up to what he considered the full value of the animal he desired to purchase; the only question, therefore, would be whether "wrongful gain" was caused to the appellant, G. W. Dick. Here again it becomes obvious that the essential criminality of the appellant's conduct, if there was criminality, lay in his dealings towards Captain Castle and not in his dealings towards Captain Laing. In the absence, therefore, of Captain Castle's evidence I am not prepared to hold it proved that the appellant acted either "fraudulently" or "dishonestly" in connection with his dealings with Captain Laing as set forth in the charge.

It has been matter for serious consideration with me since I heard arguments, whether I should not direct the Court below to record and certifiy Captain Castle's evidence in the case. The record before me does not explain why the evidence of this important witness was not obtained even, if necessary, by the issue of a commission. It is not always possible or convenient for

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an Appellate Court to use its powers under section 428 of the Code of Criminal Procedure to correct deficiencies in the inquiry conducted by the trial Court. The present is not a very convenient moment for insisting on the examination of an officer in the army, and I do not know what practical inconvenience I might cause by passing an order for Captain Castle's examination at this stage of the proceedings. If I were quite certain that the absence of his evidence has resulted in a failure of justice, I might perhaps have run this risk ; but I cannot go further than entertaining a suspicion that Captain Castle's evidence might have thrown such light on the proceedings of the appellant as to have justified his conviction even upon the charge framed in this case. I feel no great certainty on this point; the possibility of a conviction would depend upon a highly technical view of the provisions of section 415 of the Indian Penal Code. The matter, as a whole, was one in which the person who really had ground for complaint was Captain Castle rather than Captain Laing, and if the former of these gentlemen has been badly used by the appellant, there would be nothing in the result of the present proceedings to debar him from seeking his remedy in the proper Court.

The result, therefore, is that the conviction is not, in my opinion, maintainable on the evidence as it stands, and that after considering the possible result of an order requiring further evidence to be taken under section 428 of the Code of Criminal Procedure, I am not satisfied that such an order is called for in the interests of justice. I accordingly accept this appeal, set aside the conviction and sentence in this case and acquit the appellant, G. W. Dick, of the offence charged. He appears to have been released on bail. His security will, therefore, be discharged and the fine, if paid, will be refunded.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 468 OF 1914.

CRIMINAL REVISION PETITION No. 395 OF 1914.

December 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

KANDASAMI ASARI—PETITIONER

versus

NARAYANA ASARI AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145—Petitioner, possession of, on behalf of both parties—Jurisdiction to pass order.

A Magistrate has no jurisdiction to pass an order under section 145, Criminal Procedure Code, when the possession of the applicant is neither exclusive nor superior to that of the opposite party but is on behalf of both the parties and the applicant merely wants a declaration to that effect.

Tarujan Bibee v. *Asamuddi Bepuri*, 4 C. W. N. 426, followed.

Bhaskaruni Kesavarayadu v. *Bhaskaruni Chalapatirayudu*, 31 M. 318; 18 M.L.J. 343; 8 Cr. L. J. 205; 4 M. L. T. 301; *High Court Proceedings, 15th November* 1880, *No.* 2301; 2 Weir 99, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 13 of the Charter Act, praying the High Court to revise the order of the Divisional Magistrate of Tuticorin in Miscellaneous Case No. 5 of 1914.

Mr. *V. C. Seshachariar*, for the Petitioner.

Mr. *M. D. Devadoss*, for the Respondents.

The Acting *Public Prosecutor*, for the Government.

ORDER.—The respondents (2nd party) admit in their counter-petition that the *Hukdars* of the temple consist of members both of the petitioner's sub-caste and of the respondents' sub-caste (paragraph 2 of the counter-petition). They did not allege that their sub-caste *Hukdars* alone are entitled to the exclusive possession and management of the temple. On the other hand, they merely wanted a declaration that "the temple is the common property of all Asaries." (Paragraph 7 of the counter petition).

The ruling in *Tarujan Bibee* v. *Asamuddi Bepuri* (1) directly applies, and the learned Magistrate had no jurisdiction on the finding he arrived at to pass any order under section 145, Criminal Procedure Code, as the respondents' possession was on their own allegations not exclusive possession or superior possession but possession, on behalf

(1) 4 C. W. N. 426.

of all the *Hukdars*. In the case of *High Court Proceedings*, 15*th November* 1880, *No.* 2301 (2), the successful party was in exclusive possession. In *Bhaskaruni Kesavarayadu* v. *Bhaskaruni Chalapatirayudu* (3) the possession of the manager of a Hindu family, which possession was in quality superior to that of the junior members, was protected. These two cases cited by Mr. Devadoss for respondents are, therefore, clearly distinguishable.

The learned Magistrate's order is, therefore, set aside.

Order set aside.

(2) 2 Weir 99.
(3) 31 M. 318; 18 M. L. J. 343; 8 Cr. L. J. 205; 4 M. L. T. 301.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 604 OF 1914.
CRIMINAL REVISION PETITION No. 510 OF 1914.

December 9, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Hannay.

In re ALI MAHOMED MUKRI AND ANOTHER—ACCUSED—PETITIONERS.

Madras Forest Act (V of 1882), *s.* 16—*Private land wrongly included in notification regarding proposed reserve, but omitted in demarcation—Private party in possession with* patta *and paying assessment—Conviction of trespass, if legal.*

Where, under a notification published under section 16 of the Madras Forest Act, V of 1882, certain land alleged to belong to the accused had been included in the tract proposed to be constituted a reserve forest but the same was excluded from the reserve at the time the latter was demarcated, and where the party alleging title continued in possession and enjoyment, a *patta* being issued to him and assessment received from him therefor, he cannot be convicted for trespass under the Forest Act.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Puttur, in Criminal Appeal No. 34 of 1914, preferred against that of the Stationary Second Class Magistrate of Uppanangadi Taluk, in Calendar Case No. 58 of 1914.

FACTS.—One Moideen Beari possessed some lands in the village of Kalingi, near which the Government wanted to reserve a forest, and a Gazette notification was accordingly published under section 6 of the Madras Forest Act of 1882. In this notification a portion of lands which Moideen Beari claimed to be his own were included. The latter preferred an appeal out of time and it was dismissed. A final notification was thereafter published under section 16 of the Madras Forest Act. But in demarcating the actual boundary of the reserve Moideen Beari's lands were excluded and the Revenue Authorities granted a *patta* and collected assessment from Moideen Beari for his lands, which continued to remain in his possession. Moideen Beari sold the lands to the accused in 1913 and when they tried to improve the land, they were prosecuted for the offence of trespass and of clearing the reserve and were convicted. Against this conviction they preferred this criminal revision petition to the High Court.

Mr. *K. Sundara Rao*, for the Accused:—The exclusion of the plot from the reserve and the granting of the *patta* clearly recognised the rights of the accused to these plots. The final notification was subject to correction by the actual demarcation and until then the rights of private parties remained unextinguished. There is no evidence that Moideen Beari's claims had been heard and decided as required by law, *Queen-Empress* v. *Rami Reddi* (1). Notice to the actual occupant was necessary and no rights could be extinguished without such notice, *Reference under the Madras Forest Act* (2).

The *Public Prosecutor*, for the Crown, argued *contra* and laid stress upon the notification which had become final and conclusive.

ORDER.—Moideen Beari held the *patta*. He sold the land to the petitioners. Moideen Beari and after him the petitioners paid the assessment and remained in possession. There was a notification under section 16 of the Forest Act, 1882, reserving it as forest land, but boundary stones were afterwards fixed excluding the land in contravention of the notification. In these circumstances we are of opinion that the petitioners are not guilty of trespass. We set aside the conviction under the Forest Act, 1882, and direct the fine, if levied, to be refunded.

Conviction set aside.

(1) 12 M. 226; 1 Weir 761.
(2) 12 M. 203; 1 Weir 758 (F. B.).

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1086 OF 1914.

December 18, 1914.

Present:—Mr. Justice Tudball.

BISHAN PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 185—Bidding for right to sell drugs without intention of performing the obligation—Offence.

A person who bids at a sale held by a Collector of the right to sell drugs in a certain area, without any intention of performing the obligation under which he is laying himself at the time of bidding, and gives a false name, is guilty of an offence under section 185 of the Indian Penal Code.

Application in revision against an order of the Magistrate of Mainpuri.

Mr. *R. Alston* (with him Mr. *Satya Chandra Mukerji*), for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—The applicant, Bishan Prasad, has been convicted under section 185 of the Penal Code and has been sentenced to a fine of Rs. 100. He made bids at a sale held by the Collector of the right to sell drugs in a certain Tahsil and gave a false name. When finally his last bid was sanctioned by the Board of Revenue. he denied that he had ever made any bid at all and he has accordingly been prosecuted under section 185 of the Code. The point raised on his behalf is that section 185 does not contemplate a sale of this description. The language of the section, however, is wide. The right to sell drugs, *i. e.*, the monopoly granted for a certain area comes within the definition of property. It is impossible to hold that the word 'property' in section 185 is not used in its wide sense. The gist of the offence in the present case was the intention in the appellant's mind not to perform the obligation under which he was laying himself at the time of bidding. The facts having been found against him they clearly, in my opinion, come within the offence mentioned in the section. The case is similar to that of *Queen* v. *Reazooddeen* (1). There is no ground for interference. The application is, therefore, rejected.

Application rejected.

(1) 3 W. R. Cr. 33.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 218 OF 1914.

June 24, 1914.

Present:—Mr. Justice Piggott.

BHAWANI SINGH AND OTHERS—APPLICATNS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 122—Discretion—Opinion formed on Police report.

The discretion given to a Magistrate by section 122 of the Criminal Procedure Code is a wide one. There must, however, be some sort of independent inquiry by the Magistrate, showing that a judicial discretion has been exercised in rejecting a surety.

Therefore, a Magistrate's order rejecting a surety merely on the Police report and without any independent inquiry by himself is bad.

Emperor v. *Balwant*, 27 A. 293; A. W. N. (1904) 231; 1 Cr. L. J. 912; 1 A. L. J. 601, followed.

Criminal revision from an order of the District Magistrate of Mainpuri.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision which raises two questions. The three applicants, Bhawani Singh, Gana Shankar, and Rustam Singh, have been ordered by a Magistrate of the first class to furnish security to be of good behaviour. That order has been confirmed by the District Magistrate in appeal. Its propriety is called in question by the first paragraph of the application to this Court. An examination of the record discloses to my mind no valid ground for interference with this order. In so far the application fails.

The other point taken has reference to an attempt made by the three applicants to comply with the order requiring them to furnish security. Each of them tendered his security bond signed by two sureties, and it has been ascertained that the sureties offered were men of sufficient substance, regard being had to the amount of the security required. The Magistrate has, however, rejected three sureties, one for each of the three applicants, on the ground that he believes them to be men of lawless character, who could not be trusted to control the proceedings of the applicants, so as to restrain them from the commission of offences during the period covered by the security bond. The discretion given to a Magistrate by section

122, Criminal Procedure Code, is a wide one, and if the facts in this case are as stated by the Magistrate, it cannot be said that he was wrong in treating each of the sureties as an "unfit" person within the meaning of that section. The record, however, discloses the fact that the Magistrate formed this opinion on the strength merely of a report received by him from a Police Officer. There is a concensus of authority in this Court, of which I am content to refer to the case of *Emperor* v. *Balwant* (1) and to the cases therein cited, that such a conclusion as has been arrived at by the Magistrate in this case is not warranted by a Police report in respect of which there has been no formal inquiry in Court. The persons called upon to furnish security have been given no opportunity of meeting the objection. The view taken by this Court appears to be that in recording an opinion that such and such surety is an unfit person, the Magistrate must show that he has exercised a judicial discretion. No attempt has been made to lay down the nature of the inquiry which should be had and, speaking for myself personally, I should desire to restrict the interference by this Court in such a matter within narrow limits. At the same time I am not prepared to dissent from the authorities of this Court which lay down that there must be some sort of independent inquiry by the Magistrate, showing that a judicial discretion has been exercised as to the question of the fitness of the proposed surety. I set aside the order rejecting each of the three sureties in question, and following the precedent of the reported case to which I have already referred, direct the Magistrate to take up the matter again and dispose of this question of the fitness of these three sureties after a satisfactory inquiry in accordance with law. There was another surety, namely the second surety tendered by the applicant, Rustam Singh, who was rejected by the Magistrate on the ground that he lived at so great a distance from Rustam Singh's place of residence that the Magistrate felt no confidence in his ability to exercise any control over Rustam Singh's proceedings during the period covered by the security bond. Here, again, I think that the reason given for rejecting the surety may be a valid one; but the Magistrate's procedure in the matter has been somewhat too summary. It is at least conceivable that the surety intended to make arrangements for Rustam Singh to take up his residence near him. At any rate I think that the Magistrate would have exercised a sounder discretion if, before definitely rejecting the surety, he had called the latter and made some further inquiry. It is possible that the surety might himself have admitted that he had no real hope of being able to control Rustam Singh's proceedings. As I am sending the case back, I think it advisible to set aside also the order rejecting this other surety tendered on behalf of Rustam Singh, and similarly direct proper inquiry to be made with regard to this man also. Let the record be returned.

Order set aside.

(1) 27 A. 293; A. W. N. (1904) 231; 1 Cr. L. J. 912; 1 A. L. J. 601.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 579 OF 1914.

July 17, 1914.

Present:—Mr. Justice Chamier.

GOBIND SAHAI AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 526—Transfer of case—Power of District Magistrate to send case under s. 107 to second class Magistrate.

It is not competent to a District Magistrate to transfer a case under section 107 of the Criminal Procedure Code to a Magistrate of the second class, who is incompetent to conduct and complete the proceedings.

King-Emperor v. *Munna*, 24 A. 151, distinguished.

Criminal revision from an order of the District Magistrate of Meerut.

Mr. *G. P. Boys*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application for revision of an order of the District Magistrate of Meerut, dismissing an appeal against an order of a Magistrate of the second class of the same district requiring the applicants to give security for their

good behaviour for one year. The first point taken is that the second class Magistrate had no jurisdiction to hear the case. It appears that the proceedings against the applicants were instituted by a Magistrate of the first class, and that this Court, on application made to it, transferred the case from the Court of that Magistrate to the District Magistrate with instructions to make it over to some other Magistrate, subordinate to him, competent to try it. The District Magistrate then made over the case to Captain Noel, a Magistrate of the second class. Under section 526 of the Code of Criminal Procedure this Court had power to transfer the case to another Criminal Court of equal or superior jurisdiction. This Court, therefore, could not have transferred the case to Captain Noel and what this Court could not do the District Magistrate could not do. The selection of the Court was left to him, but the transfer was made by this Court. Further, it appears to me that Captain Noel is not one of the Magistrates who is competent to conduct proceedings under sections 107 to 119 of the Code of Criminal Procedure. I was referred to the decision of Mr. Justice Aikman in the case of *King-Emperor Munna* (1), in which proceedings under section 107 (2) of the Code had been initiated by a District Magistrate who was competent to do so and had been transferred by him to a Magistrate of the first class subordinate to him in the District. Mr. Justice Aikman held that when the District Magistrate had in the exercise of his discretion directed the institution of the proceedings, there was nothing in the law to prevent him from transferring the case to another Magistrate otherwise qualified to complete the proceedings. There the transfer was to a Magistrate of the first class competent to conduct proceedings under section 107(1) of the Code. I do not think that Mr. Justice Aikman would have held that the District Magistrate was competent to transfer the case to a Magistrate of the third class. On both these grounds I hold that Captain Noel had no jurisdiction to pass an order requiring the applicants to give security for their good behaviour. I, therefore, set aside all the proceedings of Captain Noel and of the District Magistrate Let the record be returned.

Order set aside.

(1) 24 A 151.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 31 OF 1914.

April 4, 1914.

Present:—Mr. Justice Rafique.

JAFAR HUSAIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 526—Transfer of proceedings under s. 110, application for—Ground of transfer—Apprehension of not having fair and impartial trial.

The petitioner made an application under section 526, Criminal Procedure Code, praying that the proceedings taken against him under section 110 of the Criminal Procedure Code be transferred from one district to another, on the grounds that he was arrested without a warrant, that his medical certificates were not accepted, that he was not informed of the charge for some days, that his request to reserve cross-examination was disallowed, that his prayer as to the production of certain documents was rejected, and that the names of some of his witnesses were struck out while a sum of Rs. 100 was demanded from him before summons could be issued to the rest of his witnesses:

Held, that these facts alone did not in any way show bias or prejudice in the mind of the Magistrate against the petitioner but they, taken with the fact of the institution of several criminal proceedings against the petitioner prior to the proceedings under section 110, Criminal Procedure Code, would likely give rise to an apprehension in his mind that he was not likely to have a fair and impartial trial in the Court before which security proceedings against him were pending and that, therefore, this was a fit case for transfer.

Criminal Miscellaneous application for transfer of case from the file of the Joint Magistrate of Meerut.

Messrs. *W. Wallach* and *Satya Chandra Mukerji*, for the Applicant.

Mr. *A. E. Ryves*, Government Advocate for the Crown.

JUDGMENT.—This is an application under section 526 of the Code of Criminal Procedure, praying that the proceedings pending against the applicant in the Court of the Joint Magistrate of Meerut be transferred to a Court in another district. In the affidavit filed on behalf of the applicant the grounds on which the transfer is sought are given. It appears from the said affidavit that the applicant, Jafar Husain, is in the service of Agha Saiyad Haidar Shah as *Mukhtar* and that there is a long standing feud between his master and one Raghunath Prasad, both of whom are *zemindars* of Barout. Ever since 1894 disputes have been going on

between the servants of the two *zemindars*, which have led to legal proceedings in Court against them. On the 24th of January of this year the applicant was arrested by the Circle Inspector without any warrant and though two respectable sureties were offered the Police refused bail. Late at night about 9 P. M. on the 24th of January 1914 the applicant was put up before the learned Joint Magistrate, who was out in camp at the time. A sum of Rs. 500 was demanded for bail in cash and a personal bond of Rs. 200 and his case was fixed for the 3rd of February 1914. The money was at once tendered, but was not accepted as there were no means in the camp of the Joint Magistrate to keep the money. The applicant was directed to take steps to have the money deposited in the treasury. It was deposited the next day. But the applicant was not released till the 27th of January 1914. After his release on his way home that day a Police constable orally informed him that his case would be taken up next day. The applicant attended Court the next day, *i. e.*, on the 28th of January 1914 and remained there the whole day, but his case was not taken up. He was informed that his case would be taken up on the 3rd of February 1914. Mr. Abdullah Shah appeared on behalf of the applicant and informed the Court that his client was too ill to attend Court, and in support of his statement tendered in evidence a medical certificate signed by the Assistant Civil Surgeon of the district. The learned Joint Magistrate would not accept the Assistant Surgeon's certificate and directed that a certificate of the Civil Surgeon should be tendered the next day in support of the statement that Jafar Husain was too ill to attend Court. On the 4th of February 1914, a medical certificate signed by an European officer of the Indian Medical Service, who was at the time serving in the 28th Pioneers at Meerut, was tendered in evidence. The certificate was to the effect that the applicant had been examined by the doctor and was found to be incapable of attending Court that day and for a week to come. It is said that no certificate could be obtained from the Civil Surgeon he was either not present in the station at day or could not be found. The learned Joint Magistrate did not accept the certificate produced on behalf of the applicant and issued a warrent of arrest against him at once and made it over for service to the Police. The applicant was accordingly brought to Court by the Police, and the Joint Magistrate and some of the Police Inspectors went to the carriage in which the applicant was brought and found him really ill. He was allowed to return home and was ordered to present himself in Court on the 9th of February 1914 and the hearing of the case was fixed for the 10th of February 1914. During this time nothing was said to the applicant about the charge on which he was arrested or about which he was going to be put on his trial. On the 10th of February 1914 the case was taken up by the learned Joint Magistrate and a notice, presumably under section 112, Criminal Procedure Code, was read out for the first time to the applicant. That notice was to the effect that information had been received through the Police that the applicant was a habitual extortioner and was, therefore, called upon to show cause why he should not furnish security. In reply to the notice the applicant said that he was not ready to proceed with the case and wanted an adjournment to engage Counsel and to prepare his defence. The request of the applicant was not acceded to and the evidence for the prosecution was begun at once. Fourteen witnesses for the prosecution were examined that day. The applicant was asked to cross-examine them. But he said that he could not do so and would like to reserve his cross-examination until he could engage a Counsel and again asked for an adjournment. The learned Joint Magistrate refused the request and ordered the applicant to put in a list of his witnesses. Jafar Husain produced a list of documents and witnesses the next day. The learned Joint Magistrate declined to send for the documents and struck out the names of some of the witnesses and asked the applicant to deposit a sum of Rs. 100 before any summons could be issued for the defence witnesses. When the proceedings against the applicant were at this stage, he came up to this Court and filed the present application. The learned Joint Magistrate has submitted an explanation of the facts

In re KHADDAM VENKATA RAO.

alleged in the affidavit of the applicant. Some of the main allegations made in the applicant's affidavit are not denied. It is not denied that the applicant was arrested without a warrant, that his medical certificates were not accepted and a warrant was issued for his arrest and production in Court on the 4th of February 1914, that the applicant was not informed of the charge until the 10th of February 1914, that his request to reserve cross-examination was disallowed, and that his prayer as to the production of documents was rejected and the names of some of his witnesses were struck out and as to the rest a sum of Rs. 100 was demanded before summonses could be issued to them. These facts do not in any way show bias or prejudice in the mind of the learned Joint Magistrate against the applicant. But they, taken with the fact of the institution of several criminal proceedings against the applicant prior to the present proceedings, would be likely to give rise to an apprehension in his mind that he is not likely to have a fair and impartial trial in the Court below. I think that under the circumstances of this case it is advisable to make an order of transfer. I accordingly allow the application and order that the proceedings now pending against the applicant in the Court of the learned Joint Magistrate of Meerut be transferred to the Court of the District Magistrate of Muzaffarnagar, who will either try the case himself or make it over for trial to some other Magistrate subordinate to him.

Application allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 729 OF 1914.

CRIMINAL REVISION PETITION No. 612 OF 1914.

November 30, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

In re KHADDAM VENKATA RAO—COMPLAINANT—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 545—Compensation ordered payable out of fine—Full amount of fine not realised—Compensation, if payable.

It is quite competent to a Court, when ordering compensation to be paid out of the fine imposed, to provide by its order for the proportionate distribution of the amount realised. In the absence of any such direction, an order providing for payment of compensation out of the fine imposed ought not to be construed as meaning that nothing was payable until the full amount of fine was realised, but as meaning that compensation will have priority over the claims of revenue.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of Kurnool, in Criminal Miscellaneous Petition No. 30 of 1914 (Sessions Case No. 9 of 1914).

FACTS.—In a cheating case which had been tried by the Sessions Judge of Kurnool, the latter, after sentencing some of the accused to a fine of Rs. 4,000 in addition to substantial punishment, ordered that out of the said fine of Rs. 4,000, if recovered, the first prosecution witness (the petitioner) was to be paid Rs. 3,000 as compensation. The moveable properties of the accused, which were attached and sold, did not realise the full amount of Rs. 4,000. The petitioner then applied to the Sessions Judge of Kurnool for payment to him of the sum realised by the sale. On this application the Sessions Judge passed an order that the Government had a prior claim to the extent of Rs. 1,00^ and it was only in the event of there being a balance, that the petitioner would be entitled to be paid anything as compensation. The petitioner thereupon preferred this criminal revision petition to the High Court.

Dr. *S. Swaminadhan*, for the Petitioner :—The learned Sessions Judge has misunderstood the provisions of section 545, Criminal Procedure Code. According to the English Common Law fine could not be inflicted in a case of felony. Even in the case of felony involving an injury to a private individual, the injured party had, until 1837, practically no redress on account of the doctrine of merger of tort in felony, according to which he could not maintain an action before conviction; and an action after conviction was utterly useless, as a conviction *ipso jure* worked a forfeiture of all the properties of the felon. In 1837, however, the law was altered, forfeiture being abolished and Courts being empowered to award compensation. Section 545 is founded upon

the English Law as altered and so compensation has priority over the claims of the revenue.

The Public Prosecutor, for the Crown :—The order of the Sessions Judge was that if the fine of Rs. 4,000 was recovered, a compensation of Rs. 3,000 must be paid to the petitioner. The obvious meaning is that if Rs. 4,000 were not recovered in full, nothing was to be paid to the petitioner.

ORDER.—The order of the Sessions Judge passed under section 545 of the Code of Criminal Procedure, in disposing of the criminal case, says :—

"Out of the fine, if recovered from the accused, I direct that Rs. 3,000 be paid to prosecution witness No. 1."

We think that this must be taken to mean that the amount realised, up to a limit of Rs. 3,000, should be devoted to compensating the prosecution witness No. 1 under section 545 of the Code of Criminal Procedure. We do not think it can have been the Judge's meaning that nothing should be payable to the prosecution witness No. 1 unless the full amount of fine (Rs. 4,000) was recovered. It was open to him to provide for the proportionate distribution of the amount realised, but he has not done so.

We set aside the order of the Acting Sessions Judge, dated 25th September 1914, and direct the amount realised to be applied as indicated above.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL RULE No. 1020 OF 1914.

August 12, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

Mahant MOHABIR DAS—PETITIONER

versus

GAYA MUNICIPALITY—OPPOSITE PARTY.

Bengal Municipal Act (III of 1884), ss. 238, 240, 273, sub-s. (1)—Building of new masonry wall, whether erection of house—Erection without sanction, whether offence—"Building," meaning of

The building of a new and additional masonry wall which materially enlarges a courtyard constitutes the erecting of a house within the meaning of sections 238 and 240 of the Bengal Municipal Act, and its erection without the sanction of the Municipal Commissioners is an offence under section 273, sub-section (1) of the Act.

The word "building", in the absence of any specific definition in the Act, should be construed in its ordinary sense and as including erections, structures, or buildings such as masonry walls.

FACTS.—This was a Rule obtained by the petitioner, *Mahant* Mohabir Das, on the District Magistrate of Gaya and on the Gaya Municipality to show cause why an order directing the demolition of a wall passed by a Deputy Magistrate of Gaya under the provisions of the Bengal Municipal Act and an order of conviction and sentence under section 273 of the said Act should not be set aside.

Mr. *Sultan Ahmad*, Deputy Legal Remembrancer for Behar and Orissa showed cause.

Babu *Lachmi Narain Singh*, in support of the Rule.

Mr. *Sultan Ahmed*.—The whole question is whether the acts of the petitioner amounted to an "erection or re-erection" within the meaning of sections 237 and 238 of the Bengal Municipal Act.

The expression "erection or re-erection" has been defined in section 240, which is not exhaustive.

The case in *Emperor* v. *Mathura Prasad* (1) has been decided without reference to section 240 of the Act, and the case was not argued on both sides. That case was wrongly decided.

Building a wall would be sufficient; vide *Dave Harishankar* v. *The Town Municipality of Umreth* (2).

[SHARFUDDIN, J.—The Bombay case does not apply, as the Bombay Act does not contain any definition like that contained in the Bengal Act.]

If a wall is attached to a building then it would be a material alteration.

[SHARFUDDIN, J.—The question is whether by this alteration it enlarges any room or verandah.]

This is a part of the building and the whole building is enlarged.

[TEUNON, J.—Does not this wall enlarge the courtyard?]

Yes.

[TEUNON, J.—Has "building" been defined?]

(1) 29 C. 491.
(2) 19 B. 27.

MIHAN SINGH *v.* EMPEROR.

No. In a case in *Hari Kishore Barna Sarma* v. *Baroda Kishore Acharja Chowdry* (3) it has been held that a detached wall was not a masonry building.

[TEUNON, J.—A wall has to be built. So a wall must be a building.]

What the petitioner appears to have done is that he straightened a wall and built a new wall alongside an old wall and this new wall must have enlarged his courtyard?

Babu *Lachmi Narain Singh*, in reply.

JUDGMENT.—In this case the petitioner before us has been convicted under section 273, sub-section 1, of the Bengal Municipal Act of 1884. The Municipality referred to is the Municipality of Gaya. It has been found that without sanction from the Municipal Commissioners the petitioner has straightened the north, south and west walls of his temple by building against the pre-existing walls what may be called a secondary or double wall. It has also been found that similarly without sanction he has built a new masonry wall and thereby enlarged his courtyard. The question before us is, whether what he has done constitutes "the erecting or re-erecting a house not being a hut" within the meaning of sections 238 and 240 of the Bengal Municipal Act, 1884. Whether the building of the double wall, to which we have referred, thereby thickening and strengthening the pre-existing wall, is more than an act of repair or constitutes a material enlargement is possibly open to doubt. But we have no doubt that the building of the new and additional masonry wall, which the petitioner is found to have erected and by means of which he has materially enlarged his courtyard, does constitute the erecting of a house within the meaning of sections 238 and 240. In section 6 (4) of the Act 'house' has been defined as "including any hut, shop, warehouse or building." 'Building' has not been defined in this Act, and we think we ought not to construe the expression otherwise than in its ordinary sense and as including erections, structures, or buildings such as masonry walls.

In this view we affirm the conviction and sentence and discharge this Rule.

Rule discharged.

(3) 8 C. W. N. 754.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 584 OF 1914.

June 5, 1914.

Present:—Mr. Justice Scott-Smith.

MIHAN SINGH AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 149- Assembly not unlawful—Offence committed by one—Liability of others.

Section 149 of the Penal Code does not operate to make all the members of an assembly which is not unlawful, equally guilty of an offence committed by one of them.

Petition for revision of the order of the Additional Sessions Judge, Lahore, dated the 14th February 1914.

Mr. *Gobind Ram*, for the Petitioners.

JUDGMENT.—There are three petitioners in this case, Mihan Singh, Wir Singh and Nadir Singh. Mihan Singh has been convicted of culpable homicide under section 304, part II, Indian Penal Code, for causing the death of Bhola Singh by striking him on the head with a stick. The other two petitioners have been convicted of an offence under section 304, part II, read with section 149, Indian Penal Code.

I see no reason whatsoever to interfere with the findings on questions of fact of the learned Sessions Judge. His finding in regard to Mihan Singh is that he exceeded his right of private defence by striking Bhola Singh in the way he did.

I directed notice to issue only in regard to Wir Singh and Nadir Singh, for, accepting the findings of the learned Sessions Judge, it appeared to me that they could not legally be convicted of any offence.

The Sessions Judge found that Mihan Singh and his party were ploughing the disputed field when the members of the complainant's party came up to interfere with them and to turn them out.

In his judgment the Sessions Judge says that they, *i.e.*, the complainant's party, were not justified in forcibly preventing the ploughing of Mihan Singh and others, on the other hand neither was Mihan Singh, appellant, justified in striking Bhola Singh on the head. Further on in the judgment he says: "The evidence clearly shows that all these six persons and Aror Singh, who has absconded, were gathered together with a common object: and though

they may have been acting in the right of private defence of their possession of the disputed land, there can be no question but that Mihan Singh at least far exceeded that right of private defence. He and the others of the appellants are, therefore, guilty of whatever offence was committed by Mihan Singh."

Now, from these findings it does not appear that Mihan Singh and his party constituted an unlawful assembly. There is no finding that their common object was any of those specified in section 141 of the Indian Penal Code. On the contrary, the Sessions Judge finds that the members of deceased's party were the aggressors, their object being to forcibly dispossess the other party of certain land.

Mihan Singh and his party were, therefore, perfectly justified in exercising their right of private defence and if Mihan Singh exceeded that right, he, and he alone, is guilty of any offence.

Section 149 does not operate to make Mihan Singh's companions equally guilty with him, as they were not at the time members of an unlawful assembly.

Accepting, then, as I do, the findings of the learned Sessions Judge, I accept the revision so far as Wir Singh and Nadir Singh are concerned, and, setting aside their convictions and sentences, acquit them and discharge them from their bail.

The petition of Mihan Singh is rejected.

Revision partly accepted and partly rejected.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 357 OF 1914.
CASE REFERRED NO. 44 OF 1914.
August 14, 1914.
Present:—Mr. Justice Oldfield.
In re SINNA KARUPPAN—ACCUSED.

Workmen's Breach of Contract Act (XIII of 1859)

—*Contract to be performed in foreign territory, whether can be enforced under the Act.*

A contract, the performance of which is to take place in a foreign territory, cannot be enforced under the Workmen's Breach of Contract Act (XIII of 1859).

Gregory v. *Vadakasi*, 10 M. 21; 1 Weir 671, followed.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Coimbatore.

The *Public Prosecutor*, for the Government.

ORDER.—The learned Sessions Judge has referred this order on two grounds. I deal with the reference only on one of them that an order cannot be passed under Act XIII of 1859 to enforce the performance of a contract, if such performance is to take place in foreign territory That objection to the order is sustainable, vide *Gregory* v. *Vadakasi* (1). The order of the second class Magistrate is set aside and the complaint dismissed.

Order set aside.

(1) 10 M. 21; 1 Weir 671.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 653 OF 1914.
September 7, 1914.
Present:—Mr. Justice Piggott.
MUL CHAND—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 117—Security ordered without any inquiry—Order, whether illegal.

An order under section 107, Criminal Procedure Code, is bad in law if it is made without making an inquiry into the truth of the information upon which proceedings were initiated.

Criminal revision against an order of the Magistrate, Muttra.

Mr. *Kailas Nath Katju*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

DAL *v.* EMPEROR.

JUDGMENT.—The order in this case requiring the applicant. Mul Chand, to furnish security to keep the peace was passed without any "inquiry as to the truth of the information upon which action had been taken," within the meaning of section 117 of the Code of Criminal Procedure. The Magistrate referred to the result of a case tried by him, in which certain persons were put on their trial on charges under sections 147 and 325 of the Indian Penal Code, as justifying the order passed by him in the present case against Mul Chand. I do not know whether Mul Chand was or was not an accused person in the riot case above referred to, and if he was or was not convicted in that case. However this may be, though the proceeding in the riot case might justify an order under section 106 of the Code of Criminal Procedure against any person who may have been convicted at that trial, it had nothing to do with the proceeding now before me. The law required the Magistrate to hold an inquiry, and even though this requirement would have been substantially complied with by an inquiry such as is prescribed in Chapter XX of the Code of Criminal Procedure for the trial of summons cases, still I am unable to find on the record before me anything that shows that an inquiry was held at all. Mul Chand was apparently asked what cause he had to show, why he should not be bound over to keep the peace, and in so far the procedure observed was correct and in accordance with the provisions of section 117, clause 2, read with section 242 of the Code of Criminal Procedure. Inasmuch, however, as Mul Chand did not admit that he was a person likely to commit a breach of the peace or was otherwise a proper subject for a proceeding under section 107 of the Code, the Magistrate was too hasty in binding him over, without further inquiry, on the strength of his own statement. I must set aside the order complained of and I do so accordingly. If security has been furnished by Mul Chand in accordance with the order, the security bonds in question are hereby discharged.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 479 OF 1914.

December 2, 1914.

Present:—Mr. Lindsay, J. C.

DAL—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

First report, statement in, made by complainant—Admissibility in evidence—Chaukidars—*Police Officers—Evidence Act (I of* 1872), *s.* 25—*Confession made to some person in presence of Police Officers, admissibility of—Admission of offence just after commission, effect of—Presumption.*

Any statement made by a complainant in his first report at the Police station is not admissible as proof of the facts therein mentioned, and cannot be used as evidence against the accused in his trial.

Village *chaukidars* are Police Officers within the meaning of section 25 of the Evidence Act.

An accused's confession to some person, although made in the presence of a Police Officer, is nevertheless admissible in evidence.

Where it is satisfactorily proved that immediately after the commission of an offence the accused made a statement incriminating himself, the reasonable inference from such a statement, in the absence of any rebutting evidence, is that the statement is a true representation of the actual facts.

Appeal against the order of the Sessions Judge, Hardoi, dated 8th October 1914.

Mr. *St. G. Jackson*, for the Appellant.

The *Government Pleader*, for the Crown.

JUDGMENT.—The accused appellant, Dal, has been convicted in the Court of the Sessions Judge of Hardoi on a charge of having murdered his mother-in-law, *Musammat* Shitabo, on the night of the 12th of August last. He has been sentenced to transportation for life. The facts of the case, as they appear from the evidence of two principal witnesses, namely Jitta and Balla *chaukidars*, are as follows. On the night of the 12th of August Sita Ram, who is the grandfather of the accused and who lives in the village of Shakurabad, came to the house of Jitta *chaukidar*, which is in a neighbouring village, and informed him that *Musammat* Shitabo had been murdered. This information was also

communicated to Balla, another *chaukidar*, who lives in the same village as Jitta. Jitta and Balla accompanied Sita Ram back to Shakurabad, Jitta being the *chaukidar* of Shakurabad although he lives in another village. The *chaukidars* entered the house occupied by the accused and there they found the dead body of *Musammat* Shitabo on a *charpoy*. Evidently she had been attacked with some cutting instrument for her throat was cut. Both the *chaukidars* deposed at the Sessions trial that when they went into the house, Sita Ram asked the accused with what weapon he had killed *Musammat* Shitabo. The accused replied that he had killed her with a *gandasa*. After stating this he went and fetched a blood-stained *gandasa* from the *barotha* of the house and handed it over to Sita Ram. Dal was arrested by the *chaukidars* and taken to the *thana*, where a report was made in the early hours of the morning. This report, it is proved, was made by Sita Ram who told the Police that during the night he was roused by a cry from his grandson Dal, that he asked Dal what was the matter and that Dal said that he had just killed his old mother-in-law. Sita Ram further stated that when he asked Dal why he had done this, the answer was that the woman had tried to seduce him and that he got angry with her and slew her with the *gandasa*. The report went on to say how Sita Ram had gone off and called the two *chaukidars*, Balla and Jitta. It is also stated in the report that the *gandasa* had been given up by the accused. The *gandasa*, it may be noted, was brought to the *thana*. The *chaukidars* also made statements at the Police station in confirmation of the report made by Sita Ram and a statement was also made by the accused in the nature of a confession. This confession, however, having been made to a Police Officer, is not admissible in evidence. Since the time this report was made Sita Ram, the accused's grandfather, has gone back on the story which he told in the initial report. He has denied altogether ever having made any such report and his statement, both to the Committing Magistrate and at the Sessions trial, was intended to show that Dal had never made any incriminating statement, but had merely said that his mother-in-law had been murdered by some one. The only other people who appear to have been in Dal's house on that night were his young wife, *Musammat* Radhia, who is the daughter of the murdered woman and his mother, *Musammat* Deoka. Neither of these witnesses give any evidence to incriminate the accused and practically all we have against the prisoner is to be found in the statements of the two *chaukidars*. Sita Ram's statement before the Judge was contradicted by the statement which he had made to the Police at the time of laying the first information, but, of course, any statement made by Sita Ram in his first report is not admissible as proof of the facts therein mentioned and cannot be used as evidence against the accused in this trial. We have, therefore, to examine the statements of both these *chaukidars*. They both swear that after they reached the house in company with Sita Ram, the accused confessed to Sita Ram in their presence that he had murdered *Musammat* Shitabo with a *gandasa*. If those statements are to be accepted as true, then we have the fact that immediately after this murder had been committed the accused confessed that it had been done by him. It has been contended that the story told by Jitta *chaukidar* in the Sessions Court does not correspond exactly with the story he told before the Committing Magistrate. In the Sessions Court what Jitta said was this:—"Sita Ram asked Dal with what he had killed. He replied with a *gandasa*. Sita Ram asked what he had done with the *gandasa*. Then Dal produced the *gandasa* from the *barotha* and gave it up." According to the English record of the statement made before the Committing Magistrate Jitta's story runs as follows :—"Sita Ram asked Dal by what weapon she had been killed. Dal went and fetched a blood-stained *gandasa*." This English version, however, does not fit in with the deposition as recorded in the vernacular in the Court of the Magistrate. According to this latter record the statement made by Jitta was as follows:—"Sita Ram asked Dal what he had killed the woman with and he replied that he had killed her with a *gandasa*." Balla's state-

ment before the Judge runs as follows:—"Sita Ram asked Dal with what weapon he had killed the woman. He answered that she (Shitabo) had suggested to him that he should have sexual intercourse with her and that he had killed her for this reason. Sita Ram again asked with what weapon he had killed the woman and Dal replied he had killed her with a *gandasa*." Balla's statement to the Magistrate was made in the same language. It is quite clear, therefore, that so far as Jitta's statement in the Sessions Court is concerned there is no contradiction between it and the statement which he made before the Committing Magistrate. Balla's statement in both the Courts is exactly the same. I can see no reason whatever for doubting the truth of the statements made by these two *chaukidars*. It is difficult to see why they should invent a story of this description. If their statements, therefore, are accepted as true, it follows that we have against the accused an admission made by him that he had killed his mother-in-law with a *gandasa*. Balla and Jitta are *chaukidars* and no doubt according to the various rulings on the interpretation of section 25 of the Evidence Act, they must be treated as Police Officers. The question, therefore, is whether this incriminating statement which was made by the accused can be used as evidence, regard being had to the provisions of section 25 of the Indian Evidence Act, which lays down that no confession made to a Police Officer shall be proved as against a person accused of any offence. In my opinion the confession does not come within the section, for on the evidence as it stands it seems to me quite clear that this statement in the nature of a confession was not made to the *chaukidars* at all but to Sita Ram. The fact that the *chaukidars* were present and heard the statement made does not, I think, bring it within the prohibition contained in section 25 of the Evidence Act. I am, therefore, of opinion that the confession is admissible in evidence and I think that having regard to other circumstances which are disclosed by the prosecution evidence, it must be taken to be a true statement. There appears to be no doubt that the deceased woman was a woman of bad character. She had bee a widow for some years and the witnesses stated that a long time after the decease of her husband she gave birth to an illegitimate child. There is also some evidence to show that she had been making some attempts to take away her daughter from the house of the accused. We have also the fact that on the night when Shitabo was murdered the only man about the house at the time was the accused, Dal. It is apparent, therefere, that there was a motive for the murder, Shitabo being a woman of bad character who was bringing disgrace upon the family into which her daughter had been married, and in these circumstances it is difficult to imagine who else could have perpetrated this crime except the prisoner himself. When we find, therefore, that immediately after the murder the accused made a statement admitting that the murder had been committed by him with a *gandusa*, it seems reasonable to infer that this statement is a true representation of what took place. It is not to be doubted that Sita Ram has been making attempts to save his grandson and that the two women who were inside the house at the time are withholding what they must necessarily know of what took place on the night in question. I hold, therefore, that this confession made to Sita Ram in the presence of the *chaukidars* is admissible in evidence and that it must be treated as a true statement. This being so, the conclusion necessarily follows that the murder was committed by the accused appellant and I find accordingly. I dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 703 OF 1914.
December 1, 1914.
Present:—Mr. Justice Fletcher and Mr. Justice Beachcroft.

SASHI RAJBANSHI AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 337, 339, 298 (1) (c), 215—Approver—Forfeiture of pardon—Approver to be committed for trial along with other accused if forfeiture proved—Plea of pardon may be decided by Magistrate—Plea may be re-opened in Sessions Court—Burden of proof—Forfeiture, question of fact—Judge—Jury.

Where an approver fails to act up to the condition of his pardon before the inquiring Magistrate, the Magistrate can re-commence the inquiry as against the approver and commit him to take his trial along with the other accused.

Under the old Code the act terminating a pardon was the withdrawal by the granting authority, under the present law, it is the forfeiture by the approver.

Per *Beachcroft, J.*—The requirement that an approver is to be examined as a witness in the case, is satisfied when he is examined as a witness in the Magistrate's Court. It is not compulsory either for the prosecution or for the defence to examine him in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness.

When an approver is put on his trial he may plead his pardon. The plea should be taken at the commencement of the proceedings before the Magistrate, for it strikes at the jurisdiction to take any proceedings at all against the approver, and it would then be necessary for the Magistrate to consider whether the pardon had been forfeited. But if he decides against the approver, or even if the plea is not taken before the Magistrate, it can be pressed in the Sessions Court and that Court ought to try the question whether the pardon has been forfeited before trying the general issue. If, however, there is a possibility of the evidence on the two issues overlapping or being identical the Judge may use his discretion and order the approver to be tried separately from the other accused.

The onus of proving forfeiture of pardon is on the Crown.

The question of forfeiture of pardon is a question of fact, therefore, its decision rests with the Jury and not with the Judge.

Appeal from the order of the Sessions Judge of Murshidabad, dated 15th July 1914, convicting the accused under sestion 395, Indian Penal Code, and sentencing each of them to seven years' rigorous imprisonment.

Babus *Hemendra Nath Sen* and *Santosh Coomar Bose*, for the Appellant.

Mr. *Orr* and Babu *Jyotish Chundra Hazra*, for the Crown.

JUDGMENT.—The accused Ananta, Nani, Sashi, Gopal, Srikunta and Bolai were tried along with seven others who have been acquitted with having committed the offence of dacoity.

The trial took place before the learned Sessions Judge of Murshidabad and a Jury. The six appellants before us were convicted and each sentenced to undergo seven years' rigorous imprisonment. Against that conviction and sentence they have appealed to this Court. The principal point that has been argued on this appeal, is as to the legality of the trial before the learned Sessions Judge. It appears that the accused Sashi was tendered and accepted a pardon under section 337 of the Code of Criminal Procedure on the 21st of April 1914, whilst the proceedings were pending before the Committing Magistrate. The Magistrate subsequently forfeited the pardon granted to Sashi and the magisterial inquiry was re-commenced from the stage at which it was interrupted as against Sashi by the tender and acceptance of the pardon. The Magistrate committed all the accused for trial. Sashi having raised before the learned Judge a plea in bar on the ground that he had received a pardon the learned Judge took a special verdict from the Jury in the first instance as to whether Sashi had forfeited his pardon. The Jury having returned a verdict that he had done so the learned Judge then continued the trial against all the accused.

Against this procedure two points have been urged on the appeal before us (1) that the procedure of the Magistrate in re-commencing the magisterial inquiry against Sashi from the stage it was interrupted by the tender and acceptance of the pardon and the commitment of Sashi to take his trial with the other accused was illegal and (2) the taking of a special verdict of the Jury as to whether the pardon granted to Sashi had been forfeited was also illegal. On the first point authorities have been cited showing that when the approver deviates from the condition of his pardon in the Sessions Court, he cannot be removed from the witness-box and placed in the dock as an accused. I should have thought that such a proposition did not require any authority. It is obvious that the Court of Session could not try a person who had not been committed for trial.

The question, however, as to whether or not an approver whose pardon has been forfeited by the Committing Magistrate can be committed and tried along with the other accused, is a totally different question.

On behalf of the appellants the decision in the case of *Queen-Empress* v. *Natu* (1) is much relied on. No doubt the observations of the learned Judges (Rampini and Pratt, JJ.,) in that case do lend support to the argument on behalf of the appellants. In that case, however, a charge had been framed against the two approvers under section 194 of the Indian Penal Code without the sanction of the High Court. The remarks of the learned Judges that "a person to whom a tender of pardon has been made should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined" show clearly that what the learned Judges were considering was the charge under section 194 of the Indian Penal Code.

In my opinion that case cannot be taken as an authority for the proposition that where the approver fails to act up to the condition of his pardon before the inquiring Magistrate that the Magistrate cannot re-commence the inquiry as against the approver and commit him to take his trial along with the other accused.

As against the interpretation sought to be placed on the decision in the case of *Queen-Empress* v. *Natu* (1) by the learned Vakil for the appellants there is a considerable body of judicial authority in which a different view was taken. In the case of *Queen-Empress* v. *Brij Narain Man* (2) the learned Judges observed: "We are unable to find anything in the Code of Criminal Procedure which would render it necessary that an approver whose pardon has been withdrawn by the Magistrate and who has been committed by the Magistrate in time to stand his trial along with the other accused in the case should be tried separately from them." A similar view was taken in the case of *Emperor* v. *Budhan* (3) and also in the case of *Sultan Khan* v. *Emperor* (4) and in the case of *Emperor* v. *Bala* (5) a similar view seems to have been taken by Fulton, J.

I think that the opinions expressed in these cases are correct and that the case of *Queen-Emperss* v. *Natu* (1) is only an authority for what was actually decided in that case, namely, that "a person to whom a tender of pardon has been made should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined." These remarks appear to me to be only capable of referring to a charge under section 194, although perhaps the judgment is not very happily worded. In that view the opinions expressed in *Queen-Empress* v. *Natu* (1) are not in conflict with the judgments of the High Courts of Allahabad and Bombay which I have cited above. I think, therefore, that the commitment to and trial before the Sessions Court in the present case was not illegal.

The second question urged on this appeal is that the trial was illegal by reason of the learned Judge having taken a verdict from the Jury as to whether Sashi had forfeited his pardon or not. The only case cited in support of this argument is the decision of this Court in the case of *Emperor* v. *Abani Bhushan Chuckerbutty* (6). That case came before a special Bench of three Judges, consisting of Holmwood and Sharfuddin and D. Chatterjee, JJ., under the provisions of the Criminal Law Amendment Act: Holmwood, J., held that the Committing Magistrate was the sole authority to determine whether or not the pardon had been forfeited. The grounds on which Holmwood, J., formed this opinion are stated by him as follows: "As soon as a charge is drawn up, the accused is *ipso facto* put upon his defence.....The word 'withdrawal' has been left out of the present Code, and, as I have just said, the forfeiture appears now to operate *ipso facto*." In support of this view the learned Judge relies on the case of *Queen-Empress* v. *Manick Chandra Sarkar* (7), which lays down that the withdrawal or forfeiture of the pardon should be by the authority that granted it; but that case did not decide that the validity of the withdrawal or forfeiture could not be questioned at the

(1) 27 C. 137.
(2) 20 A. 529; A. W. N. (1898) 152.
(3) 29 A. 24; 3 A. L. J. 615; A. W. N. (1906) 258; 4 Cr. L. J. 142.
(4) 5 A. L. J. 695; A. W. N. (1908) 259; 8 Cr. L. J. 445.
(5) 25 B. 675; 3 Bom. L. R. 271.
(6) 8 Ind. Cas. 721; 37 C. 845; 11 Cr. L. J. 702.
(7) 24 C. 492.

trial. The other cases, *Kullan* v. *Emperor* (8), relied on by Holmwood, J., with all due respect to the learned Judge, decided exactly the opposite to what that learned Judge did. Towards the end of his judgment Holmwood, J., however, remarked that "It is open to the accused here to show that the statement he made on oath was not a false statement, or was a false statement induced by improper influence." D. Chatterjee, J., held that as the case came before the Court as a "special Tribunal" under the provisions of the Criminal Law Amendment Act the Court has no jurisdiction to inquire into the fact whether the pardon had been properly forfeited or not: D. Chatterjee, J., however, remarked that "it is perfectly open to the accused to show before us in this Court that the statements that are alleged to be false are true in fact, or were induced by improper influences." The tribunal before which that case came was not a "Special Tribunal" but the High Court though, no doubt the Bench, was specially constituted to hear a case committed to it under the provisions of the Criminal Law Amendment Act. The provisions of the law except so far as they have been varied by the Criminal Law Amendment Act apply to such trials.

I am unable to concur in the views expressed in the case of *Emperor* v. *Abani Bhushan Chuckerbutty* (6), which appears to me to be opposed to whole current of judicial decisions in India. Nor can I understand the remarks of the learned Judges that if the Committing Magistrate was the sole Judge as to whether or not the pardon had been forfeited the accused could be permitted to give evidence to show that his former statement was true or induced by improper influences. Such evidence would be irrelevant on the charge of dacoity against the accused but would be relevant on the issue as to whether the pardon had been validly forfeited. On the other hand there are a number of authorities in which a different view has been taken.

In the case of *Kullan* v. *Emperor* (8), the learned Judges remarked: "We think that where a pardon has been tendered and the approver is afterwards put on trial he should be asked if he relies on it and if he says 'yes', which is a plea of pardon, the issue as to the pardon should be tried first." Again, in the case of *In re Aligirisami Naicken* (9), it was held that the Judge at the trial at the Sessions must leave it to the Jury to decide whether the pardon had been actually forfeited and not decide the point himself.

The High Court of Bombay has adopted a similar view.

In the case of *Emperor* v. *Bala* (5) the following observations appear in the judgment of the learned Judges: "As the law now stands, the question is whether the accused has forfeited his pardon by some act of his own—not whether the Magistrate has validly withdrawn it. This question is one of fact on which it is clear that the Magistrate may hold one opinion and the Sessions Court another, just as may happen on any other question of fact at issue in the case. The Sessions Court has to determine for itself on the evidence before it whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon cannot be tried." Again, in the case of *Emperor* v. *Kothia* (10), Aston, J., remarked: "It is, therefore, open to a pardoned accomplice, if placed on trial as an accomplice who has forfeited the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered." The same view was taken by the Chief Court of the Punjab as will appear from the following remarks in the judgment in the case of *Emperor* v. *Kadu* (11): "The word 'withdrawn' does not now appear at all. The word 'forfeited' has been substituted. Under the present Code, therefore, a pardon cannot be withdrawn, it can only be forfeited, and whether or not it has been forfeited will be a question of fact to be tried and decided by the Court acting under competent authority, which tries such person in res-

(8) 2 Ind. Cas. 343; 32 M. 173; 9 Cr. L. J. 571.

(9) 5 Ind. Cas 831; 33 M. 514; 11 Cr. L. J. 254; 7 M. L T. 121; (1910) M. W. N. 5.

(10) 30 B. 611; 4 Cr L. J. 346; 8 Bom L R. 740.

(11) 31 P. R. 1904 Cr.; 176 P. L. R. 1905; 1 Cr. L. J. 1082.

pect of the charge in regard to which a pardon was tendered to him." Against this large body of judicial authority there is only the decision in the case of *Emperor* v. *Abani Bhushan Chuckerbutty* (6). But when that case is closely looked at it cannot be taken as an authority the other way. For the Court admitted evidence to show that the statement of the accomplice whose pardon had been withdrawn was not false and that such statement was induced by improper means which was clearly irrelevant on the charge of dacoity but relevant on the plea as to whether the pardon had been validly withdrawn. In that view the judgments in the case of *Emperor* v. *Abani Bhushan Chuckerbutty* (6) can be reconciled with decision of the other cases I have referred to above although it may not have been strictly regular or in accordance with the weight of judicial opinion to have tried the plea in bar along with the charge on which the accused was committed for trial. The course adopted by the learned Judge in the present case in taking a verdict from the Jury in the first instance on the plea in bar, was manifestly correct.

Then a subsidiary point was raised that the fact that the learned Judge took the verdict of the Jury on the plea in bar raised by Sashi after recording some of the evidence on the charge vitiates the trial. But Sashi when called upon to plead raised his plea in bar in such an obscure manner that the learned Judge apparently in the first instance did not grasp what Sashi meant when he said he was a witness. As soon, however, as the learned Judge realised the plea that Sashi wished to place before the Court, he proceeded in a regular manner and any irregularity that there may have been, cannot have prejudiced the accused at the trial. Finally, it was argued that the learned Judge in his charge to the Jury on the charge upon which the accused had been committed for trial misdirected the Jury. I was and still am unable to appreciate what were the misdirections the learned Vakil for the appellants complains of. But even if the portions referred to amount to misdirections they are of such a trivial nature that they could not possibly have had any effect on the verdict of the Jury.

In the result I think the present appeal ought to be dismissed,

BEACHCROFT, J.—The learned Pleader for the appellants bases his appeal on three grounds, (1) that the joint trial of the approver, Sashi, and the other accused was illegal, a branch of which argument is that it was incumbent on the prosecution to examine Sashi as a witness at the Sessions trial; (2) that the Judge adopted an extraordinary procedure in taking a verdict on the question whether Sashi had forfeited his pardon, after the examination of eleven only of the fifty-five prosecution witnesses, which seriously prejudiced the appellants; (3) that there were misdirections in the charge to the Jury.

Many cases are to be found in the reports in which the question of the joint trial of an approver with the other accused has arisen, and in approaching a consideration of these cases there is a broad dividing line between the two classes into which they naturally fall, a line which, I think, has not always been observed.

One class comprises those cases in which at the Sessions trial the approver has failed to observe the conditions of his pardon, and has then been transferred from the witness-box to the dock and tried with the other accused. Instances of such cases are those of *Queen* v. *Petumber Dhoobee* (12); *Queen* v. *Bipro Dass* (13); *In re Joydee Paramanik* (14); *Queen-Empress* v. *Mulua* (15); *Queen-Empress* v. *Ram Tevan*, (16) and *Queen-Empress* v. *Jagat Chandra Mali* (17). To the procedure adopted in such cases there has been a double objection, *viz.*, that the trial of the approver was without jurisdiction, he never having been committed to the Sessions and that to take him straight from the witness-box to the dock and try him with the other accused prejudiced him in his defence.

The second class comprises those cases in which in the Magistrate's Court the approver has failed to observe the conditions of his pardon and, his pardon having been withdrawn the inquiry against him in respect of the offence has been continued along with the inquiry against the other

(12) 14 W. R. Cr. 10.
(13) 19 W. R. Cr. 43.
(14) 7 C. L. R. 66.
(15) 14 A. 502; A. W. N. (1892) 95.
(16) 15 M. 352; 2 Weir 364.
(17) 22 C. 50.

accused and they have jointly been committed to the Sessions. It is clear that remarks made in the first class of cases to the effect that the trial of the approver should await the termination of the trial of the other accused, can have no application to the totally different state of facts met with in the second class, when the approver comes before the Sessions Court as an accused and not as a witness but those remarks have been quoted in support of the view that when the pardon has been withdrawn before the case has come to the Sessions the joint trial is improper.

The current of decisions that the trial of the approver must await the trial of the other accused even in the second class of cases, was started by the case of *Queen-Empress* v. *Sudra* (18), decided by a single Judge. This case does not really fall within either of the classes to which I have referred, for the approver was committed to the Sessions, not on a charge of murder, which was the charge against the other accused, but in a separate proceedings on a charge of receiving stolen property belonging to the murdered man. The case turned on the meaning of the words "in the case" in section 337 of the Code of Criminal Procedure and Knox, J., remarked that the approver should not be tried till the original case had been fully heard and determined. That this dictum could not be universally correct was realised by the learned Judge, who mentioned one difficulty which might arise from its universal application, *viz.*, what was to be done when some of the accused in the original case absconded, and hinted that in such a case the rule might be relaxed.

This case was subsequently dissented from by a Division Bench of the same Court, *Queen-Empress* v. *Brij Narain Man* (2); and the later decision was followed in *Emperor* v. *Budhan* (3).

Shortly after the decision in *Queen-Empress* v. *Brij Narain Man* (2) a Bench of the Bombay High Court in *Queen-Empress* v. *Bhau* (19) took the view that nothing could be done against an approver till the trial of the other accused at Sessions was finished. The learned Judges relied on the case of *Queen-Empress* v. *Sudra* (18) and five other cases, not one of which is an authority for the general proposition stated. This case was doubted by Fulton, J., in the later case of *Emperor* v. *Bala* (5) and the judgment of Candy, J., shows that at an earlier stage a view inconsistent with that expressed in *Queen-Empress* v. *Bhau* (19) had been adopted.

In this Court the only reported case is that of *Queen-Empress* v. *Natu* (1). In that case the commitment of the approver was criticised on three grounds, only two of which have any bearing on the present discussion. These are that it was obligatory that the approver should be available as a witness at the Sessions trial and that the commitment of the approver before the trial of the other accused had terminated was illegal. Logically, the second reason would appear to depend on the first, for if there is no obligation that the approver should be available as a witness at the Sessions there would appear to be no reason, as a general proposition of law, for delaying his trial till the termination of the trial of the other accused; though circumstances might exist, which would induce the Sessions Judge as a matter of discretion to direct a separate trial on the ground of inconvenience or possible prejudice to the other accused.

Section 337 (2), Criminal Procedare Code, provides that a person accepting a tender of pardon is to be examined as a witness in the case. That condition is fulfilled when the approver is examined as a witness in the Magistrate's Court. In my opinion that sub-section does not mean that it is compulsory to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness. It is contrary to all principles that the Crown should be obliged to examine as a prosecution witness a person who has shown himself by his evidence in a previous stage of case to be untrustworthy. This view was taken in the csae of *Queen-Empress* v. *Ramasami* (20). Incidentally I may remark that the view expressed in the same case that beyond revoking the pardon nothing should be done against the approver until

(18) 14 A. 336; A. W. N. (1892) 21.
(19) 23 B. 493.
(20) 24 M. 321; 2 Weir 396.

after the trial of the other accused is over, is *obiter dictum* and based on the case of *Queen-Empress* v. *Bhau* (19) and the cases therein quoted, which apply to an entirely different state of facts.

It is to be noticed that the learned Judges who decided the case of *Queen-Empress* v. *Natu* (1) though referring to sub-sections (2) and (3) of section 337 say that the intention of the law is that the approver shall be "available" as a witness in the Sessions Court. If section 337 (2) really applies his examination is compulsory. The language of the Code is imperative "he shall be examined." I have pointed out that there is no obligation on the prosecution to examine him at the Sessions trial, if he has previously shown himself untrustworthy. There is never any obligation on the accused to examine a witness, and with all respect to the learned Judges I see nothing in the section to lead to the supposition that no action is to be taken against him in order that he may be 'available' as a witness for the defence. In fact he will be available as such witness if at the Sessions trial he is able to successfully plead that he has not forfeited his pardon; though I do not wish to be understood as giving this contingency as a reason for differing from the view expressed in *Queen-Empress* v. *Natu* (1).

I am of opinion that where an approver has forfeited his pardon in the Magistrate's Court there is no illegality in proceeding with the inquiry against him and in committing him for trial jointly with the other accused.

The second argument advanced by the learned Pleader for the appellants was, as originally formulated that the procedure of the learned Sessions Judge was unintelligible, and it is quite clear that he did not realise what the object of the learned Judge was. It would have been better if the learned Sessions Judge has clearly stated in his order-sheet, what was the preliminary point on which he heard arguments on the 4th July. But an examination of the earlier proceedings leads to the conclusion that he was trying a preliminary issue in bar on a plea by Sashi that he had been granted a pardon. On the charge being read the following plea by Sashi was recorded, "that he is a witness, that he cannot be tried in this case and that he is not guilty." This may reasonably be read as, *first*, a plea of pardon, *second*, an objection to being tried jointly with the other accused, *third*, a plea of not guilty on the general issue.

It appears that an argument was then addressed to the learned Judge objecting to the Magistrate's procedure in "cancelling" the pardon and at once proceeding with the inquiry against the accused jointly. The learned Judge decided that he could do nothing in view of section 215 of the Code of Criminal Procedure. Then on the 4th July, after the examination of 11 witnesses, the evidence of Sashi given before the Committing Magistrate was read. This was followed by arguments on the "preliminary point." The Judge then charged the Jury and took their verdict on the question whether Sashi had forfeited his pardon.

From this it is evident that the learned Judge was trying the preliminary issue raised by Sashi's plea of pardon as a bar to his being tried at all.

This raises the question whether the procedure adopted was correct. The learned Pleader for the appellants argues in the first place that the only person to decide whether the pardon was forfeited was the authority who granted the pardon, and in the second that if this was a question for the Court of Session it was one for the Judge to decide and not the Jury, and to support the second part of the argument he relies on section 298 (1) (*c*) of the Code of Criminal Proceedure.

In the case of *Queen-Empress* v. *Manick Chandra Sarkar* (7) it was decided that the authority which granted the pardon was the authority which had jurisdiction to revoke it. That case was decided under the old Criminal Procedure Code (Act X of 1882). The decision has become obsolete for Act V of 1898 made radical alteration in the law. Under the existing Code there is no provision for withdrawing the pardon, but the first clause of section 339 shows in what circumstances the pardon is forfeited and the second clause provides that when forfeited the approver's statement may be given in evidence against him. Under the old law the pardon remained

in force until it was withdrawn by the authority granting it in consequence of a failure by the approver to observe the condition under which it was granted, under the present law the result of a failure to observe the conditions is that the approver may be put on his trial without any formal order of withdrawal on cancellation. The act terminating the pardon was, under the old law, the withdrawal by the granting authority, under present law it is the forfeiture by the approver. It follows, as a matter of course, that when the approver is put on his trial he may plead his pardon and in such case it must be shown that his pardon has been forfeited.

Then arises the question what Court is to decide whether the pardon has been forfeited. The plea should, in my opinion, be taken at the commencement of the proceedings before the Magistrate, for it strikes at the jurisdiction to take any proceedings at all against the approver, and it would then be necessary for the Magistrate to consider whether the pardon had been forfeited. But if he decides against the approver or even if the plea is not taken before the Magistrate it does not follow that the plea cannot be pressed in the Sessions Court. That is the Court which has to decide on the guilt or innocence of the accused and I cannot conceive that the Court which has to adjudicate on that point has its hands tied in regard to what may be the strongest and perhaps the only point in the accused's defence. The position is exactly the same as in any ordinary Sessions trial *e.g.*, on a charge of criminal breach of trust. The Committing Magistrate has to be satisfied both of the trust and of the breach before he can commit and the Sessions Court has to come to a finding on both points before it can convict. So if a pardon has been granted, the forfeiture must be proved.

When the case comes before the Sessions Court that Court ought to try the question whether the pardon has been forfeited before trying the general issue. It is possible that the evidence on the two issues may overlap and in some cases be practically identical and that seems to me to be the only argument against trying the question of forfeiture of pardon before calling on the accused to plead to the charge of the offence, and where such is the case it might be a reason for the Judge to use his discretion and order the approver to be tried separately from the other accused.

In expressing the above views as to the change made in the law by Act V of 1898 and as to the duty of the Sessions Court to try the question whether the pardon was forfeited or not, I have not failed to consider the judgment of Holmwood, J., in *Emperor* v. *Abani Bhushan Chuckerbutty* (6). It istrue that the learned Judge expresses the opinion that the inquiry as to forfeiture should not be re-opened at the trial, but in the concluding paragraph of his judgment he says, "it is open to the accused here to show that the statement he made on oath was not a false statement." which is only another way of saying that he may prove that the pardon was in fact not forfeited. The learned Judge thereby in effect says that the question may be re-opened. Chatterjee, J., in the same case says: "It was for the Committing Magistrate to decide this question (*i.e.*, the question of forfeiture).....I say this with this qualification, that this is only for the purpose of the commitment, and it is perfectly open to the accused to show before us in this Court that the statements which are alleged to be false are true in fact," which I take to mean that the Magistrate must come to a finding on the question of forfeiture before he can commit to the Sessions, that his finding has no effect beyond the proceedings in his own Court, and that the question can be re-opened in the Sessions Court. I consider that not only may the question be re-opened but the onus is on the Crown to prove that the pardon has been forfeited.

Now, assuming that the procedure adopted was not quite correct, in that evidence should have beeen taken only as against Sashi in the first instance and only on preliminary plea, there is no reason to suppose that any of the accused has been in any way prejudiced.

The argument that it was for the Judge and not the Jury to decide whether the pardon was forfeited, is not supported by section 298 (1) (*c*) of the Code of Criminal Procedure. That clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible. Here

the question of forfeiture of the pardon was important not for the purpose of making other evidence admissible, but for the purpose of determining whether the trial could at all continue as against Sashi. That was a question of fact for the Jury.

As regards the arguments that the learned Judge misdirected the Jury it is sufficient to say that no passage in the charge has been pointed out, which justifies the suggestion.

I agree that the appeals should be dismissed.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 187 OF 1914.

September 21, 1914.

Present:—Mr. Lindsay, J. C.

RAGHU AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Penal Code Act XLV of 1860), *s.* 304*A*—*Death by negligence—Boat, over-crowded, sinking of—Sinking due to strong wind and rough water and resulting in loss of life—Unseaworthy condition of boat not proved—Lessees of ferry not responsible—Accident.*

Where owing to strong wind and rough water a ferry-boat overturns or sinks resulting in loss of life, the lessees of the ferry cannot be convicted of an offence under section 304A, Indian Penal Code, unless it is shown that the boat, although over-crowded, was in an unseaworthy condition at the time of the occurrence.

Appeal against the order of the Sessions Judge, Sitapur, dated 22nd July 1914, upholding that of the Magistrate Sitapur, dated 1st July 1914.

Mr. *P. C. Bhattacharji*, for the Applicants.

The *Government Pleader*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed on appeal by the Sessions Judge of Sitapur. The order directed that an appeal filed by the accused applicants against their conviction in the Court of the Magistrate should be dismissed. The conviction was under section 304A of the Indian Penal Code. The applicants are the lessees of a ferry-boat which was plying in the river Chauka and the evidence goes to show that on the 21th May last a marriage party arrived on the banks of the river to be ferried across in the boat of which the applicants were the lessees. A number of the persons who joined this marriage party got across the river in one trip. The boat returned and was tied up to the bank and fastened to another boat which was already by the edge of the river. According to the Magistrate the boat was then boarded by no less than forty-two people and it was also stated in the judgment that an *ekka* (or a conveyance of some sort), and a palanquin were put on board as well. The witnesses for the prosecution admit that a strong wind was blowing at the time and the water was rough. So far as I can see the boat broke loose and the people, no doubt, got into a state of panic. One boat fell and sank and the other boat overturned, two men were reported to be missing and it may be presumed that they were drowned. The whole question in the case is whether or not these two lessees were rightly convicted of an offence under section 304A. Their conviction could only stand in case it were proved that the boat or boats which were used at this particular time were in an unseaworthy condition. It is very difficult to come to any definite conclusion on the evidence which is upon the record. The wretched passengers who must have been in a state of great fright are quite unable to give any coherent account of what took place. The most they can say is that the water came into the boat but whether it came in over the sides or through the bottom is not quite clear. The only direct evidence as to the conditions of the boats is to be found in the statements of the two Police Officers. Both these witnesses deposed that one of the boats was in an unseaworthy condition. It is to be remarked, however, with regard to this evidence that these Police Officers did not see the boats till the second or third day after the accident, and I gather from what they say that by that time one boat had been under water for some considerable period. Whether or not the state they were in when they were examined by the Police Officers is a fair criterion of their state at the time of the accident is a matter regarding which I entertain considerable doubt. It is not

MOHAMMAD v. ALI RAZA.

sufficient to find, as both the Magistrate and the Sessions Judge have found, that one of the boats had rag or cloth stuffed in to the seams. Everybody knows that wooden boats of this kind have to be plugged with hemp or some other such substance in order to keep out water. It is also a well-known fact that every boat of this kind always has little water in the bottom which percolates through the seams. Reading the evidence together, it appears to me that it is far more reasonable to suppose that this unhappy affair was in the nature of an accident. At any rate, whatever took place, it does not seem to me that these two accused applicants can be held responsible. It looks as if the boat was over-crowded. Forty-two passengers, an *ekka* and a palanquin seem to be a very considerable load, and with a strong east wind blowing and the water lashing up into waves it is small wonder that the boat went under. I do not think it is established that either of these boats was really unfit to ply as ferry boat. In fact we have it that just before this accident took place one of the boats had gone across and came back in perfect safety and in his judgment the Sessions Judge points out that had it not been for the high wind either of the boats would have made the passage without mishap. That finding of the learned Judge seems to me to dispose of the theory of negligence in the sense that the accused had been plying a boat which was not fit to travel across the water.

I allow this application and set aside the convictions and sentences and direct these two accused be acquitted and released.

Application accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1139 OF 1914.

December 18, 1914.

Present:—Mr. Justice Tudball.

Syed MOHAMMAD—APPLICANT

versus

Mirza ALI RAZA—OPPOSITE PARTY.

Complaint dismissed by one Magistrate—Fresh complaint to another—Transfer of case—Criminal Procedure Code (Act V of 1898), ss. 526, 437.

A complaint under sections 420, 409, Indian Penal Code, dismissed on the complainant's statement that he had come to terms with the accused and did not wish to offer any evidence, can be reinstituted in the Court of another Magistrate who has jurisdiction to entertain it.

Where in a case there is a good deal of evidence (both oral and documentary) in English and the Magistrate in whose Court the case is pending does not know English, it may be neccessary and perhaps advisable to transfer the case to some Magistrate who knows that language.

Application for revision filed by Syed Mohammad.

Mr. *Nihal Chand*, for the Applicant.

Mr. *W. Wallach*, for the Opposite Party.

JUDGMENT.—Mirza Ali Raza, the opposite party to this application, on the 30th of June 1913, made a complaint against Syed Mohammad, the applicant in the Court of Qazi Ibrar Ahmad, a Magistrate of the first Class, charging him with offences under sections 420 and 409 of the Code. The complainant in the case brought about the transfer of the trial from the Court of that Magistrate to the Court of another Magistrate of the first Class, Rai Bahadur Radha Raman. The ground for the transfer was that a good deal of the evidence in the case was English correspondence and also the probability that English witnesses might be examined. It is not clear by whom the order of transfer was passed but presumably it was by the District Magistrate. On the 9th of September 1913, when the case was called in the Court of Rai Bahadur Radha Raman the complainant said that he had come to terms with the accused and did not wish to offer any evidence and so the Magistrate discharged the latter. A fresh complaint has now been made in the Court of Qazi Ibrar Ahmad and the Magistrate has taken cognizance of the complaint. The present application is directed against these proceedings and it is prayed that they may be quashed and the complaint dismissed on the ground that the Magistrate had no jurisdiction to sit in judgment over the decision of the District Magistrate, as a Magistrate of co-ordinate jurisdiction cannot re-open the case. There appears to have been an error in the application. There is nothing to show that Rai Bahadur Radha Raman was ever the District Magistrate of Moradabad, and the history of services

shows that from the commencement of 1913 to the 18th of November 1913 he was a first Class Magistrate and not a District Magistrate. He is no longer attached to the District. So far as the facts are stated before me the only Magistrate who had jurisdiction in the matter or could now have jurisdiction therein is the one in whose Court the complaint has been laid afresh. The Court of Rai Bahadur Radha Raman merely had jurisdiction in this case by reason of the order of transfer and that case having come to an end in his Court and he having left the District there is no other Court except that of Qazi Ibrar Ahmad to take cognizance of the complaint. Therefore it is impossible for me to pass any order quashing the proceedings and dismissing the complaint; nor would it be right to put a stop to the proceedings. If, as the case appears to be, there be a good deal of evidence in English both oral and documentary and as the Magistrate in whose Court the case is pending does not know English, it may be necessary and perhaps would be advisable to transfer the case to the Court of some Magistrate who knows that language. But it is unnecessary for me to pass any order in respect thereof, as it is open to the parties, both of whom express their agreement to a transfer and to apply to the District Magistrate for an order in that respect. The present application is rejected.

Application rejected.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1494 OF 1914.

September 2, 1914.

Present:—Mr. Justice Johnstone.

ABDUL KARIM—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 514—Bond for appearance in Court—Liability of surety.

When a person stands surety for the appearance in Court, up to the conclusion of the case, of a man, who has been called upon under section 110, Criminal Procedure Code, to furnish security for good behaviour, the liability of the surety does not cease until the culprit, if so ordered, appears with his sureties and executes his bond.

Petition for revision of the order of the District Magistrate, Jhelum, dated the 9th May 1914.

Mr. *Noor-ud-Din*, for the Petitioner.

ORDER.—There are no grounds for interference. The petitioner, Abdul Karim, stood surety for the appearance in the Court, up to the conclusion of the case, of a man who had been called upon under section 110, Criminal Procedure Code, to furnish security for good behaviour. After some hearings the Court on 18th February 1914 found the case proved against that man and he was directed to produce his sureties, but he failed to appear.

I cannot accede to the contention that the petitioner's liability ceased when the Court held that the case was proved. The case was not complete, nor were the Magistrate's duties in connection therewith at an end, until the culprit had appeared with his sureties and executed his bond.

I dismiss the petition.

Petition dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 318 OF 1914.

CRIMINAL REVISION PETITION No. 273 OF 1914.

November 27, 1914.

Present:—Mr. Justice Ayling.

A. K. SUNDARSANAM AIYANGAR—PETITIONER

versus

ELAYAVALLI SRINIVASACHARI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 144 (4)—Order passed by acting District Magistrate—Petition for rescission, by whom to be disposed of.

An order passed under section 144, Criminal Procedure Code, by a Joint Magistrate, while acting as a District Magistrate, can be rescinded or altered after his reversion, by the then District Magistrate himself and the latter cannot transfer an application for rescission or alteration to the former.

Petition, under section 15 of the Charter Act, praying the High Court to revise the order of the Headquarter Joint Magistrate of

NADIR *v.* EMPEROR.

Tinnevelly, in his proceedings, dated 30th March 1914.

Messrs. *T. Richmond* and *C. Narasimhachariar*, for the Petitioner.

Messrs. *E. R. Osborne* and *N. S. Rangaswami Aiyangar*, for the Respondent.

The *Public Prosecutor*, for the Government.

ORDER.—The order under section 144, Criminal Procedure Code, was passed by Mr. Jackson as District Magistrate. A petition for its rescission under clause (4) of the same section was presented to his successor, after Mr. Jackson had handed over charge of the office of District Magistrate and reverted as Joint Magistrate. In such circumstances the power of rescinding or altering the order lay only with Mr. Jackson's successor and the latter was wrong in transferring the petition to Mr. Jackson, for disposal. Mr. Osborne contends that the clause authorises a Magistrate to rescind or alter an order, after vacating office but I do not think this is the proper interpretation.

Mr. Jackson after receiving the petition by transfer passed an order dealing with the case on its merits, and declining to modify or rescind his order as District Magistrate.

It is suggested that I should set aside the District Magistrate's order transferring the petition and that of the Joint Magistrate and direct the District Magistrate to restore the petition to his file and dispose of it himself. But in view of the discretionary nature of the matter and of the fact that the original order has long ago expired by lapse of time, no useful purpose would now be served by such a course.

I, therefore, decline to interfere.

Petition dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NOS. 13 AND 14 OF 1914.

March 3, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

NADIR AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Practice—Witness improving on his former statement—Evidence—Colouring matter of blood on clothes and nail parings of accused—Murder.

It is very unsafe to rely upon a witness who materially improves on his former statement.

In the absence of reasonable proof of guilt, the presence of colouring matter of blood on certain articles of clothing of a person accused of murder or of mammalian blood on his nail parings is not of much consequence and can be explained in various ways.

Appeal from the order of the Additional Sessions Judge of Jhelum Division, at Rawalpindi, dated the 24th November 1913, convicting the appellant and sentencing him to death.

Mr. *Nand Lal*, for the Appellant.

Mr. *Saunders*, for the Respondent.

JUDGMENT.—Nadir and Ram have been convicted of the murder of *Musammat* Bhari, a girl six years of age, and have been sentenced to death by the Additional Sessions Judge of Rawalpindi. Nadir has appealed through the Jail Authorities (Criminal Appeal No. 13) and Ram through an Advocate, (Criminal Appeal No. 14), and their appeals may be conveniently disposed of together. Their cases are also before us for confirmation of sentence under section 374, Criminal Procedure Code.

A third accused, by name Beli Ram, was acquitted by the Sessions Judge.

The girl *Musammat* Bhari disappeared on the afternoon of the 12th August after leaving the house of her aunt, *Musammat* Gauhar Bano, to read the Quran in the mosque. Her dead body was found on the succeeding night some time after midnight by Dulla, *Chaukidar*, P. W. No. 3; Tara, P. W. No. 4; and Mohkam Din, P. W. No. 5, in a manger in the unoccupied house of one Jahana under circumstances detailed in the judgment of the Sessions Judge which showed unmistakably that she had been murdered and robbed of the valuable ornaments which she used to wear.

Excluding the evidence of the child *Musammat* Bholi which has been rejected, and in our opinion rightly, by the Sessions Judge, the case against the appellants rests upon the evidence of Dulla coupled with the fact that colouring matter of blood was found upon the loin cloth and shoes of Ram, and upon the turban and shoes of Nadir, whilst mammalian blood was found in the paring of Nadir's nails.

The unsatisfactory character of Dulla's evidence is clear from the summary of it given in the Sessions Judge's judgment. It is clear that he has improved upon his first statement, which he made to the Sub-Inspector, and which was that he had seen the two appellants at midnight coming out of the courtyard of the house where *Musammat* Bhari's body was found shortly after. We gather that, when under cross-examination in the Sessions Court, his meaning was that he was in the lane outside Jahana's house and saw appellants coming out of the passage, into which the courtyard opens. When he was re-called and examined again two days after his first statement in the Sessions Court, he said he was at the spot marked No. 10 in the plan, Exhibit F, and actually saw appellants coming out of the room where the dead body was found. This was certainly a lie and when a witness improves on his original statement in this way it is very unsafe to rely upon him. We do not think he lied in saying that he saw appellants under suspicious circumstances late at night and that this led him to suspect them, but we think it is doubtful where exactly he did see them.

The point, however, which, in our opinion, is fatal to the case for the prosecution is, that appellants' foot-prints were not found in the house where the dead body was discovered. The theory of the prosecution is that they had gone back there for some purpose or other, but if they had done so we are of opinion that they would certainly have left some foot-prints. It is in evidence that there was mud all over the floor and the foot-prints of Dulla, Tara, Mohkam and the dead child's grandmother were found in the mud. The Sessions Judge says:—"The explanation may be that the accused took the precaution of effacing the tracks, or it may be that they left foot-prints which were indistinct." This explanation does not commend itself to us; it is clear from the evidence that a careful search was made for tracks and there is nothing on the record to show that there were any indistinct tracks or signs of foot-prints having been effaced.

Wherever the appellants had come from when Dulla saw them we do not think it possible that they had come from the room where the dead body was found. They may have come from Beli's house to which the same passage leads. Once it is admitted that appellants had not just come from Jahana's house, the evidence of Dulla loses all its force.

The presence of colouring matter of blood on certain articles of appellants' clothing and of mammalian blood on Nadir's nail parings is not at all conclusive and may be explained in various ways. No doubt taken with other evidence it would be a point against the appellants, but by itself it does not count for much.

For the above reasons we consider that the evidence is not sufficient for the conviction of either of the appellants. We accept the appeals and setting aside the convictions and sentences, acquit Nadir and Ram and direct that they be forthwith set at liberty.

Appeals accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 335 OF 1914.

April 22, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

KALI PRASAD BANERJEE—ACCUSED—PETITIONER

versus

EMPEROR ON THE PROSECUTION OF BHARAT CHANDRA BANERJEE—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 465—Signing telegram in another's name—No intent to injure—Forgery—Denial of fact by accused—Defence inconsistent with denial.

The mere signing a telegram in another's name, where it is not shown to have been done with intent

to injure him and where it does not actually injure him, does not constitute the offence of forgery, even though the signature may have been made without the authority of such person.

An accused is not bound by any statement denying any fact against him if he desires subsequently to take a further defence inconsistent with the denial.

Criminal revision against an order of the Sessions Judge of Faridpur on appeal dated 5th January 1914.

FACTS.—The accused, Kali Prasad Banerjee, was a student of the H. E. School at Madaripur. He was arrested as concerned in the Gopalpur dacoity case (District Faridpur), and released on bail. While this case was still under investigation another dacoity took place in village Kawakuri within the same Sub-Division, Madaripur, District Faridpur, in which Kali Prasad was again suspected to have been concerned and re-arrested. The two cases were investigated together as committed by the same gang and the inquiry was carried on through the months of June, July and August. At the end of July when the Sud-Divisional Officer of Madaripur was at Khalia, the village of Kali Prasad, certain information reached him in consequence of which he issued warrants to search the house of Kali Prasad and the dispensary of Ramani Mohan Das Gupta in connection with the Kawakuri case. Ramani had his dispensary at the house of Bharat Chandra Banerjee whose house and that of Kali Prasad were in the same premises.

In course of this search made on 4th August 1913 certain properties of Kali Prasad and Ramani were seized among which was a swordstick belonging to Ramani. Both were arrested and Ramani was sent up to take his trial under the Arms Act as holding an arm without license. Bharat Chandra Banerjee was one of the witnesses to this search.

While the Arms Act case against Ramani was pending, from information coming from District Magistrate of Barisal, the Sub-Divisional Officer of Madaripur asked the District Magistrate of Faridpur to call for the original of a telegram sent at Khalia Telegraph Office on the morning of the 5th August 1913 to the address of Lolit Kabiraj of Madaripur. This was received from the Telegraph Department and marked Exhibit I, and read

"To

Lolit Mohan Das Kabiraj,
Madaripur.

Ramani arrested, take care, tell Kali too---
Bharat Chandra—Khalia."

This telegram was forwarded to the Police to assist them in their investigation of the Arms Act and dacoity cases. On 1st September 1913 Bharat Chandra Banerjee was sent to the Sub-Divisional Officer with a report by the Madaripur Inspector of Police to the effect that the telegram was never sent by Bharat Chandra but was forged and sent by Kali Prasad Banerjee, accordingly the complaint of Bharat Chandra Banerjee was recorded in which he alleged that he neither sent nor authorized the sending of the telegram in question and that it was sent by Kali Prasad Banerjee with intent to injure him. The accused was, therefore, prosecuted under section 465, Indian Penal Code, and the accused was convicted and sentenced on the 31st October 1913 to undergo rigorous imprisonment for six months, by the Sub-Divisional Officer of Madaripur. On appeal to the Sessions Judge of Faridpur the conviction was upheld and appeal dismissed on 5th January 1914. The accused then moved the High Court on 2nd March 1914 and obtained a Rule on five grounds *viz.*, (1) meaning of telegram open to defence version, (2) Court ought to have examined Lolit Kabiraj, (3) if a warning it is not a forgery, (4) no intention (5), prejudiced for want of cross-examination of Bharat. The accused was granted bail.

Mr. *K. N. Chaudhuri* (with Babu *Narendra Kumar Bose*), for the Petitioner.

Mr. *Sultan Ahmed* for Mr. *Orr*, *Deputy Legal Remembrancer*, for the Opposite Party.

JUDGMENT.—We are of opinion that this Rule must be made absolute on all the grounds upon which it was issued. A perusal of the 3rd paragraph of the trying Magistrate's judgment in which he speaks rather irregularly of facts to which he was able to depose of his own knowledge seems to clearly establish that Bharat Chandra Banerjee, Kali Prasad Banerjee and Ramani Mohan Das were all living together. Bharat Chandra Banerjee saw the search made and he saw Ramani arrested, and there is

nothing to show that there was any necessity to warn Lolit Kabiraj, and if the telegram was intended as a warning Kali who is mentioned in it must be the accused himself, for the Mukhtear Kali Prasad whom it is suggested was referred to could not have been invoked in the case at all except for the purpose of exercising his legitimate function in defending the accused. The word "take care" is a very common wrong use among even educated Bengalees of the expression "take necessary steps," and there certainly appears to us to be nothing on the face of the telegram having regard to those facts which the learned Magistrate has set out as being within his own knowledge to enable us to say that the telegram must have been intended as a warning to Lolit Kabiraj and some Kali other than the accused.

Then on the second point it does not certainly fall within the meaning of forgery. The use of the name "Bharat Chandra" if it was intended to represent Bharat Chandra Banerjee which there is nothing to show would not be improbable considering that Ramani lived in Bharat Chandra's house and as the Magistrate finds under his protection, and the youth who sent the telegram may very well have thought that his friends would take more serious notice of it if it was in the name of Ramani's protector. But there is really nothing to show that the expression "Bharat Chandra" refers to Bharat Chandra Banerjee at all, and like everything else in this case it is based upon pure assumption. Then if it did refer to Bharat Chandra Banerjee there is nothing to show that it was done with intent to injure him. The learned District Magistrate in showing cause states that there is evidence that he was actually injured. The learned Deputy Legal Remembrancer for Bihar and Orissa who appears in the absence of the learned Deputy Legal Remembrancer of this Province frankly admits that he is unable to say that there is any such evidence, and certainly no injury was done to Bharat Chandra Banerjee and it does not seem easy to see how any injury could have been done to him, for as far as being an associate of the accused and of Ramani that was already patent to every body on the 4th August when the Magistrate himself says that he directed the Police to search his house.

As regards the 4th point the accused certainly was not tied and bound by any statement denying any fact against him if he desired subsequently to take the further defence that Bharat really authorized him to send the telegram, and we are of opinion that on that ground also Bharat ought to have been submitted to further cross-examination. The denial of a person in his position that he had nothing to do with the telegram is very natural, but it is not very trustworthy especially when he has not been subjected to any cross-examination.

For all these reasons the Rule must be made absolute. The conviction and sentence are set aside and the accused acquitted and released.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 247 OF 1914.

May 7, 1914.

Present:—Justice Sir P. C. Banerji, Kt.

RAM NATH—APPLICANT

versus

MUNICIPAL BOARD OF MUTTRA—OPPOSITE PARTY.

U. P. Municipalities Act (I of 1900), ss. 87, 88, 147—Notice under s. 88—Prosecution under s. 87—Conviction whether legal—Daily fine, whether legal under s. 88—Evidence—Report of Municipal Overseer, admissibility of—Municipal Board neglecting to pass order within time despite receipt of written notice and written reminder, effect of.

Where a notice is issued by a Board under section 88 but the prosecution and conviction are under section 87, the order of conviction cannot stand.

A daily fine cannot be imposed for an offence under section 88.

The report of a Municipal Overseer as to when the construction of a *chajja* took place, is not admissible in evidence and no finding can be based on such a report.

Under section 87 of the Municipalities Act the applicant gave notice to the Board, on September 30th, 1912, of his intention to erect a building. The Municipal Board took no notice of it. On 28th November

1912 the applicant by written communication called the attention of the Board to its omission. But the reminder had no effect on the Board:

Held, that under section 87, clause (3), the Board must be deemed to have sanctioned the proposed building.

Criminal revision from an order of the District Magistrate of Muttra.

Mr. *Purushottam Das Tandon*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for revision of an order convicting the applicant under section 147 of Act I of 1900, (the Municipalities Act). The Municipal Board on July 2nd, 1913, issued a notice to the applicant, Ram Nath, under section 88 of the Act, directing him to pull down a *chajja*. As he did not comply with the notice he was prosecuted and the prosecution resulted in his conviction. He was sentenced to a fine of Rs. 10, and to a daily fine of Rupee 1. The last portion of the order, about daily fine is clearly wrong and a reference has been made by the learned District Magistrate asking this Court to set aside this portion of the Magistrate's order.

As regards the conviction two points have been raised. It is first contended that a notice under section 88 could only be issued requiring a person "to remove or alter a projection or structure overhanging, projecting into or encroaching on any street ; and that there is no evidence in this case that the *chajja* built by the applicant projects into or overhangs any street or drain or sewer or aqueduct. This is so and the Magistrate did not try the case as a case of breach of an order lawfully issued upon notice under section 88. The case was tried as if a notice had been issued under sub-section (5) section 87. As no such notice was issued the case could not be tried as one under that sub-section. Even if it be assumed that the notice was one under that sub-section, I am of opinion that the conviction cannot be supported. It appears that on September 30th 1912, the applicant, Ram Nath, gave notice to the Municipal Board of Muttra under section 87 of the Act, of his intention to make the construction complained of. No notice of this was taken by the Municipal Board and on November 28th, 1912, Ram Nath by a written communication called the attention of the Board to its omission to make an order in respect of his previous application of September 30th, 1912. No order was passed by the Municipal Board within 15 days of the receipt of this reminder of the 28th November, 1912, and it was only on July 2nd, 1913, that the Board moved in the matter. Therefore, under sub-section (3) of section 87, the Municipal Board should be deemed to have sanctioned the construction which Ram Nath proposed to make. It is said in the judgment of the Magistrate that the construction of the *chajja* took place on November 3rd, 1912, that is befrore the expiry of the 15 days. But this finding is based only on a report of the Overseer made to the Municipal Board. This report was not admissible in evidence. The Overseer was not examined in this case and Ram Nath does not admit that he made the construction on November 3rd, as alleged. Therefore, there was nothing before the Magistrate to justify the conclusion that the construction had been made before the Municipal Board could be deemed under sub-section (3) of section 87, to have sanctioned the construction. On this ground also the conviction is untenable. I allow the application and set aside the order of the Magistrate both as regards the fine imposed on Ram Nath and the daily fine which he was ordered to pay. Any portion of the fines, if paid, must be refunded. This also disposes of the reference made by the District Magistrate No. 244 of 1914.

Application allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 137 OF 1914.

CRIMINAL REVISION PETITION No. 118 OF 1914.

September 18, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

MUTHUKARUPPAN SERVAI AND ANOTHER—PETITIONERS.

versus

VELLAYYA KUDUMBAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 428—Remand by Appellate Court for additional evidence and finding, whether legal.

Section 428 of the Criminal Procedure Code does not empower an Appellate Magistrate to call for a

CHANDA v. RAMA MISARI.

fresh finding from a Subordinate Magistrate, nor can he act upon such finding if submitted by the Sub-Magistrate.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Melur Division, in Calendar Appeal No. 50 of 1913, preferred against that of the second Class Magistrate of Madura Taluq, in Calendar Case No. 192 of 1912.

Mr. *E. R. Osborne*, for the Petitioners.

Mr. *C. Madavan Nair*, for the Accused.

Mr. *N. Grant*, for the Government.

JUDGMENT.—The Appellate Magistrate has fallen into three errors in his proceedings in the trial of the appeal.

One of the errors is that he seems to have asked the 2nd Class Magistrate not only to take further evidence but also to record a clear finding on the question whether the lane is a public or a private one. Section 428, Criminal Procedure Code, does not empower the Appellate Magistrate to call for a fresh finding from the Subordinate Magistrate.

The next error is that the Appellate Magistrate instead of disposing of the case himself, after considering the whole evidence including the additional evidence has purported to act upon the fresh finding of the Sub-Magistrate.

The last error is that he mistook the nature of the finding so submitted by the Sub-Magistrate.

However the whole case is trifling and as the Public Prosecutor does not wish to have the accused put again in peril, and as this petition is evidently the outcome of private malice, I decline to interfere.

Petition dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 378 OF 1914.
CRIMINAL REVISION PETITION No. 310 OF 1914.

October 28, 1914.

Present:—Mr. Justice Kumarasawmi Sastri

CHANDA *alias* RUKMANI BAI—PETITIONER

versus

RAMA MISARI—COUNTER-PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 488 — *Application for maintenance by wife—Presence of relations or friends to bear her costs, whether ground for dismissal of application.*

A wife's application for maintenance against her husband should not be dismissed on the mere ground that she has relations or friends willing to maintain her or to bear the costs of the proceedings

Kunnath Anjumma v. *Veluth Ahmed*, 2 Weir 616 Cr, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional first Class Magistrate of Ramnad, in Miscellaneous Case No. 11 of 1914, dated 30th May 1914.

Mr. *T. Rangachariar*, for the Petitioner.

Mr. *C. Padmanabha Aiyangar*, for the Respondent.

ORDER.—The Joint Magistrate does not find that the petitioner was not the wife of the counter-petitioner. He stopped the case after three witnesses were examined. He does not find that the petitioner had sufficient means independent of the husband. The mere fact that she has relations or friends willing to maintain her or to bear the costs of the proceedings will be no ground for dismissing the application *Kunnath Anjumma* v. *Veluth Ahmed* (1).

I am of opinion that the order of the Magistrate cannot be supported. I set it aside and direct him to proceed with the inquiry and dispose of it according to law.

Order set asdie.

(1) 2 Weir 616 Cr.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 263 OF 1912.

December 16, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Carnduff.

Mahant KISHEN DYAL GIR—DEFENDANT—APPELLANT

versus

Syed MAHOMED AMIRUL HUSSEIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 2, O. XLI, r. 2—All pleas of estoppel, whether barred, if not raised in written statement—Res judicata, *plea of, not raised, whether can be raised in appeal—Mortgage suit—Subsequent mortgagee made party must set up even his prior mortgage—Prior mortgagee not necessary party and not bound to appear and plead—Parties—Pleadings.*

By reason of Order VIII, rule 2, of the Civil Procedure Code, all pleas of estoppel of whatever nature are not barred if they are not taken in the written statement.

Therefore, an objection which could have been taken by one of numerous defendants in a mortgage suit to show that his purchase right in the property could not be affected by the plaintiffs' suit by reason of the principle of *res judicata*, is not such a matter as could show that the plaintiffs' suit was not maintainable by reason of Order VIII, rule 2, of the Civil Procedure Code and can be raised in appeal with the leave of the Court under Order XLI, rule 2 of the Code.

A puisne mortgagee, who has also a prior mortgage, if made defendant as a puisne mortgagee, is bound to appear and set up both his prior and subsequent mortgages. But if he is only a prior mortgagee and not a subsequent mortgagee and is sought to be kept on the record as defendant simply because the authenticity of his mortgage is not admitted, it is not at all necessary for him to appear and defend his rights under his prior mortgage.

Mahomed Ibrahim Hossain Khan v. *Ambika Pershad Singh*, 14 Ind. Cas. 496; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 22 M. L. J. 468; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 39 C. 527, distinguished.

Appeal from original decree from a decision of the Subordnate Judge of Gaya, dated the 15th May 1912.

Dr. *Rash Behary Ghose* and Babu *Atul Chandra Dutt*, for the Appellant.

Babus *Mohendra Nath Roy* and *Chandra Sekhar Prosad Singh*, for the Respondents.

Babu *Shib Chandra Palit*, for the Deputy Registrar.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs as assignees of a mortgage, dated the 28th April 1896, executed by one Mohammed Buksh in favour of a lady named Nawaba Hormuzi Begum.

The plaintiffs' case is that they took an assignment from this lady, who is their relative and about 80 years of age, and paid her Rs. 16,000 in silver at her own house before the registration of the instrument of assignment.

The bond was for Rs. 5,000 with Rs. 24 per cent. interest and compound interest with monthly rests. The mortage debt had mounted up, at the time of suit, to about Rs. 45,000. The bond is admittedly genuine and the plaintiffs have obtained a decree for the whole amount. Out of a large number of defendants, who were joined in the suit as having some interest in the properties mortgaged, the defendant No. 27, the Mahant of Budh Gaya, alone appeals. Property No. 5 in the schedule to the plaint is alone involved in this appeal.

The property consists of certain *mokarari* rights in *Mauza* Pesra Kumhari, otherwise called Pesra Nizamut, and Sunder Kumhari, *asli mai dakhili* appertaining to *Mahal* Azamghur, *Perganna* Sherghatty, District Gaya.

The plaintiffs claim that the mortgagor had 16-annas of this property in permanent *mokarari* interest, and one of the questions raised and decided in this suit is as to the share of the mortgagor. The Mahant had a subsequent mortgage on Pesra and Sunder Kumhari, described in his plaint as two separate villages in one *touzi* number, dated 22nd May 1896. He also claimed a prior lien on the properties as assignee of a mortgage to Baijnath Singh and his brothers, dated 16th March 1887, given by Mohammed Buksh in respect of certain shares in all the *mauzas* held by him in *Mahal* Azamghur.

Baijnath Singh's family sued on their mortgage in 1894 and got a decree on the 11th August 1896. This decree was assigned to the Mahant. In a suit brought by the Mahant in the year 1900 on his mortgage of 22nd May 1896 and a deed of further charge dated 3rd March 1897, *Musammat* Hormuzi Begum was made a party and the principal contention of the appellant before us is that the decree of the District Judge, dated 19th July 1900, operates as *res judicata* against her so that her assignees cannot now sue on her mortgage.

This plea was never put forward in the written statement nor in the lower Court nor is it taken in the grounds of appeal before us.

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It was strenuously urged before us by the learned Vakil for the respondents that by reason of Order VIII, rule 2, of the Civil Procedure Code, all pleas of estoppel of whatever nature are barred unless they are taken in the written statement. It was pointed out that Order VIII, rule 2, corresponds in every respect to Order XIX, rule 15, of the English Judicature Acts and a note in this year's Annual Practice, citing the authority of *Coppinger* v *Norton* (1) for the proposition that all estoppels are included in that rule, was put before us. On referring to the report of that case, however, we do not find that any such rule is laid down in the judgment of any of the learned Judges, three of whom delivered separate judgments. We do not think that an objection which could have been taken by one of numerous defendants in the suit to show that his purchased right in the property could not be affected by the plaintiffs' suit by reason of the principle of *res judicata*, was a matter which could be said to show that the plaintiffs' suit was not maintainable. We think, therefore, that the question could be raised with the leave of the Court under Order XLI, rule 2.

We, therefore, though with some hesitation, allowed the point to be argued but we considered it our duty to put the strictest interpretation on the proceedings in the suit of 1900 which are alleged to create the bar of *res judicata*. What then are the facts as regards that litigation?

It appears that Nawaba Hormuzi Begum was defendant No. 13 in that suit. In paragraph 7 of the plaint, dated 27th July 1899, it was stated that "the plaintiff had come to know that the defendants Nos. 9 to 18 assert some connection with the properties mortgaged under the plaintiff's bond, therefore, they have been added as defendants to give them a chance of redemption of mortgage."

It is strenuously urged that this is impleading the defendant No. 13 as a puisne mortgagee. But it is to be noted that all the defendants Nos. 9 to 18 were impleaded under different interests. Numbers 9 to 11 were the family of Baijnath who admittedly had prior mortgage, and the decree, the Mahant obtained, directed that the sale-proceeds should be applied first to the payment of their mortgage. There is nothing in the pleading to show that these defendants had any subsequent mortgages and the judgment distinctly says they were admittedly prior mortgagees. The defendant No. 13 had a separate mortgage of her own and a petition of the 6th June 1900 put in by the Mahant gives the correct date of her mortgage 28th April 1896, thus admitting that it was a prior mortgage but asking that she should be kept on the record because the plaintiff did not admit the authenticity of her mortgage. Now whether the plaintiff admitted this or not, it was certainly not necessary for her to appear and defend her rights under her prior mortgage and although she was kept on the record, the preamble to the District Judge's judgment and decree of 19th July 1900 clearly says there were several prior mortgagees and other persons made defendants, but all have now been relinquished except defendants Nos. 1 to 8 and defendant No. 15. The decree gives in its heading the name of all 19 defendants and there is a note that defendants Nos. 9 to 11, 14 and 17 were struck off as per order dated June 4th, 1900, and the defendants Nos. 12, 16 and 18 were struck off as per order dated 6th June 1900. This is a statement of fact and the petition of June 6th shows why No. 13 was allowed to remain on but the fact that the District Judge unnecessarily apparently acceded to the prayer of the plaintiff to let him impugn the authenticity of her mortgage could not render it incumbent on her to appear, her mortgage being admittedly a prior mortgage, nor could this note in the decree make her bound by its terms any more than was the *pro forma* defendant No. 19, who was impleadeed by the plaintiff as his own *benamidar* and whose name was never expunged from the decree.

The test in all the cases we have had laid before us is, was the defendant impleaded as a puisne mortgagee and, therefore, a necessary party? If he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. The decree itself is against defendant No. 1 alone and that being so, it must be taken to be in accordance with the express declaration in the judgment that at the time judgment was passed defendant No. 13 among others had been given up.

After all the cases bearing on the point

(1) (1902) 2 Ir. Rep. 241; 35 I. L. T. R. 250; 6 Irish Law Rep. 701.

had been cited before us, it was conceded that the view we take would be unanswerable but for the latest decision of the Judicial Committee in *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (2), where it was held that a lady who obtained a mortgage in 1874 with possession until 1887 (the due date of payment), was a necessary party in a suit brought by the mortgagees of three intermediate mortgages between 1874 and February 1888 and that the omission of her heirs to put her rights in issue in those suits barred her rights under her mortgage by reason of Explanation II of section 13 of the Civil Procedure Code.

We are unable to see that their Lordships of the Judicial Committee laid down any new rule embracing a simple prior mortgagee as such. It appears that *Musammat* Alfan had a subsequent mortgage in 1888 and that her heirs were interested in the three intermediate mortgages and were made defendants in the suits on these mortgages and not having set up in those suits such rights as they had under the mortgage of 17th February 1888 and the *zurpeshgi*-deed of 1874, section 13, Explanation II, applied.

But here we are dealing with an admitted prior mortgagee who had no interest whatever in any subsequent mortgages, and we are asked now for the first time in argument before the Court to hold on highly technical grounds that the lady was impleaded as a puisne mortgagee and that a decree was passed against her.

We find as a fact that neither of these assertions has any substance in it and as a matter of law that she must be treated as a prior mortgagee pure and simple, and that her rights were not affected by anything which took place in the litigation in 1900. That being so, we proceed to deal with certain minor points that were argued on the merits.

And first as to the share of Mohammed Buksh in the *mokarari*. It is admitted that he inherited 4-annas from his wife Umeda Bibi, and that according to the defendant-appellant's contention is all the plaintiffs can claim in this suit. But there is evidence that three of Mohammed Buksh's sons, who admittedly inherited $1\frac{1}{2}$-annas each from their mother, predeceased their father, and the only question is whether those sons died unmarried. The plaintiffs' contention that one of them was married and had two sons, is based on the evidence of witness No. 4 for defendants Nos. 50 and 74, but he was very much shaken in cross-examination and had to admit that he knew that Mohammed Buksh had 8-annas share as he had to deal with his documents.

On the other hand witness No. 1 for defendant No. 61 clearly says that the share of the three sons of Mohammed Buksh who died during his life-time devolved on him, as was held in the judgment of 1900. It is in vain to say that this is merely the expression of an opinion on a point of law, since he is dealing with the actual facts as to the shares and tells us he was in the service of Mohammed Buksh Khan and that he does not know what the legal share of the sons was. The defendant No. 61 elicited the statement from him and it was carried no further though it was against the plaintiffs' case as well as defendant No. 27's.

The learned Judge's decision in the Court below on this point is rather unsatisfactory. After stating that according to defendant No. 27 Mohammed Buksh inherited only 4-annas of *mokarari*, he says that three of the sons of the mortgagor died in his life-time. So that the mortgagor must have inherited something out of their shares. It is difficult, he says, to ascertain from the evidence on the record what that something is. He seems finally to hold that because the defendant No. 27 sued on his mortgage-bond making Hormuzi Begum a party and it was held in that suit that the mortgagor had $8\frac{1}{2}$-annas, and that $8\frac{1}{2}$-annas was available to satisfy defendant No. 27's decree and was ordered to be sold for the benefit of defendant No. 27, there is nothing on the record to show that more than $8\frac{1}{2}$-annas *mokarari* belonged to Mohammed Buksh. But it seems to us that on this finding defendant No. 27 is estopped from denying that the share of which he took the benefit in his decree of 1900 was $8\frac{1}{2}$-annas. Be that as it may, the matter must be decided on the evidence before us if there is no estoppel and that evidence, though meagre, is perfectly clear and is only open to doubt so far as one witness imposes a wife and two children on one of the sons of Mohammed Buksh, whose existence his cross

(2) 14 Ind. Cas. 496; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 22 M. L. J. 468; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 39 C. 527.

examination goes to show was rather mythical.

The learned Judge was evidently dealing with the plaintiffs' contention that Mohammed Buksh had 16-annas of the *mokarari*. This he seems to think cannot be by reason of the judgment of 1900: but there is evidence on the record coming from the defendants' side, that is from the witnesses of defendants other than No. 27, and we are inclined to the view that defendant No. 27 cannot now be heard to say that the share was less than the $8\frac{1}{2}$-annas which he brought to sale under his mortgage-decree of 1900.

We, therefore, uphold the Subordinate Judge's finding on this point. The next point urged was the priority of the defendant No. 27's claim under his assignment of Baijnath's mortgage.

This is clearly untenable as, Baijnath's mortgage did not include any *mokarari* whatever. It was of certain shares of *milkiat* registered under certain *touzi* numbers, which could not possibly refer to *mokarari*. That Mohammad Buksh had shares in the *milkiat* is clear from the evidence and is admitted by defendant No. 27's own witness No. 1, Ahmed Raza, page 124, paper-book, who says that the *milkiat* belonged to Mohammed Bul sh's mother. In this suit we are only concerned with the *mokarrari*. There is, therefore, nothing in this point.

Thirdly, it was sought to be argued somewhat faintly that the story of Rs. 16,000 in silver, being paid over to an old lady at her country house was too improbable to be believed.

The Judge who heard the witnesses has believed it and we see nothing inherently improbable in it, having regard to the customs of this country.

Notes or Government securities would not be of much use to an old lady in the *Mofassil*, and hard cash which she could hoard in her treasure house would be a much greater temptation to her than mere paper. Moreover, her servants, who must be presumed to have had an active hand in the negotiations, would obviously prefer money which could be handled for paying off local charges and debts as well as Government revenue. We are, therefore, quite prepared to hold that there was a perfectly valid assignment of the mortgage to the plaintiffs. We have thus dealt with all the points which were raised in this appeal, and the result is that the appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

October 21, 1914.

Present:—Lord Dunedin, Lord Atkinson, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—APPELLANT

versus

Sri Raja KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA—DEFENDANT—RESPONDENT

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—APPELLANT—

versus

Sri BIRBAR NARAYAN CHANDRA DHIR NARENDRA—DEFENDANT RESPONDENT.

Bengal Regulation (I of 1793), s. 8, cl. 4—Bengal Regulation (VIII of 1793), s. 41—Chowkidari chakran lands—Inclusion in zemindari—Parmanent sanad—Resumption, when permissible—Burden of proof—"Assigned," meaning of, in Village Chowkidari Act (VI of 1870).

Zemindars have a *prima facie* title to the full enjoyment of every parcel of land lying within the ambit of their estates for which they pay revenue to Government, and it rests on the Government to prove that when the *zemindari* was confirmed, land therein was subject to reservation empowering the Government to resume and assess it.

Rajah Sahib Perhlad Sein v. *Maharajah Rajender Kishore Singh*, 12 M. I. A. 292 at p. 331; 12 W. R. 6 (P. C.); 2 B. L. R. 111; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 430; 20 Eng. Rep. 349, followed.

Under section 8, clause 4, of Bengal Regulation I of 1793 and section 41 of Regulation VIII of 1793, the power or option of resumption was reserved only in respect of lands which had been appropriated by the *zemindar* with the permission or under the authority of Government for the purpose of remunerating the *chowkidars* for their services and which, although included in the *mahal* and annexed to the *malguzari* lands, were not taken into consideration for assessment of revenue.

The word 'assigned' in Bengal Act VI of 1870 means assigned by the Government or appropriated under its authority or with its permission.

The mere fact that some of the appointments of *chowkidars* were made with the approval of Government Officers cannot alter the nature of the grants.

SECRETARY OF STATE *v.* KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA.

The history of the *chakran* grants in Orissa traced.

Joykishen Mookerjee v. *The Collector of East Burdwan*, 10 M. I. A. 16; 1 W. R. (P. C.) 26; 1 Suth. P C. J. 542; 2 Sar. P. C. J. 54; 19 Eng. Rep. 879, referred to.

Consolidated appeals from two decrees and judgments of the High Court of Judicature at Fort William in Bengal, dated 23rd March 1910, reversing those of the Subordinate Judge of Cuttack, dated 11th September 1906 and 27th May 1907 respectively.

FACTS.—For a time long anterior to the acquisiton of Orissa by the British, the predecessors-in-title of the plaintiffs had been in possession of the estates respectively known as the *zemindaris* of Sukinda and Madhupur, of which the lands in dispute form a portion. These *zemindaris* lay within that portion of Orissa known as *rajwara* where, according to custom, the *zemindars* were allowed to exercise a feudals way over their *jagir* on payment of a fixed tribute to the Imperial Government. In the Settlement which took place on the occupation of this territory by the Company's troops in 1803, these *zemindars* were granted *sanads* entitling them to hold their estates at a fixed *jama* in perpetuity, and their estates were brought within the Mogulbandi (that is, that portion of Orissa, where according to custom the land revenue was a first charge upon the estate), the general Regulations in force in Bengal being made applicable to them. The *sanads* so issued were confirmed by section 33 of Regulation XII of 1805. These *sanads* imposed upon the *zemindars* the duty of preventing the commission of theft, robberies at night and highway robberies, and, in case of any such occurrence, of arresting the offenders and sending them for trial to the *Huzur* (Government Officers), but left to them (*zemindars*) a free hand as to the manner in which the duty was to be discharged. This necessitated the employment by the *zemindars* of *chowkidars*, who were paid by grants of lands in return for their services. These grants, however, do not appear to have been excluded from assessment fixed upon the *zemindaris* by the Government. By his orders dated 1st August 1902 and 28th November 1902 respectively, the Collector of Cuttack, purporting to act under the Village Chowkidari Act (VI of 1870), transferred the lands in suit to the plaintiffs, at the same time subjecting them to an assessment. The plaintiffs thereupon, sued for a declaration that the lands were not *chowkidari chakaran* lands within the meaning of the Act and that, therefore, the Government was not entitled to resume and assess them. The Secretary of State for India, who was the defendent in both the suits, contended that the suits were barred by Article 14 of the Indian Limitation Act, XV of 1877, and that the suit lands were *chowkidari chakaran* lands. The Subordios Judge of Cuttack upheld the contentionatefn the defendant and dismissed the suits. On appeal the High Court of Calcutta reversed the decrees of the Court below and decreed the suits. The defendant then appealed to His Majesty in Council.

Sir *Earle Richards, K. C.*, and Mr. *Dunne*, for the Appellant:—The lands in suit are *chowkidari chakaran* lands. The word 'assigned' has not the restrictive meaning given to it by the High Court. The intention of the Legislature in framing the Act was to do away with *jagirs* assigned for the maintenance of Police Officers. There is evidence to show that Government officers had a hand in the appointment of, and had powers of supervision over, these *chowkidars*. The Collector was, therefore, justified in imposing the assessment which was really the *chowkidari* cess. There was no case of resumption at all.

Messrs. *DeGruyther, K. C.*, and *Dunne*, for the Respondents:—The onus of proving that the Government had, at the Permanent Settlement, reserved to itself the right to impose assessment, lay very heavily on the Government and it had failed to discharge the same. The evidence shows that the whole *zemindari*, including the lands in suit, was taken into considération and the revenue payable by the *zemindars* was fixed on that basis. There was no exclusion of any portion. The lands were the property of the plaintiffs and the Collector's order of transfer was meaningless. The Government had no right to resume the suit lands.

Sir *Earle Richards, K. C.*, briefly replied.

JUDGMENT.

MR. AMEER ALI.—The plaintiffs in the two actions which have given rise to the present appeals are respectively the *zemindars* of Sukinda and Madhupur in the Province of Orissa, and the question for determination

relates to certain lands included in their estates in respect of which the defendant, the Secretary of State for India in Council, claims to exercise the right of resumption and assessment by virtue of the provisions of Act VI of 1870 of the Bengal Council.

The facts of the two cases are set out with great clearness in the judgment of the High Court of Bengal, and do not, therefore, require a detailed statement. Their Lordships propose to give only a brief sketch of the circumstances wich have culminated in the present litigation.

It appears that the predecessors of the two plaintiffs had been in possession of their estates from a time long anterior to the establishment of British power in that part of the country. The origin of their title under British rule is intimately connected with the political history of the Province. Orissa consists of three well-defined tracts. In the middle lies a level open country inhabited by a settled population. Here the Moguls in the reign of Akbar introduced their revenue system with its regular assessment of public dues. These territories were consequently designated the Mogulbandi, which is defined in Regulation XII of 1805 as being that "part of the District of the Zillah of Cuttack in which, according to established usage as in Bengal, the land itself is responsible for the payment of the public revenue and in which every landholder holds his land subject to the conditions of that usage."

The wild and hilly tract on the west and the low marshy lands along the seashore to the east were held by a number of chiefs who, under the designation of Rajas, *zemindars* and *Khandaits* were allowed to exercise a feudal sway in their respective *jagirs* on payment of a fixed tribute to the Imperial Government. These outlying parts of the Province were usually called the Rajwara.

The *zemindaris* of Sukinda and Madhupur lay within the Rajwara and outside the Mogulbandi territories.

Shortly before the acquisition of the *Dewanny* by the East India Company, the Mahrattas had obtained possession of a large tract to the south of the Suvarnarekha river, including the Rajwara, and thus, when the Company obtained the virtual Government of Bengal, Behar and Orissa, under Shah Allam's grant, the *de facto* British possession of the latter Province did not extend beyond the Suvarnarekha to the south of Midnapore.

In 1803 the Mahratta Raghoji Bhonslay, who held southern Orissa, came into collision with the forces of the East India Company, and in the October of that year the country south of the Suvarnarekha river was occupied by British forces. The Settlement of the newly acquired territories was entrusted to Colonel Harcourt, who commanded the Company's troops, and a civil Officer of the name of Mr. Melville. They were designated Commissioners, and they appear to have done their work with great thoroughness. In this Settlement were included the *zemindars* of Sukinda and Madhupur, to whom *sanads* were granted entitling them to hold their estates at a fixed *jama* in perpetuity. These two *zemindaris* were then brought within the Mogulbandi and subjected to the general Regulations in force in Bengal.

Later in the year came the Treaty of Deogaun, by which Bhonslay ceded a considerable tract of country belonging to the hill Chiefs. With these, agreements or *kaulnamas* were entered into guaranteeing the perpetual enjoyment by them of their properties on definite terms. The *zemindar* of Sukinda alleged in his suit that he also held under a *kaulnama*, but he failed to establish his allegation, which was evidently made under some misapprehension.

There is no doubt, however, that a Settlement was made with, and a *sanad* granted to him by the Commissioners, the terms of which will be referred to in the course of this judgment.

By section 33 of Regulation XII of 1805 statutory confirmation was given to the *sanads* of the two plaintiffs' ancestors.

The lands in dispute admittedly form part of the estates settled with the plaintiffs' ancestors in 1803 and in respect of which the revenue was fixed in perpetuity. The plaintiffs accordingly urge that the Collector representing the defendant has no right to exercise in respect of these lands the powers he claims under Act VI of 1870, B. C. The basis of his contentions will appear clearly when the course of legislation which led up to this enactment has been shortly explained.

From time immemorial it has been customary in India to remunerate officers charged with certain public or *quasi*-public duties by grants of lands to be held either rent-free or at a reduced rent.

One of the best known examples of these service-tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of Police duties in rural areas, and is commonly known as *chowkidari chakran* lands, from the word *chowkidar*, which means "a watchman" and *chakran*, "service."

The history of these *chowkidari* grants is set out with considerable lucidity in Lord Kingsdown's judgment in the case of *Joykishen Mookerjee* v. *Collector of East Burdwan* (1). The following passage explains the origin of the system and the shape it assumed after the Decennial Settlement of 1789 and the Permanent Settlement of 1793:

"It appears that these *zemindars* were entrusted, previously to the British possession of India, as well with the defence of the territory against foreign enemies as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of *tannahdars*, or a general Police force, and other officers in great numbers, under the name of *chowkidars*, *pykes*, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the *zemindar*, the collection of his revenue, and other services personal to the *zemindar*.

"All these different officers were at that time the servants of the *zemindar*, appointed by him and removeable by him, and they were remunerated in many cases by the enjoyment of land rent-free or at a low rent in consideration of their services.

"The lands so enjoyed were called *chakaran* or service lands. These lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that Settlement was to divide them into two classes:—

"*First. Tannahdary* lands, which by Bengal Regulation I of 1793, section 8, clause 4, were made resumable by the Government, the Government taking upon itself the maintenance of the general Police force and relieving the *zemindar* from that expense.

"*Second.* All other *chakran* lands, which by Bengal Regulation VIII of 1793, section 41, were, whether held by public officers or private servants in lieu of wages, to be annexed to the *malguzari* lands, and declared responsible for the public revenue assessed on the *zemindar's* independent *Talooks* or other estates, in which they were included in common with all other *malguzari* lands therein."

Later on Lord Kingsdown explains the nature of the lands that were held by *chowkidars* in lieu of wages. Paraphrasing clause 1, section 8, of Regulation I of 1793 and section 11 of Regulation VIII of 1793, he says:—

"They were not to be included in the *malguzari* lands for the purpose of increasing the *jama*, because the *zemindars* had not the full benefit of them; but they were to be included in the *malguzari* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest."

It is clear from the language of clause 4, section 8, of Regulation I of 1793 and of section 41 of Regulation VIII of the same year, that the power or "option" of resumption was reserved in respect of those lands that had been appropriated by the *zemindar* with the permission or under the authority of Government for the purpose of remunerating the *chowkidars* for their services, lands which, although included in the *mahal* and "annexed" to the *malguzari* lands, were not taken into consideration for the assessment of revenue because in reality they formed no part of his assets.

Here it becomes necessary to notice the *sanad* that was granted to the *zemindar* of Sukinda in 1804, an attested copy of which is in the record. A *sanad* was also granted to the *zemindar* of Madhupur; it apparently has been lost, but it may be assumed that it was to the same effect as the *zemindar* of Sukinda's *sanad*, the attested copy of which is, so far as is material, as follows:—

"As the duties of the *zemindars* of the said *killa* have from before been entrusted to Dhrubjoy Bhupati Harichandan, the

(1) 10 M. I. A. 16; 1 W. R. (P. C.) 26; 1 Suth. P. C. J. 542; 2 Sar. P. C. J. 51; 19 E. R. 879.

zemindar, the *zemindari* of the said *killa* has been bestowed upon and given to the siad *zemindar* by the Government of the East India Company; you shall regard the said person as the permanent *zemindar* of the said *killa*, and shall not act against his orders, instructions, and advice, and shall not conceal and keep secret any matter whatsoever from him. The said *zemindar* shall discharge the duties attached to the said *zemindari* in proper manner, and collect rent from the said *zemindari* in the best way according to the laws of the Government, and he shall without any objection pay into the Government Treasury 5, 500 *kahan cowris*, the fixed annual amount payable to the Government, in proper time and according to proper instalments. He shall keep the tenants and the people in general satisfied and pleased by good treatment and shall make such exertions and attempts as to make the *zemindari* improve and prosper, and he shall be so careful and vigilant that swords, guns, and other war weapons and ammunition may not be manufactured in the said *zemindari* and that theft, robberies at night, and highway robberies may not be committed at any place and in case such occurrence takes place, he shall arrest the thieves with stolen property and send them up to the *Huzur* (Government Officers) for trial."

It will be observed that the *sanad* imposes on the *zemindar* the duty of preventing the commission of theft, robberies at night, and highway robberies, "and in case of any such occurrence, of arresting the offenders and sending them for trial." But it makes no provision regarding the machinery he was to employ for the purpose. The evident inference is that the Government was content with leaving to the *zemindar* the manner in which he was to discharge the duty of maintaining peace and order in his *zemindari*. The Government obviously made no provision therefor. Regulation XIII of 1805, which was enacted "for the maintenance of the peace and for the support and administration of the Police in the Zillah of Cuttack," did not, as appears to be clear from the preamble and from the provisions of section 5, relate to the *zemindaris* of Sukinda and Madhupur, the Settlement of which, as already stated, had been made by special *sanads*.

The subsequent enactments before the Act of 1870 passed with the object of regularising or improving the rural Police are not material to this judgment. It is sufficient to say that the system under which the village *chowkidars*, as a part of the Police machinery, held parcels of land as remuneration for their services, wherever in vogue, remained practically untouched until 1870. It was then that the necessity was felt of bringing the rural Police or village *chowkidars* under the direct control of the State.

The preamble to the Act states the object with which it was enacted.

Section 1 defines *chowkidari chakran* lands. It says:—

"The words '*choukidari chakran* lands' shall mean lands which may have been assigned, otherwise than under a Temporary Settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the Police, and in respect to which such officer may be at the time of the passing of this Act liable to render service to a *zemindar*."

The Act then lays down rules for the constitution of village *punchayets* or committees, whose powers and duties are defined in considerable detail. In Part II it proceeds to deal with the *chowkidari chakran* lands.

Sections 48, 49, and 50 form the most material provisions of the Statute for the purpose of the present discussion.

They run as follows :—

"XLVIII. All *chowkidari chakran* lands before the passing of this Act, assigned for the benefit of any village in which a *punchayet* shall be appointed, shall be transferred in manner and subject as hereinafter mentioned to the *zemindar* of the estate or tenure within which may be situate such lands.

"XLIX. All lands so transferred shall be subject to an assessment which shall be fixed at one-half of the annual value of such land, according to the average rates of letting land similar in quality in the neighbourhood of such land, and such assessment shall be made by the *punchayet* of the village.

"L. Such assessment, when made by the *punchayet*, shall be submitted to the Collector of the district, and he or any other officer exercising the powers of a Collector by him thereunto appointed may approve, or revise and approve, the same, (provided that it shall be lawful for the

zemindar to contest the assessment before it is so approved), and after such approval the Collector of the district shall, by an order under his hand in the form in Schedule C, transfer to such *zemindar* such land subject to the assessment so approved."

Section 51 declares that the order of transfer made under section 50 shall operate to transfer the land to such *zemindar*, subject to the assessment and subject to the rights of third parties.

Section 52 declares that the amount of the assessment shall be a permanent charge on the land; and the subsequent sections provide how it is to be realised in case of default of payment.

Section 58 empowers the Lieutenant-Governor to appoint commissions "to ascertain and determine"—

"the *chowkidari chakran* lands and other lands before the passing of this Act assigned for the maintenance of an officer to keep watch in any village and to report crime to the Police in such district."

But for the contentions, to which their Lordships will advert later, that have been advanced on behalf of the appellant, the Secretary of State for India, it would not have been necessary to give *in extenso* the above sections.

Act VI of 1870 (B. C.) was, when enacted, not introduced into Orissa; its operation was confined to Bengal where the category of lands referred to in Lord Kingsdown's judgment largely existed.

In 1899 the Act was, by a resolution of the Government of Bengal, dated the 9th of February 1897, extented to Orissa.

It appears that the plaintiffs, the *zemindars* of Sukinda and Madhupur respectively, in discharge of the duties imposed on them by their *sanads* to maintain peace and order within their estates, retained in their service a large number of *chowkidars* whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these *chowkidars* was kept in the *zemindari* office, and it would appear that in the appointment of the *chowkidars* in more than one instance the Government Police Officer had a voice. But the records show that the *zemindar* often changed the lands held by these men, and resumed what he considered to be in excess of their requirements.

Such was the condition of affairs in these two *zemindaris* when the Act was made applicable to Orissa.

Shortly after its extension, the Collector of the Cuttack District proceeded to apply its provisions to the lands held by the *chowkidars* of Sukinda and Madhupur respectively, on the ground that they were *chowkidari chakran* lands within the meaning of the Act. The plaintiffs protested strongly against his proceedings: whilst expressing their willingness to submit to any reasonable contribution that might be required of them for the payment of the *chowkidars* who were to be appointed under the new system, they took exception to the Collector's attempts to resume and assess or re-assess their lands, and to transfer the same to them. Their objections were rejected, and the lands were then attached and put up to sale under the provisions of sections 54 and 55 of the Act.

The plaintiffs thereupon brought these actions in the Court of the Subordinate Judge of Cuttack, in substance, for a declaration that the Act did not apply to the lands in suit, and for an injunction restraining the defendant-appellant from interfering with them.

The two suits were tried by two different Subordinate Judges, who, affirming the contention of the Collector that the lands in dispute were *chowkidari chakran* lands, dismissed the actions. On appeal the High Court of Bengal, after an exhaustive examination of the subject, reversed the decisions of the first Court and granted the plaintiffs the relief they sought.

The Secretary of State for India in Council has appealed in both actions; and it has been contended on his behalf that the learned Judges of the High Court were in error in referring to the previous legislation in order to construe Act VI of 1870 (B. C.); that the Act was applicable to all lands whether "assigned" by Government or by the *zemindar* for the maintenance of *chowkidars* and that the onus was on the plaintiffs to show that they were not *chowkidari chakran* lands.

Their Lordships think that this argument proceeds on a manifest fallacy. The lands

in dispute admittedly lie within the ambit of the estates settled with the plaintiffs' ancestors.

The plaintiffs are the *zemindars* and "as such they have the *prima facie* title," to use the language of this Board in the well-known case of *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Singh* (2), to the full enjoyment of every parcel of land within their *zemindaris* for which they pay revenue to Government.

It rests on the defendant to show that when the *zemindaris* were confirmed to the plaintiffs' ancestors, it was subject to reservations in respect of any land which gave Government the power of resuming and assessing it. That onus the defendant has not discharged; in fact it is not now contended for him that there was any such reservation. The power of resumption was, as already remarked, reserved by Government by the old Regulations in respect of lands which had been set apart by the *zemindars* with its permission or under its authority.

In Regulation I of 1793 the word used is "appropriated;" in Regulation XIII of 1805 the expression "assigned" is employed; but in both Statutes the characteristics of the grants under which the lands were held depend on the implied authorisation of the Government, which excluded them from consideration in the adjustment of the *jama* of the *mahal*. In the present case the defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the plaintiffs, nor that there was any obligation on the part of the plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their *zemindaris*. They entertained the services of *chowkidars* for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government Officer cannot alter the nature of the grants.

In their Lordships' opinion the word "assigned" in the definition section of Act VI of 1870 (B. C.) means lands assigned by Government or appropriated under its authority or with its permission. Not only does the form of the "Transferring Order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands assigned by Government, as explained above for the maintenance of the *chowkidars* and in respect of which they reserved the right to resume and transfer to the *zemindar* subject to an additional assessment; but the resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean. Their Lordships do not propose to burden their judgment with long quotations from this interesting document; they only wish to refer to two passages which appear to them to place the matter beyond doubt. In one place the Lieutenant-Governor after reviewing the whole subject says:—

"As already remarked, the *chowkidari jagirs* are State grants. They are excluded in the temporarily-settled estates from the settlements made with the *zemindars*, while in the permanently settled estates they cannot be legally interfered with by the *zemindars*. The latter have thus in both classes of estates no connection with the *jagir* lands, and the Lieutenant-Governor accepts the view that they are under no obligation to furnish lands or otherwise specially provide for the maintenance of the *chowkidars*. Their liability is to contribute to any funds raised in the same manner as other residents of the villages. Nor it is binding on the Government to continue the *jagir* grants for all time."

In the orders that are passed, a distinction is made with regard to the *chowkidari* holdings in the temporarily settled tracts, and those situated in "permanently settled estates."

With regard to these it is declared that on resumption "the holdings should be included in the estate within which they lie, and form part of its assets in the future."

Nothing can be clearer in their Lordships' view than that the Act was designed to deal with lands which, although lying within a *mahal*, did not form a part of its assets, which is not the case with the *zemindaris* of Sukinda and Madhupur.

Their Lordships are of opinion that the judgments and decrees of the High Court should be affirmed and these appeals dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeals dismissed.

(2) 12 M. I. A. 292 at p. 331; 12 W. R. 6 (P. C.); 2 B. L. R. 111; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 430; 20 Eng. Rep. 319.

Solicitors for the Appellants: *India Office.*

Solicitors for the Respondents: Messrs. *Barrow Rogers* and *Nevill.*

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 45 OF 1912-13 OF PARTABGARH DISTRICT.

May 5, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

Musammat RAGHUNATH KUAR—PLAINTIFF—APPELLANT

versus

THE COURT OF WARDS, *Patti* SAIFABAD, *Hissa* IX, DISTRICT PARTABGARH—DEFENDANT—RESPONDENT.

Hindu Law—Presumption—Pattidari *body, persons related through males to member of, status of—Ejectment, notice of, contested—Under-proprietary rights claimed—Tenant to make out* prima facie *case only—Settlement Court deciding status of person applies to all members of his family.*

Hindu Law allows of a strong presumption that persons related through males to a member of a *pattidari* body are also themselves *pattidars.*

A tenant contesting a notice of ejectment on the ground that he has got under-proprietary rights in the holding, has simply to make out a *prima facie* case before the Revenue Court.

The judgment of the Settlement Court deciding the status of a person applies to anyone belonging to that person's family.

Appeal from the decree of the Commissioner, Fyzabad, dated 27th March 1913, upholding the order of the Assistant Collector, Partabgarh, dated 28th June 1912.

Babu *Rudra Dat Sinha*, for the Appellant.

Babu *Balraj Sahai*, for the Respondent.

JUDGMENT.

BAILLIE, S. M. (*April 9th*, 1914.)—Appellants are persons who have been recorded as holding the land in question as ordinary tenants at the first Settlement and since. They contest a notice of ejectment on the ground that they have under-proprietary rights. The claim made was that at Settlement under-proprietary rights had been decreed to Farman Singh, a member of the same family, in his *sir* land. They produce evidence to substantiate a pedigree showing their descent from an ancestor of Farman Singh. The Court of first instance found that the pedigree was vouched for by tutored witnesses and that the fact that Farman Singh was a *zemindar* was no reason to believe that the other members of his family were *zemindars.* He gives as an analogous illustration of the absurdity of the claim made that one person may be a king but that does not make his relations kings. The Assistant Collector must be well aware that this so-called analogy is absurd. Hindu Law would allow of a strong presumption that persons related through males to a member of a *pattidari* body are also themselves *pattidars.* The fact appears to me to have been overlooked that in the Revenue Court a *prima facie* case only is required. The inquiry appears to me to have been a very unsatisfactory one. The claim made by the appellant is not in itself in any way improbable and a local inquiry well made would, no doubt, have made it possible to ascertain a reliable pedigree of the appellant's predecessors-in-interest and their relationship to Farman Singh. The judgment in Farman Singh's case at Settlement would apply to any person who was a member of his family. It was held that he belonged to the family of the old *zemindars* and had held the land continuously as *sir.* I think that before this appeal is decided, a local inquiry should be ordered to ascertain the exact relationship of the appellant to Farman Singh and to ascertain the exact position of the appellant and her relatives in the village as regards their rights in groves and other uncultivated areas, their wells and in general any facts bearing on their position, including the incidence of the rents as compared with the rents of other tenants. There appears to have been at Settlement two classes of claimants, in the first instance to *pukhtadari* rights and in the second to under-proprietary rights in *sir.* Of these Farman Singh and others who claimed a 12-anna share in the *pukhtadari* were held to be of the family of the old *zemindars* and Zabar Singh and others who claimed a 4-anna share were held to have been mere tenants. In the local inquiry this distinction should not be lost sight of. If appellants are connected with Zabar Singh, they cannot be held to have any rights: if they belong to the same family as Farman Singh, they may have rights.

HLA DUN *v.* M. L. R. M. CHETTY FIRM.

TWEEDY, J. M. (*April 20th*, 1914.)—I concur. The points on which findings are desired should be clearly specified and the case remitted under rule 25.

BAILLIE, S. M.—The points on which local inquiry and report are called for are:—

1st. Did appellant's father belong to the same family as Farman Singh ?

2nd. Is there in appellant's position in the village, her rights in groves, wells, etc., and the rate of rent paid by her, any reason to consider that she has occupied the position of a privileged person?

3rd. Are there any other facts bearing on the question whether appellant enjoys under proprietary rights ?

Issues remitted.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL NO. 100 OF 1913.
July 17, 1914.
Present:—Mr. Justice Twomey.
HLA DUN AND OTHERS—PPAINTIFFS—APPELLANTS
versus
M. L. R. M. CHETTY FIRM, BY THEIR DULY CONSTITUTED AGENT AND ATTORNEY CHINA TAMBI PILLAY, AND OTHERS—DEFENDANTS—RESPONDENTS.

Lower Burma Land and Revenue Act (II of 1876), *ss.* 55 *and* 56 *Civil Procedure Code (Act V of* 1908), *s.* 60—*Standing crops, inquiry into ownership of—Use or enjoyment of land—Jurisdiction of Civil Courts.*

A claim to the ownership of crops is not the same thing as a claim to the use or enjoyment of the land on which the crops are grown. It is a claim to the use or enjoyment of something yielded by the land. The Civil Courts have jurisdiction to determine claims and objections in respect of the attachments of standing crops.

When a Civil Court inquires as to possession of land incidentally and collaterally and only for the purpose of deciding who is entitled to the crop standing on the land, it does not exercise any jurisdiction as to the use or enjoyment of the land within the meaning of section 56 of the Lower Burma Land and Revenue Act.

Mr. *Clifton*, for the Appellants.

Mr. *Chari*, for Respondent No. 1.

Mr. *Mya Bu*, for Respondents No. 2 and 4.

JUDGMENT.—The plaintiff-appellant, Maung Pu, sued for a declaratinn of title to the paddy crop reaped on certain land which he worked in the rains of 1911. The defendant-respondent No. 4, Maung Ba Cho, was in possession of the land the previous season, but as he failed to pay the land revenue for that agricultural year, the land (in respect of which landholder's rights had not been attained) was resumed by Government, and the village headman afterwards allotted it for cultivation to Maung Pu in May. Maung Pu's case is that he thereupon ploughed the land and sowed paddy broadcast and that the crop belonged to him. But after the land had been resumed, Ba Cho went and paid up the revenue arrears and the order of resumption was withdrawn by the Deputy Commissioner, who was apparently not aware that the land had in the meantime been allotted to a fresh occupier, Maung Pu. Ba Cho went to the land and built a hut on it during the rains and claims to have ploughed it and sown paddy after Maung Pu's ploughing. In the course of the rainy season of 1911 the defendant-respondent No. 1, a Chetty Firm, in one case and defendants-respondents Nos. 2 and 3 in another case obtained money-decrees against Ba Cho, and when the crop on the land came to maturity, these decree-holders attached the crop in execution as if it belonged to Ba Cho. The crop was harvested and sold under the orders of the Civil Court and the sale-proceeds are now in deposit.

In the Sub-Divisional Court Maung Pu's suit for a declaration of title was unsuccessful. Maung Pu and Ba Cho each produced evidence as to the working of the land in the 1911 rains. The Sub-Divisional Judge appears to have based his decision less on the evidence as to ploughing and sowing than on the fact, which he held proved, that "Ba Cho is the owner of the land in question or is entitled to possession."

Maung Pu appealed to the Divisional Court where it was held that though Maung Pu had ploughed the land and sown the crop, the Civil Courts are debarred from granting him a declaratory decree because of the provisions of the Land and Revenue Act excluding the jurisdiction of the Civil Courts. The learned Judge held that "a claim to the title of paddy produced on such land (*i.e.*, land in respect of which landholder's rights have not been attained) is a claim to the use and enjoyment of

the land" as contemplated in section 55 (*b*), Land and Revenue Act. The Judge goes on to say:

"Were I to decide to the contrary effect, it would mean that I decided that, although Ba Cho was allowed to pay the revenue for the land for 1910-11 and, therefore, according to ordinary usage recognized as the possessor as against other individuals by the Deputy Commissioner, Maung Pu should be recognized as the possessor for 1911-12."

I am unable to concur in these views. A claim to the ownership of crops is not the same thing as a claim to the use or enjoyment of the land on which the crops are grown. It is a claim to the use or enjoyment of something yielded by the land. If the use or enjoyment of the land includes the use or enjoyment of what the land yields, then the jurisdiction of the Civil Courts would be ousted even when the crop has been harvested and the grain transported to another locality, and such a result would be manifestly absurd. It might be argued that the jurisdiction of the Civil Court is ousted at any rate as long as the crops are standing. But, in my opinion, even this would involve an unjustifiable extension of the words "use or enjoyment of such land" in section 55. For "standing crops" are moveable property under the Code of Civil Procedure, and are liable to attachment under section 60. The person who grows the crop may be a mere licensee with no permanent, heritable and transferable rights of use or occupancy and the land is in that case not liable to attachment under section 60. But he has complete disposing power over the crop which he has grown, and may exercise this power even before the crop is reaped. The standing crop being liable to attachment by the Civil Courts in execution, I think it follows of necessity that the Civil Courts may exercise their ordinary powers of determining claims and objections in respect of the attachment. It is objected by Counsel for the respondents that a suit for a declaration of title to the crops may involve, as this does, an inquiry as to who was in lawful possession of the land when the crop was planted or sown, and that the Civil Courts are prohibited from making such an inquiry by section 56, Land and Revenue Act. But section 56 merely lays down that no Civil Court shall "exercise jurisdiction as to (*inter alia*) disputes as to the use or enjoyment of such lands." A Court does not exercise jurisdiction in such a dispute by inquiring as to possession incidentally and collaterally and only for the purpose of deciding who is entitled to the crop. To exercise jurisdiction in a dispute means to adjudicate and determine it. The Civil Court may have to form an opinion as to who was in lawful possession of the land as a relevant fact in determining the rightful ownership of the crop, but that is not exercising jurisdiction in respect of disputed possession.

Turning to the evidence in this case, I think there can be no doubt that Maung Pu was in lawful possession under the permission given to him by the village headman, and that the land was ploughed and the crop sown by Maung Pu, as indeed the Divisional Judge has found. It was not till the 20th June that the orders for resumption of the land were cancelled and Maung Pu had then been in possession under the village headman's permit for a month. During that time he worked the land with four pairs of bullocks and four labourers. There is no reason to distrust the evidence of the neighbouring cultivators, Ko Maung and Tun E, on this point, and it is corroborated by the evidence of Maung Pu's coolies, one of whom is related to Ba Cho. Ba Cho's witnesses Tun Aung and Tun Baw are related to him; Parayachi is an inaccurate witness who is unable to say definitely whether Ba Cho ploughed or sowed; Ko Tun gives definite evidence in favour of Ba Cho, but his cross-examination shows that he is at enmity with Maung Pu's father-in-law. The probabilities and the weight of evidence are both in favour of Maung Pu.

I, therefore, set aside the decrees of the lower Courts and grant a decree to the plaintiff as prayed with costs against the defendants-respondents in all Courts. The Advocate's fee in this Court is fixed at 5 gold *mohurs*.

Decrees set aside.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

(REVENUE PETITION No. 18 OF 1913-14 OF SITAPUR DISTRICT.

March 27, 1914.

Present:—Mr. Tweedy, J. M.

NARPAT SINGH—DEFENDANT—APPELLANT

versus

GUR BAKHSH SINGH AND OTHER—PLAINTIFFS AND BAL BHADRA SINGH AND OTHER DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 107H—Under-proprietary rights, claim for—Gift, deed of, muafi *held under—Maintenance, grant for—Proprietary rights, full, not gifted—Government revenue to be paid by grantor—Vested right in grantee, loss or surrender of, to be proved.*

The second paragraph of section 107H of the Oudh Rent Act does not apply to a case where there is no gift of full proprietary rights and the grantor binds himself to pay the Government revenue for the land given by him as *muafi* for the purpose of maintenance, unless it is proved that the land is given in consideration of the loss or surrender of a vested right in the grantee.

Appeal from the decree of the Officiating Commissioner, Lucknow, dated 4th September 1913, upholding the order of the Deputy Commissioner, Sitapur, dated 18th April 1913, reversing that of the Assistant Collector, Sitapur, dated 28th January 1913.

FACTS.—The grantee held certain lands as *muafi* for the purpose of maintenance under a deed of gift dated 3rd February 1870. The deed provided that the land was to be held *bila lagan* by the grantee while the Government revenue was to be paid by the grantor, the only question for determination being whether the grantee could be declared, as he contended, an under-propietor of the *muafi* lands, under the provisions of the second paragraph of section 107H of the Oudh Rent Act.

Pandit *Gokaran Nath Misra* and Pandit *Gaya Prasad*, for the Appellant.

The Hon'ble Rai *Sri Ram* Bahadur and Babu *Krishna Kumar*, for the Plaintiffs-Respondents.

JUDGMENT.—This case is typical of the heirships to which the resumption law in Oudh gives rise, but the case for the appellant is a very weak one. The attempt to show that the case comes under the second paragraph of section 107H hopelessly breaks down. There is no evidence of any 'vested right", nor is there any *proof* that the grant was given in consideration of the loss or surrender of a right of any kind. That being the case, the grant falls under paragraph (1) of section 107G and rent must be assessed. It is perfectly clear, and is indeed admitted by the appellant, that there was no gift of full proprietary rights because the payment of the Government revenue was specially reserved to the grantor. The appeal is dismissed with costs. This order will govern No. 19. *

Appeal dismissed.

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* *i. e.* Petition No. 19 of 1913-14 of Sitapur District.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 265 OF 1912.

October 22, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

Musammat ISHAR DEVI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BINDRABAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom or Personal Law—High class Hindus—Presumption—Sobti Khatris *of Gujrat District*—Onus.

In the case of high class Hindus, the presumption is that they are governed by their personal law and the *onus* lies on the party setting up custom to prove that they are governed by custom.

The *Sobti Khatris* of the Gujrat District are governed in matters of succession by the customs prevailing amongst agriculturists.

Ganpat Rai v. *Kesho Ram*, 1 Ind. Cas. 691; 34 P. R. 1909; 181 P. L. R. 1908; 169 P. W. R. 1908 and *Lachman Das* v. *Pahla Mal*, 59 P. R. 1908; 12 P. W. R. 1908, distinguisxed.

Attar Singh v. *Prem Singh*, 12 P. R. 1906; 108 P. L. R. 1906; *Dalo* v. *Mohlu*, 3 Ind. Cas. 593; 87 P. R. 1909; 131 P. L. R. 1909; 105 P. W. R. 1909, referred to.

Devi Ditta Singh v. *Dropti*, 2 Ind. Cas. 940; 56 P. R. 1909; 129 P. L. R. 1909; 96 P. W. R. 1909, followed.

Second appeal from the decree of the Additional Divisional Judge, Jhelum Division, at Sialkot, dated the 19th July 1911, affirming that of the Munsif, first Class, Gujrat, dated the 14th October 1910, decreeing plaintiffs' claim.

Rai Bahadur Pandit *Shev Narain* and Diwan *Mehr Chand*, for the Appellants.

ISHAR DEVI *v.* BINDRABAN.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Santanam*, for the Respondents.

JUDGMENT.—This appeal has been admitted under section 70 (1) (*b*) of the unamended Punjab Courts Act upon the question whether the parties, who are *Sobti Khatris* of the village of Alimgarh in the Gujrat District, are governed by their personal law or follow the custom of agriculturists in matters of inheritance to ancestral property. A pedigree-table is given in the judgment of the lower Appellate Court. The property of Ram Saran deceased is in dispute and the question is whether the plaintiffs, who are his nephews, are excluded from succession by his daughter, *Musammat* Ishar Devi, defendant No. 2. The lower Courts have concurrently found, for reasons fully stated by them, that the parties are governed by custom and have, therefore, decreed the plaintiffs' suit, and the defendants, *Musammat* Ishar Devi and her mother, *Musammat* Hukam Devi, appeal.

As the parties are high class Hindus, the initial presumption, of course, is that they are governed by their personal law and the onus was upon the plaintiffs to show that they were governed by custom. The present village of Alimgarh is made up of the original village of that name and of seven other small villages, all eight being now known as the *pattis* of the whole *mouza*. The original village of Alimgarh, which is now represented by the *patti* of that name, was founded in the time of the Emperor Akbar by Brahm Das, *Sobti Khatri*, and he and his descendants have continued in occupation thereof ever since without any interruption. The *lambardar* of the *patti* is a *Sobti Khatri* and *Sobti Khatris* own 412 out of 1592 *ghumaons* of land of the whole village. Of this 412 *ghumaons*, 171 are shown in the revenue papers as cultivated by the owners, 161 *ghumaons* are cultivated by tenants-at-will and 79 *ghumaons* by occupancy-tenants. It is clear that the Alimgarh *patti* is really a compact community of agriculturists and has been so far about 300 years. It is no doubt in evidence that a few of the *Sobti Khatris* of Alimgarh supplement their incomes from agriculture by money-lending and by service, but it appears that the main source of their livelihood is agriculture, and the fact that a few of them supplement their incomes in other ways does not, in the opinion of the lower Courts, take them out of the category of agriculturists.

Pandit Sheo Narain points out that there are some other proprietors in the *patti* besides *Khatris*. There are, however, only a few such and they are recorded as *malikan-i-kabza* without any share in the *shamilat* of the *patti*. This fact does not, in our opinion, show that the common land has been broken by the introduction of strangers into the *patti*; nor do we think that the fact that some of the land is cultivated by tenants, is against the theory that these *Khatris* constitute an agricultural community, for the presence of tenants is a common feature in every village. The lower Appellate Court says that the founders of the original village of Alimgarh got it recorded as their custom in the *Wajib-ul-arz* that collaterals excluded daughters. Pandit Sheo Narain points out that the extract from the *Wajib-ul-arz* which is on the record does not support this. We think it probable that the lower Appellate Court meant to refer to the *Riwaj-i-am* of the district in section No. 10 of which it is stated as regards *Brahmins* and *Khatris* that the daughter's line succeeds only in case of an adoption and otherwise does not succeed in any case. No instances are given in the *Riwaj-i-am* and, therefore, the entry is not of itself of very much value.

Pandit Sheo Narain next referred to the instances cited by the plaintiffs' witnesses. These are instances where a daughter has been excluded by collaterals of the deceased proprietor and Pandit Sheo Narain points out that in a good many of them the exclusion is by persons who were joint with the deceased, and that according to Hindu Law even such persons would exclude a daughter in accordance with the rule of survivorship. There is force in this argument, but besides these instances there are others in which daughters have been excluded by persons who were not joint with the deceased. One of these is that of Kashi deceased, whose daughter was excluded by his collaterals. This instance is cited by Gobind Sahai, witness. Ralla Ram witness of the neighbouring village of Ranghanwala cites two instances which are directly in point, where daughters were excluded by collaterals who were separate from the deceased. There is

also one instance from the parties' own family, where the daughter's son of Dittu Mal was excluded from Dittu Mal's property. Thus there are certainly several instances in support of the parties being governed by custom, whereas the appellants have failed to adduce a single instance, either from this or from the other villages, of *Sobti Khatris*, in which a daughter has succeeded to the exclusion of collaterals.

We shall now refer briefly to certain authorities cited by Counsel for each side. Pandit Sheo Narain on behalf of the appellants referred to the following:—

Ganpat Rai v. *Kesho Ram* (1). This was a case in which parties were *Khatris* of Satgharra in the Montgomery District and it was held that the plaintiffs upon whom the onus lay, had failed to establish that in matters of succession the *Khatris* of Satgharra were governed by custom and not by Hindu Law.

In our opinion that case is clearly distinguished from the present one, *firstly*, because Satgharra is really a town and *secondly*, because it was found on the evidence that none of the parties were in any sense agriculturists.

The next case referred to by him was *Lachman Das* v. *Pahla Mal* (2). That was a case of *Brahmins* of Gopalpur in the Amritsar District and it was held that in matters of alienation they were governed by Hindu Law and not by agricultural custom. The weight of evidence appears to have been that the parties were not wholly dependent on agriculture but followed other professions, such as trade, money-lending and service, and it was held that the evidence was insufficient to affirmatively establish the contention of the plaintiff that his family was governed by agricultural custom. *Attar Singh* v. *Prem Singh* (3), also referred to by Pandit Sheo Narain, was a case decided by a single Judge and related to *Khatris* of a village in the Chakwal Tahsil of the Jhelum District. It was held on the evidence that the family of the parties had been engaged in money-lending and other business and that, therefore, they were governed by Hindu Law.

For the respondents Mr. Shafi has referred us to *Bhag Singh* v. *Narain Singh* (4), wherein it was held that the parties who were *Khatris* of a village in the Ambala District, being in the main agriculturists, must be presumed to be governed by agricultural custom, but the fact that they indulged in money-lending would not be of any significance. *Devi Ditta Singh* v. *Dropti* (5) was also cited by him and is clearly in point. In that case it was held that the parties, who were *Brahmins* of Rawal in the Rawalpindi District, were governed by the general rules of agricultural custom and not by Hindu Law, and consequently daughters were excluded by near agnates of the last male proprietor. This case is, in our opinion, nearly on all fours with the present one, for the village was owned by *Brahmin* agriculturists though some of the proprietors eked out their living by taking service. In the present case the *patti* of Alimgarh is owned by *Khatri* agriculturists though a few of them eke out their living by money-lending or by service. Mr. Shafi also refers us to *Dalo* v. *Mohlu* (6), which was a case of *Brahmins* of the Kangra District who, it was held, were governed by custom, chiefly on the ground that the parties were agriculturists who had owned land for six generations. *Uttam Singh* v. *Jhanda Singh* (7), a case of *Bedis* of the Hoshiarpur District, was decided on the same general principles. It was held that the parties were governed by custom, because the whole village belonged to a community of *Bedis* whose ancestors founded it some generations previously. They formed a compact body and their main profession was that of agriculture though, as in the present case, some of them had adopted professions and supplemented their income by trading. So far then as the authorities go, we consider that they are distinctly in favour of the view that the parties to the present case are governed in matters of succession by the customs prevailing amongst agriculturists.

Mr. Shafi has also pointed out three matters in which he urges that these parties

(1) 1 Ind. Cas. 691; 34 P. R. 1909; 181 P. L. R. 1908; 169 P. W. R. 1908.
(2) 59 P. R. 1908; 121 P. W. R. 1908.
(3) 12 P. R. 1906; 108 P. L. R. 1906.
(5) 11 Ind. Cas. 406; 87 P. W. R. 1911.
(5) 2 Ind. Cas. 940; 56 P. R. 1909; 129 P. L. R. 1909; 96 P. W. R. 1909.
(6) 3 Ind. Cas 593; 87 P. R. 1909; 131 P. L. R. 1909; 105 P. W. R. 1909.
(7) 21 P. R. 1896.

have adopted the customs of agriculturists. These are :—

(1) They have adopted *chadar andazi* marriages;

(2) they recognise customary divorce ;

(3) they allow the adoption of a daughter's son.

There is no doubt that according to the strict Hindu Law *chadar andazi* marriages and divorce in any form are not allowed, and we think that his argument has force as regards these two points. As regards the third point, the validity of the adoption of a daughter's son is a moot point. It is allowed in some parts of India and is not allowed in others. Mr. Shafi lays great stress on the fact that the appellants have not been able to cite a single instance of exclusion of the agnates of a deceased proprietor by his daughter. We agree with him that the appellants' inability to cite any such instance is a strong point against them. We also think it as important that the two Courts, who have concurred in holding that these *Khatris* are governed by agricultural custom, were presided over by Hindu Judges who were not likely to hold lightly that the parties did not follow their personal law.

We have carefully considered the case and having regard to the evidence on the record and the authorities referred to by us, we have no hesitation in upholding the concurrent finding of the Courts below and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 6 OF 1914.

December 3, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

PARBHU DYAL—OBJECTOR—APPELLANT

versus

HARCHARAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Hindu Law—Will—Gift—Devisees or donees, some members of joint Hindu family—Joint or separate—Interest of donees or devisees—Presumption.

Where the devisees or donees are only some of the members of a joint Hindu family, and there is a clear intention to exclude the remaining members of the family and to confer on the devisees or donees interests to be held separate from any property which the joint family may happen to possess there is no ground for assuming that the devisees or donees were intended to hold the property as co-parceners in the sense of the Hindu Law, though it may well be otherwise when the devisees or donees are all the members or heads of a joint family.

Kishori Dubain v. *Mundra Dubain*, 10 Ind. Cas. 565; 33 A. 665; 8 A. L. J. 757, referred to.

Execution first appeal from the decision of the Subordinate Judge of Muttra, dated the 27th of November 1913.

The Hon'ble Dr. *Sunder Lal*, for the Appellant.

Mr. *B. E. O'Conor* (with him Mr. *L. M. Banerjee*), for the Respondents.

JUDGMENT.

CHAMIER, J.—The firm, of which the respondents to this appeal are the present proprietors, brougut a suit for Rs. 19,000 odd in the Bombay High Court against the appellant, Parbhu Dyal, and his father, Ajudhia Prasad. The suit was dismissed against the appellant but was decreed against Ajudhia Prasad. In execution of their decree the respondents attached a 15-*biswas* share in *Mouzah* Badhar in the Muttra District, alleging that it was the property of Ajudhia Prasad. The appellant objected to the attachment, asserting that the whole of the share was his property and that his father had no interest whatever in it.

The Court below has held that Ajudhia Prasad has an interest in the property as a member of a joint family consisting of himself and his sons, and that that interest is liable to attachment and sale in execution of the respondents' decree. It, therefore, allowed the objection in part. Parbhu Dyal has appealed and the decree-holders-respondents have filed cross-objections. Ajudhia Prasad is the adopted son of one Narain Das, a well-to-do *Banya* who carried on business in Muttra, Delhi, Hathras and elsewhere. In 1878 Narain Das bought a 10-*biswas* share in the village now in question. A few years later he built a temple in the village and dedicated half of the share to the upkeep of the same. He died in January 1884 and in September 1885 the remaining 10 *biswas* of the village were taken over by his representatives in lieu of a debt of Rs. 13,000 due to the deceased. A few days before he died, he made a Will which has been the

subject of much discussion before us. After revoking previous Wills, he says that he has adopted Ajudhia Prasad but thinks that he is unfit to carry on the business, therefore, he makes the following arrangement:—

1. Five men named are to be managers of the business of the different *kothis* and are to act under the instructions and supervision of his widow, *Musammat* Raj Koer, who is to be owner and executrix (*malik-o-wasi*).

2. The five men named are to carry on the business under the general orders of the widow. In case of loss, actual or anticipated, the widow with the concurrence of the five men is authorised to close the whole or any part of the business.

3. The widow is authorised to dismiss, suspend, or transfer servants.

4. Each of the managers is to be moved on every year to another branch and accounts between the branches are to be settled every year. The widow may dismiss any of the managers for good cause, but only with the concurrence of the rest.

5. Ajudhia Prasad is to have Rs. 25 per mensem, but the allowance may be increased by the widow with the concurrence of the managers. On the occasion of a birth or death in his family something extra may be paid to him.

6. Certain allowances are provided for his daughters.

7. Certain sums are to be paid annually to the managers and the widow is authorised to increase the amounts in case of good service.

8. Provision is made for the temple.

9. The stock of the different *kothis* is said to be entered in the books. All the gold and silver ornaments are to be enjoyed by the widow. After her death the ornaments and all the property, moveable and immoveable, are to be disposed of as the widow may direct by Will made with the concurrence of the managers

10. All expenses of management, etc., are to be arranged for by the managers under the direction and with the concurrence of the widow.

11. Suits are to be brought in the name of the widow or any of the managers nominated by her.

12. If any manager dies, the widow and the surviving managers are to appoint another. After the death of the widow the managers are to carry on the business. In the last resort the Government may arrange to carry on the business and give effect to the Will, but only if the widow and all the managers are dead or have declined to carry on.

13. All the property specified at the foot of the Will, except houses Nos. 1 and 5, and all property not entered in the list are declared to be the testator's own acquisitions. Ajudhia Prasad and his wife have no right to it and if they lay any claim it is to be registered.

In the description of the first house in the list, it is said that the house is ancestral property but a *kotha* and a *dalan* in it are said to be self-acquired by Narain Das.

There is nothing to show that there was in the hands of Narain Das any ancestral property except the two houses. It was suggested that these houses should be regarded as the nucleus of the property amassed by Narain Das and, therefore, that the whole should be treated as the joint property of Narain Das, his son and grandsons. Nothing of the kind seems to have been suggested in the Court below, and we have no evidence that either of the houses brought in any rent. In the circumstances all the property left by Narain Das with the exception of the two houses must be regarded as his self-acquired property.

The appellant's case is that the widow, *Musammat* Raj Koer, became under the Will of her husband full proprietor of all the self-acquired property, that on December 11th, 1897, she made a Will whereby she passed over Ajudhia Prasad and left all the property to his three sons, Parbhu Dyal (the appellant), Damodar Das and Nityanand, as joint owners, that Damodar Das died in the life-time of Raj Koer and the disposition, therefore, took effect in favour of Parbhu Dyal and Nityanand, and that on the death of the latter in March 1900 Parbhu Dyal, the appellant, became by survivorship sole owner of the property and, therefore, no part of it can be attached in execution of a decree against his father.

The respondents' case is that the Will of Narain Das does not confer on *Musammat* Raj Koer more than an estate for life at the most and that on her death, the whole

property devolved upon Ajudhia Prasad. They also contend that the alleged Will of Raj Koer has not been proved.

The Court below has accepted the respondents' contentions regarding the two Wills, but has held that the property devolved upon Ajudhia Prasad and his sons. The learned Subordinate Judge seems to have been under the impression that at least two sons of Ajudhia Prasad are living, but it is common ground that Parbhu Dyal alone is now living. According to the findings of the Court below the interest of Ajudhia Prasad in the village is an undivided half of 15 *biswas*, the remaining five *biswas* being the property of the temple.

At the hearing the respondents' learned Vakil said that he would be satisfied with a finding that only an undivided half of 15 *biswas* was liable to attachment in execution of the respondents' decree.

The Will of Narain Das is a most curious document and gives rise to a difficult question, whether he really intended to give Raj Koer full proprietary rights in his estate. Some of the provisions are hardly compatible with the view that he intended to give her full proprietary rights. The truth appears to be that in his desire to arrange for the proper conduct of the business which had been his idol, he overlooked the necessity for carefully defining the interest of the widow. On the whole, however, I incline to the view that the Will confers upon the widow a full proprietary estate and that the provisions which appear to make her dependent upon the five managers are not intended to cut down her estate. But in the view which I take of some other questions in the case, the result appears to be practically the same whether the widow of Narain Das took a full proprietary estate or only a life-interest.

The Court below finds that the alleged Will of Raj Koer has not been proved. The Subordinate Judge thinks it suspicious that the Will was not registered and that it was not mentioned till 1902. He also thinks that it bears internal evidence of having been prepared to meet events which did not happen till after Raj Koer's death and could not have been foreseen. I think that sufficient reason has not been given for rejecting this Will. It was mentioned and the date and purport of it were given in the written statement filed in the Bombay High Court in 1900 on behalf of Parbhu Dyal, and we find that less than a month after Raj Koer's death a petition was presented to the Revenue Authorities by Ajudhia Prasad's wife, Ram Koer, on behalf of her minor sons, Parbhu Dyal and Nityanand, in which it was stated that the two boys were the heirs of Raj Koer. A report to the same effect was made by the *Patwari* of the village and on April 25th, 1899, mutation of names was effected in their favour (see the copy of the order of that date and of the extract from the *Khewat* for 1306 *Fasli*, which should be read with the extract from the *Khewat* for 1305 *Fasli*. It is true that on that occasion the Will of Raj Koer is not actually mentioned, but in the absence of such a Will there was no reason for describing the two boys as heirs of Raj Koer. The Subordinate Judge does not refer at all to the evidence of the *Patwari*, Chitar Mal, who swears that the Will was executed in his presence, nor to the evidence of Sita Ram taken on commission in the case in Bombay, nor to the evidence of Sita Ram's son, Ram Nath, who swears that the Will is in the handwriting of his father and is signed by him at the foot. I see no reason for rejecting the evidence of those witnesses. Nor do I think that the Will bears internal evidence of having been fabricated. It is not a matter for surprise that Raj Koer should wish to disinherit Ajudhia Prasad, considering that his adoptive father had declined to leave any property to him and Ajudhia Prasad had failed to keep the business going. All Wills are not registered and in face of the evidence referred to, I am unable to reject the Will merely because it was not registered.

As Damodar Das died in the life-time of Raj Koer the Will took effect in favour of the two surviving sons of Ajudhia Prasad, namely, Parbhu Dyal and Nityanand (the latter's name is badly written in some of the documents and was actually read as Baldeo Dat by the Court Reader, but the name appears to be Nityanand). The question is whether on the death of Nityanand in March 1900 his interest passed to his father Ajudhia Prasad or to his brother Parbhu Dyal. It is clear that the devise to Parbhu Dyal and his brother was not

intended to take effect in favour of them *and* their father, who was presumably joint with them; but was it intended to confer upon them a joint interest with rights of survivorship *inter se*. A similar question arose in *Kishori Dubain* v. *Mundra Dubain* (1) and it was held that the fact that two devisees or donees of property were living in union as members of a joint Hindu family, was not necessarily a sufficient reason for holding that they took a joint estate with rights of survivorship *inter se*. It appears to me that when the devisees or donees are only some of the members of a joint family and there is a clear intention, as in this case, to exclude the remaining member of the family and to confer on the devisees or donees interests to be held separate from any property which the joint family may happen to possess, there is no ground for assuming that the devisees or donees were intended to hold the property as co-parceners in the sense of the Hindu Law. It may well be otherwise when the devisees or donees are all the members or even the heads of a joint family. Having regard to the circumstances in which the Will of Raj Koer was made, I am of opinion that the two brothers, Parbhu Dyal and Nityanand, took separate interests. Accordingly when the latter died, his share passed to his father, Ajudhia Prasad, that share amounted to $7\frac{1}{2}$ *biswas* in the village and can, in my opinion, be attached and brought to sale by the respondents-decree-holders.

In practical purposes the same result follows if Raj Koer took only a life-interest in the 15-*biswas* share. On her death it would have passed to Ajudhia Prasad and his sons and the interest of Ajudhia Prasad would now be an undivided half of the 15 *biswas*.

For the above reasons I am of opinion that the appellant's objection should have been allowed as regards a $7\frac{1}{2}$-*biswas* share in the village and I would modify the order of the Court below accordingly.

PIGGOTT, J.—I concur.

BY THE COURT.—The decree of the Court below is modified. The appellant's objection is allowed as regards $7\frac{1}{2}$ *biswas* in the village. Parties will pay and receive proportionate costs throughout and costs in this Court will include fees on the higher scale.

The cross-objections are also dismissed.

Decree modified.

(1) 10 Ind. Cas. 565; 33 A. 665; 8 A. L. J. 757.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 2, 22 AND 23 OF 1912 AND APPEALS NOS. 309 AND 310 OF 1914.

October 23, 1914.

Present: —Mr. Justice Sankaran Nair and Mr. Justice Spencer.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM, AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sri Raja VATSAVYA VENKATA SIMHADRI JAGHAPATHIRAJU BAHADUR GARU, HAVING DIED SUBSEQUENT TO THE JUDGMENT, HIS WIFE, *Sri Raja* VATSAVYA VENKATA SUBHADRAYAMMA JAGHAPATHI BAHADUR GARU, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Irrigation Cess Act (VII of 1865), s. 1—'Engagement', meaning of—Madras Revenue Recovery Act (II of 1864), s. 59—Madras Land Encroachment Act (III of 1905), s. 1.

The decree of a Court passed after the *Inam* Settlement and entitling a *mokhasadar* to irrigate free of water-cess more area than was exempted from water-cess at the *Inam* Settlement, may be treated as sufficient to establish an engagement of the kind referred to in section 1 of Act VII of 1865.

Appasami Aiyar v. *Secretary of State for India*, 6 Ind. Cas. 265; (1910) M. W. N. 107; 7 M. L. T. 349; *Kesari Venkatasubbiah* v. *Secretary of State for India*, 20 Ind. Cas. 804; 14 M. L. T. 131; *Nuttall* v. *Bracewell*, 2 Ex. 1 at p. 11; 4 H. & C. 714; 36 L. J. Ex. 1; 12 Jur. (N. S.) 989; 15 L. T. 313; *Holker* v. *Porritt*, 10 Ex. 59; 44 L. J. Ex. 52; 33 L. T. 125; 23 W. R. 400; *Marai Sussai Mudaliar* v. *Secretary of State for India*, 14 M. L. J. 350; *Watts* v. *Kelson*, 6 Ch. App. 166; 43 L. J. Ch. 126; 24 L. T. 209; 19 W. R. 338, followed.

Where a right to take water is proved, even though no express agreement on behalf of Government not to levy any charge is proved, an engagement under Act VII of 1865, section 1, will be implied and no cess can be levied.

Lutchimee Doss v. *Secretary of State*, 3 Ind. Cas. 456; 32 M. 456 at p. 468; 6 M. L. T. 242; 19 M. L. J. 470; *Secretary of State for India in Council* v. *Perumal Pillai*, 24 M. 279; 11 M. L. J. 117; *Ritraj Koer* v. *Sarfraz Koer*, 15 M. L. J. 349 at p. 351; 27 A. 655; 2 C. L. J. 185; 2 A. L. J. 623; 7 Bom. L. R. 872; 9 C. W. N. 889; 8 O. C. 293 (P. C.); 32 I. A. 165, followed.

SECRETARY OF STATE *v.* SIMHADRI JAGHAPATHIRAJU.

The effect of Act III of 1905 (Madras Land Encroachment Act) is not to take away rights which existed prior to the Act, and Government is not, by reason of that Act, coupled with Act VII of 1865, entitled to impose a cess upon those land-holders who before that Act were not liable to pay cess for using the water.

Kandukuri Mahalakshmana Garu Chetty v. *Secretary of State for India*, 8 Ind. Cas. 67; 34 M. 295 at p. 300; 8 M. L T. 389; (1910) M. W. N. 595; 20 M. L. J. 823; *Secretary of State* v. *Kamapalli*, 15 Ind. Cas. 594; 37 M. 364 at p. 366 *note*; 23 M. L. J. 109; (1912) M. W. N. 771, followed

Where a river belongs to Government, it is open to it to construct sluices without prejudice to the rights of the *mokhasadars*, but their previously existing right to receive water free of water-cess will not be affected by construction of sluices. A suit to recover back water-cess paid under protest and after attachment should be brought within six months from the date on which the amount was paid, and the period of limitation applicable is that prescribed by section 59 of Act II of 1864.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suits Nos. 19, 16 of 1910 and 10 and 11 of 1911, respectively.

The Government Pleader for the 1st Appellant:—The Settlement Statement, Exhibit H, shows that only ten acres and odd are registered as wet. This indicates that the Item Commissioner allowed that extent alone, overruling the claim of the *mokhasadars* to one-third of the water. The Government is, therefore, entitled to levy cess upon the extent irrigated in excess of the wet area so registered. There is no ownership in water in a stream [Per Sundara Iyer, J., in *Chockalingam Pillai* v. *Emperor* (1) and *Secretary of State* v. *Kannapalli Janakiramayya*(2)]. The claim for refund of cess is clearly barred by limitation.

The Hon'ble Mr. *B. N. Sarma* and Mr. *V. Ramesam*, for the Respondents:—The Government had no right to levy a cess. The right of the respondents to one-third water of the stream had been established in Original Suit No. 545 of 1885. The bed of the stream also belongs to the *mokhasadars*. *Appasami Aiyar* v. *Secretary of State* (3); *Kesari Venkatasubbiah* v. *Secretary of State for India* (4); *Secretary of State for India* v. *Kannapalli Janakiramayya* (2); *Kandukuri Mahalakshmana Garu Chetty* v. *Secretary of State for India* (5); *Secretary of State for India* v. *Swami Nautheswarar* (6); *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (7) and *Papachar Sethumathava Chariar* v. *The Secretary of State* (8). The respondents have an absolute right to dispose of their one-third water in any way they pleased. See observations of Bramwell, B., in *Nuttall* v. *Bracewell* (9). See also *Holker* v. *Porritt* (10) and *Maria Susai Mudaliar* v. *Secretary of State for India in Council* (11), following *Watts* v. *Kelson* (12). The claim for refund of cess paid under protest is not barred.

JUDGMENT.

SPENCER, J.—The simple question in these appeals is whether the respondents are liable to pay water-cess to Government for irrigating lands in excess of the area classed as wet at the *Inam* Settlement with the water of the Eti Koppaka Channel. Similar questions arose in *Appasami Aiyar* v. *Secretary of State for India in Council* (3) and in *Kesari Venkatasubbiah* v. *Secretary of State for India in Council* (4), the latter decision having been published after the filing of these appeals; and if those cases were rightly decided, as I think they were, these appeals must be dismissed.

Prior to the present suit, there has been litigation between the parties. In Original Suit No. 545 of 1885 on the file of the District Munsif's Court of Ellamanchilli, it was decided that two sluices should be constructed at the entrance of the Koppaka Channel, two feet in height, one being $1\frac{1}{2}$ yards wide for the use of the Koppaka

(1) 13 Ind. Cas. 819; (1912) M. W. N. 119; 11 M. L T. 162; 13 Cr. L. J. 131.

(2) 18 Ind. Cas. 770; 37 M. 322; 24 M. L. J. 365; 13 M. L. T. 235; (1913) M. W. N. 225.

(3) 6 Ind. Cas. 265; (1910) M. W. N. 107; 7 M. L. T. 349.

(4) 20 Ind. Cas. 804; 14 M. L. T. 131.

(5) 8 Ind. Cas 67; 34 M. 295 at p. 300; 8 M. L. T. 389; (1910) M. W. N. 595; 20 M. L. J. 823.

(6) 6 Ind. Cas. 199; 34 M. 21; 7 M. L. T. 407; 20 M. L. J. 766; (1910) M. W. N. 495.

(7) 8 Ind. Cas. 357; 34 M. 366; 9 M. L. T. 47; (1910) 2 M. W. N. 119.

(8) 26 Ind. Cas. 187; 1 L. W. 941.

(9) 2 Ex. 1 at p. 11; 4 H. & C. 714; 36 L. J. Ex. 1 12 Jur. (N. S) 989; 15 L. T. 313.

(10) 10 Ex. 59; 44 L. J. Ex. 52; 33 L. T. 125; 23 W. R. 400.

(11) 14 M. L. J. 350.

(12) 6 Ch. App. 166; 43 L. J. Ch. 126; 24 L. T. 269; 19 W. R. 338.

mokhasadars, and the other, three yards in width, for the use of the Government *ryots* and the *ryots* of the Darlapudi proprietor. The right of Koppaka *mokhasadars* was thereby recognised by arresting the whole water of the river, giving two-thirds of it to Government and taking one-third of it for themselves; and thus their title to one-third of the water of the river was established. But in the Settlement Statement, Exhibit H, only 10 acres 12 cents of land were registered as wet in this *mokhasa*. It is contended on behalf of the Government that the Inam Commissioner only allowed the above said area to be registered as wet land in spite of the *mokhasdars'* claim in that Settlement to one-third of the water. Exhibit G is a letter from the Tahsildar of Sarvasiddhi, dated 1st October 1848, recognising the *mokhasadars'* rights for a flow of water in one turn through the Etti Koppaka Channel as against two turns through the Pulaparthi Channel, and this letter is referred to as one of the documents mentioned in Exhibit H as being in the possession of the *mokhasadars*. It is, therefore, argued that, though the *mokhasadars* are entitled to take one-third of the water, the Government is nevertheless entitled to impose a cess on the extent irrigated in excess of the registered wet area, as the arrangement come to at the *Inam* Settlement was a condition precedent.

The proviso to section 1 of Act VII of 1865 declares that, where an *inamdar* is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess will be imposed under this Act for water supplied to the extent of such right. The question for our decision, therefore, resolves itself into the further question, what is the scope of the judgment in Original Suit No. 545 of 1885 which undoubtedly binds the parties? Is the right recognised in that suit limited by the prior Settlement which fixed a definite area of land as entitled to water free of charge? And does the decree operate as an 'engagement' within the meaning of the Act?

In *Papachar Sethumathava Chariar* v. *Secretary of State for India* (8) it was recently held by Wallis, C. J., and Seshagiri Aiyar, J., that the *Inam* Settlement did not override a previous arrangement with the Government by which an *inamdar* was entitled to water free of separate charge. If the arrangement is one subsequent to the Settlement, I should be inclined to hold that it governed the relations between the parties even more decidedly than an engagement prior to the Settlement. In *Kesari Venkatasubbiah* v. *Secretary of State for India in Council* (4) a decree of Court passed after the *Inam* Settlement was treated as sufficient to establish an engagement of the kind referred to in the proviso to section 1 of Act VII of 1865.

If the Government had a right by virtue of the *Inam* Settlement to restrict the respondents to the area of irrigated land allotted to them under the Settlement, a demand might have been made, when Original Suit No. 545 of 1885 was decided, to have inserted in the decree a stipulation that the taking of one-third of the whole water of the river should be subject to the payment of assessment on the portion irrigated in excess of the registered area. But not only did Government recognise the *mokhasadars'* unrestricted right to one-third of the water in this suit, but from time to time Government officials made similar unqualified admissions in Exhibits G, L, M, P and O. I am, therefore, of opinion that the Subordinate Judge was right in his view that the plaintiffs are not liable to pay water-cess so long as they do not take more than their one-third share of the water in the stream.

The respondents' Pleader has attempted to base his claim also on the position that the bed of the stream belongs to the *mokhasadars*. It is unnecessary for us to deal with this question, as there was no finding in the lower Court as to the ownership of the entire bed of the stream. The Subordinate Judge has found that the river belongs to the Government and is under its control and I find no evidence to lead me to a different conclusion. In Original Suit No. 545 it was only found that the dam itself was situated in that part of the bed of the river which belonged to the *mokhasadars*. Such being the findings of fact in the present case, a very few words are necessary to distinguish the decisions cited in support of the respondents' contentions. *Secre-*

tary of State v. *Kannepalli Janakiramayya* (2) and *Kandukuri Mahalakshmana Garu Chetty* v. *Secretary of State for India* (5) turned on a question whether the ownership of the bed of channels which take off water from the Vamsathara river, claimed by Government to belong to them, carried with it a right to use the water of the channels free of charge. *Secretary of State for India* v. *Swami Nautheswarar* (6) and *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (7) are cases depending on the question whether the main source of supply was a Government source, a question which it is unnecessary to consider in detail in the present appeals, as the attention of the parties was not directed to it in the lower Court. In *Kesari Venkatasubbiah* v. *Secretary of State for India* (4) Sadasiva Aiyar, J., has distinguished the case in *Secretary of State for India* v. *Swami Nautheswarar* (6) from the facts of the case before him and the same reasons may be used against applying that decision to the facts of the case before us.

In Appeals Nos. 22 and 23, the respondents have filed objection petitions in which they seek to have it further declared that they have a right to dispose of the one-third share for any purpose and in any manner they think fit, subject to any rights that any other riparian owners, except the Government, may have; in other words, they claim an absolute right over the one-third of the water, that they appropriate and keep in their control, to utilise it in any way they may choose; and in support of this they rely on certain expressions in the judgment of Bramwell, B., in *Nuttall* v. *Bracewell* (9) and on the observations in *Holker* v. *Porritt* (10), where it was stated as regards the diversion of a portion of a certain stream into a separate course, "the water which came down to him at the farm was his own to use it as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use which he chose to make of it there. In this respect his position was different from that of a riparian owner, who only shares the use of the water in common with other riparian owners." In *Maria Susai Mudaliar* v. *Secretary of State for India in Council* (11) there is a similar observation, following the remarks of Sir G. Mellish, L. J., in *Watts* v. *Kelson* (12), that when the water arrived in the plaintiff's tanks "he could do what he liked with it."

The question of ownership in running water, never a single one, is here beset with such uncertainty about the source and course of the stream owing to the want of full evidence on these points that it would be dangerous to make a wide pronouncement about the *mokhasadars'* right to exercise absolute ownership over the water. On the point whether water in a stream can be owned, in *Chockalingam Pillai* v. *Emperor* (1) Sundara Aiyer, J., observed: "In England, water flowing in a river is regarded as not owned by any person. The right of the riparian proprietor is to use it. He is not the owner of the water which he is entitled to use." Again in *Secretary of State for India* v. *Kannepalli Janakiramayya* (2) my learned brother observed that the ownership of water ceased when the water left the land. In the present case, the rights that the respondents claimed in paragraph III of their plaint were rights based on ownership of the bed of the river where the regulating sluices were constructed, and the natural rights appertaining to riparian owners. This at least may be said. The respondents have, in addition to their rights as riparian owners, the rights accruing to them by virtue of the decree in Original Suit No. 545 and by certain admissions made by the Government. They have been given such a declaration as they are entitled to by reason of their right to a one-third share of the water. I would not give them any declaration defining more exactly what the rights of riparian owners are than what has been already declared in their favour in this suit.

In Appeal No. 310, there is an objection petition that Rs. 705 collected by the Government as water-cess for *Fasli* 1305 and disallowed by the lower Court as barred by limitation, should have been allowed to be recovered. It is conceded that there was an order for attachment and that the suit was brought more than six months after the date of payment. Section 59 of Act II of 1864 prescribes a limitation period of six months for applying to the Civil Courts for redress to parties aggrieved by proceedings under that Act.

As the cause of action is stated in the plaint as being the payment of this sum of money made under protest and under threat of attachment, I think that an application for redress of the plaintiffs' grievance should have been made within six months and that the lower Court, therefore, rightly decided that the claim was time-barred.

These appeals must, therefore, be dismissed with costs. The objection petitions will also be dismissed with costs.

SANKARAN NAIR, J.—I concur in dismissing the appeals and memorandum of objections with costs, and propose to add a few words on the question of law. Disregarding those instances in which a person could not have got his water but for some work constructed by Government, in all other cases the decisions are uniform that where a right to take water is proved, even though no express agreement on behalf of Government not to levy any charge is proved, an engagement under Act VII of 1865 will be implied and no cess can be levied, *Lutchimee Doss* v. *Secretary of State for India* (13), the Chief Justice and Miller, J.; *Appasami Aiyer* v. *Secretary of State for India in Council* (3), Benson and Krishnaswami Aiyar, JJ.; and *Kesari Venkata Subbiah* v. *The Secretary of State for India* (4), Sundara Aiyar and Sadasiva Aiyar, JJ.; *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (14), Abdur Rahim, J., and myself, subsequently followed by Miller and Abdur Rahim, JJ.; *Secretary of State for India in Council* v. *Perumal Pillai* (15); *Ritraj Koer* v. *Sarfaraz Koer* (16). In the cases of *zemindars* and *inamdars* some of the decision put it on the ground that when the *zemindari* or *inam* was granted, an agreement will be implied against the Government to allow the natural facilities for rights of irrigation which the land-holder then had, *Secretary of State for India* v. *Swami Nautheswarar* (6). Others put it also on the ground that as the owner of the bed of the river, the *zemindar* had a right to use the water.

(13) 3 Ind. Cas. 456; 32 M. 456 at p. 468; 6 M. L. T. 242; 19 M. L. J. 470.
(14) 18 Ind. Cas. 294; 37 M. 369 *note*.
(15) 24 M. 279; 11 M. L. J 117.
(16) 15 M. L. J. 349 at p. 351; 27 A. 655; 2 C. L. J. 185 (P. C.); 2 A. L. J. 623; 7 Bom. L. R. 872; 9 C. W. N. 889; 8 O. C. 293; 32 I. A. 165.

There is a conflict of judicial opinion on the effect of Act III of 1905. I am of opinion that it did not take away any rights which existed at the time the Act was passed and the Government were not by reason of that Act, coupled with Act VII of 1865, entitled to impose a cess upon those land-holders who were before that Act not liable to pay cess for their using the water. See *Kandukuri Mahalakshmana Garu Chetty* v. *Secretary of State for India* (5) (Uralam judgment). Benson and Sundara Aiyar, JJ., also, before whom this Act was pressed, declined to hold the land-holder liable, *Secretary of State* v. *Kamapalli* (17). On the other hand Miller and Munro, JJ., in the Uralam judgment approved by the Chief Justice and Ayling, J., in *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (7) held that the Act makes the river Government property and entitles the Government to apply Act VII of 1865. In this case it is true the river is found to belong to Government and under its control. The Government may, therefore, possibly regulate the supply of water without prejudice to the respondents by constructing sluices, etc. But as the right to the supply of water without liability to pay any charge existed already, it is not dependent on the works constructed by Government, and no cess under Act VII of 1865 may be levied. The respondent's right to the water has been declared by a judicial decision. No cess is, therefore, leviable. He cannot get anything more.

Appeals dismissed.

(17) 15 Ind. Cas. 594; 37 M. 364 at p. 366 *note*; 23 M. L. J. 109; (1912) M. W. N. 771.

DINABANDHU JANA *v.* CHINTAMONI JANA.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER NO. 410 OF 1912.
December 22, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Carnduff.
DINABANDHU JANA AND ANOTHER—DEFENDANTS—APPELLANTS
versus
CHINTAMONI JANA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15, 20, 21—Mistake of law by arbitrator—Award on private reference, when cannot be filed.

A mistake of law on a legal point specifically referrred to an arbitrator, does not vitiate his award, but if the point was not specifically referred and the decision is patently contrary to law, the Court will not file the award.

Where any of the grounds mentioned in paragraphs 14 or 15 of Schedule II of the Civil Procedure Code is proved, a Court cannot proceed to file an award where the matter has been referred to arbitration without the intervention of the Court. Even if the invalid portion of the award is separable, it would still not be enforceable by the summary procedure of rule 20.

Mana Vikrama v *Mallichery*, 3 M. 68, referred to.

Appeal against a decree of the Sub-Judge of Cuttack, dated the 30th April 1912.

Babus *Ram Chandra Majumdar* and *Chandra Sekhar Banerjee*, for the Appellants.

Babus *Provash Chandra Mitter* and *Suresh Chandra Chakrabarty*, for the Respondent.

JUDGMENT.—This is an appeal from an order allowing an award to be filed under rule 20, Schedule II, of the Civil Procedure Code.

It appears that there were four brothers, named Chintamoni, Dinabandhu, Jogabandhu and Keshari, who were joint in mess and property. Chintamoni had three sons, Dasarathi, Panchanidi and Brohmanand.

Keshari had a son who died in his father's life-time and Keshari is said to have adopted Brohmanand. Keshari died before 1909. At the beginning of December 1909, the three surviving brothers separated in mess and on the 25th December 1909 an agreement was signed by the three brothers and on behalf of Brohmanand by his natural father and guardian, Chintamoni, to submit their affairs to arbitration with a view to partition their properties according to shares and to settle certain disputes among them as regards the property in certain businesses, religious endowments, liability to debts, etc. On the 26th December 1909, the arbitrators made a draft award as to the shares and as to properties standing in the names of persons outside the arbitration and as to properties standing separately in the names of Chintamoni, Panchanidi and Chintamoni's wife. They also decided the question of the *shebaitship* of the *Thakurs*. No stamp was forthcoming until the 20th April 1911 and so the final award, which had undoubtedly been accepted by all the parties in draft, was written out on the 21st April 1911 and the persent applicatian to file the award was made on the 5th June 1911. Dinabandhu and Jogabandhu then objected to its being filed, on the ground that they had never agreed to submit the matter to arbitration at all and had been induced to sign a blank paper on which the alleged agreement was fraudulently drafted. They further contended that the alleged arbitrators never took any evidence and that the arbitrators exceeded the powers given in the said *ikrarnama*. The major portion of this defence is wholly dishonest.

It is proved beyond all manner of doubt that the objectors did agree to arbitration, in terms of the *ikrarnama*, that the arbitrators who are gentlemen entirely above suspicion, did meet and did take the statements of all the parties and that the objectors agreed to the specification of shares and asked the arbitrators to proceed to a division of the dwelling houses and moveable properties, which was done, and the parties acquiesced and took possession accordingly. There was nothing outside the scope of the reference in all this. Then came the question of the dispute about the two *Thakurs*, brought by Chintamoni from another place and established at his sole expense. Also about the family *Bhagabat* whose worship, the arbitrators found Chintamoni had performed alone ever since the separation in mess, all the others being unwilling to perform the *Seba*. This question was, in our opinion, clearly before the arbitrators on the reference and they had no course open to them under the circumstances, but to place the *Thakurs* and the *Bhagabatgadi* in charge of Chintamoni as *Sebait*. Unfortunately, they went further and declared the order of succession to the *shebaitship* by primogeniture in Chintamoni's family. This was not only in excess of their powers but was clearly contrary to Hindu Law. A mistake of law on a legal point specifically referred to them would

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not, on the authorities, have vitiated the award, but a decision affecting the succession that was not referred to them and a decision that is patently contrary to law, could not be accepted by the Court and is a bar to the filing of the award in Court, though it may not affect the contract between the parties on the other points.

Having regard to the extreme dishonesty of the defence throughout and the separable character of the award as to succession, we have anxiously considered whether having regard to the provisions of rule 14 (*a*) this portion of the award could not be struck out, but on a true interpretation of rule 21 it would appear that where any of the grounds mentioned in paragraph 14 or 15 is proved the Court cannot proceed to file the award where the matter has been referred to arbitration without the intervention of the Court. Even if it could be held that the invalid portion of the award was separable, it would still not be enforceable by the summary procedure of rule 20, as was pointed out in *Mana Vikrama* v. *Mallichery* (1).

But in the present case there is an illegality apparent upon the face of this portion of the award though apart from this there is no objection to the legality of the award in general apparent on the face of it.

It is a pity that the arbitrators unnecessarily went out of their way to render an otherwise excellant award incapable of being filed, but the mere fact that it cannot be filed will not affect its usefulness as a contract between the parties in all matters other than the succession to the *shebaitship*. In view of the extreme dishonesty of the main defence and the very technical nature of the only objection on which the appellants can succeed, which in itself has no pecuniary value, we must direct that the respondents do get their full costs from the appellants in both Courts.

The question of the properties standing in the names of persons other than those who made the reference was rightly excluded by the arbitrators from the scope of the award. We mention this since it has been urged by the appellants that on this point also the arbitrators exceeded their powers under the reference. The appeal must be decreed and the application to file the award must be refused, but the appellants will bear all the costs in both Courts for the reasons we have stated above. We fix the hearing fee at four gold *mohurs*.

Appeal decreed.

(1) 3 M. 68.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 98 OF 1913.

June 29, 1914.

Present:—Mr. Hallifax, A. J. C.

JAIRAM—PLAINTIFF—APPELLANT

versus

SUNDERLAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Occupancy-holding, transfer of, without landlord's consent or ratification—Transfer voidable—Rule affirmed in Central Provinces Tenancy Act (IX of 1883).

A transfer of an occupancy-holding is voidable at the instance of the landlord unless he consented to the transfer at the time it was made or subsequently. This rule was merely affirmed in the Central Provinces Tenancy Act IX of 1883.

Appeal against the decree of the Divisional Judge, Nerbudda Division, dated the 4th November 1912, confirming that of the District Judge, Betul, dated the 30th April 1912.

Mr. *J. C. Ghosh*, for the Appellant.

The Hon'ble Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—The appellant was plaintiff in the first Court and the respondents were the only contesting defendants. The former respresents in this case Nandram and Gopiram Sunars as the mortgagees of a half share in an occupancy-holding in the village of Kamath. The mortgage was executed in 1878 The respondents represent one Gulab Khan who held a mortgage of the entire holding executed in 1875. In 1906 he obtained a decree for foreclosure on this mortgage in a suit to which the subsequent mortgagees were not parties. This decree he transferred to the respondents, who obtained possession of the holding. The respondents are also now proprietors of the whole village of Kamath. (The contention put forward in the fifth ground of appeal that there were other sharers was withdrawn.) The appellant sued to redeem the respondents' prior mortgage and to enforce his own. The reply of the

respondents, or so much of it as concerns us now, was that the *malguzar* of the village in 1878 and his successors never consented to the appellant's mortgage, which cannot be enforced against them as they are now the *malguzars*. The mortgage of 1875 which they hold they can themselves, of course, ratify now, even if they had not done so when they bought the decree based on it.

In both the Courts below it has been found that the appellant's mortgage of 1878 never received the landlord's consent or ratification. In the first Court, that of the District Judge of Betul, it seems to have been tacitly admitted that a mortgage of an occupancy-holding executed before the 1st of January 1884, when Act IX of 1883 (the Central Provinces Tenancy Act) came into force, could not be enforced against the landlord and was voidable at his option, unless it had been executed with his consent or subsequently ratified by him. In appeal the plaintiff withdrew his tacit admission and contended that mortgages of occupancy holdings did not before 1884 require the consent of the *malguzar* to make them good against him. The learned Divisional Judge held that "all such transfers effected before Act IX of 1883 came into force are governed by the *Wajib-ul-arz*", quoting as authority *Nathu Lalla* v. *Vithoba* (1); *Dallu Patel* v. *Madho Patel* (2) and a third case wrongly entered as reported in 1 C. P. L. R. 152 of which the names of the parties are not given. He further held on the authority of *Nathu Lalla* v. *Vithoba* (1) that in this case "the occupancy right was not transferable without the landlord's consent according to the *Wajib-ul-arz*."

The plaintiff contends now that his mortgage is valid against the *malguzar* though it was without his consent, and further that in finding that the consent of the former *malguzar*, Gadi Patel, has not been proved, the Divisional Judge has examined only one of the two pieces of evidence on the record and has left the other and more important item out of consideration entirely. I take the second point first. The learned Divisional Judge points out that the only witness on the question of consent, Ganpat Rao (P. W. No. 2), the son of Gadi Patel *alias* Vithal Rao, does not try to prove more than that his father accepted rent from the plaintiff in the capacity of mortgagee in possession, but no receipts were produced showing that the rent was accepted from the mortgagee in that capacity. He has certainly overlooked the deposition of Gadi Patel himself made on the 17th of September 1906, of which copies were filed by both parties (Exhibits P-4 and D-9). He said: "I have seen Gulab Khan cultivate the entire fields for the ten years about twenty years ago. For the last twenty years he has not been cultivating any part of the field." In cross-examination he said: "I realized entire rents from the plaintiff, Gulab Khan, for those ten years. (Shown 10 receipts P-5 to P-15). These are receipts granted by me. They are for half the land. The receipts for the other half may be in Gopiram's name." It would be more than absurd to suggest that this last sentence was evidence tending to show that Gadi Patel ever treated Gopiram as mortgagee in possession and accepted the rent from him in that capacity. The whole of the evidence bearing on the question of the ratification by Gadi Patel of the mortgage has, therefore, been examined in the lower Appellate Court and the finding of that Court that he never ratified it, is conclusive.

The rulings of this Court in *Nathu Lalla* v. *Vithoba* (1) and *Dallu Patel* v. *Madho Patel* (2) refer only to absolute occupancy-holdings. The absolute occupancy right was a creation of the first Settlement, as was explained by Bose, A. J. C., in *Ragho* v. *Sadoo* (3), and the incidents of that right are regulated by the provisions of the *Wajib-ul-arz*. But that a transfer of an occupancy right is not governed by the *Wajib-ul-arz* is distinctly laid down in the first of the two rulings mentioned in the judgment of the lower Appellate Court as authority for the contrary view. And if the *Wajib-ul-arz* did govern this case, it would be impossible for the ruling in *Nathu Lalla* v. *Vithoba* (1), the report of which does not say from what district the case came, to lay down that in this case from the Betul

(1) 1 C. P. L. R. 9.
(2) 3 C. P. L. R. 158.
(3) 5 Ind Cas. 428; 6 N. L. R. 6.

District "the occupancy right was not transferable without the landlord's consent according to the *Wajib-ul-arz*." In the absence of all evidence to the contrary, we must presume that there is no record in the *Wajib-ul-arz* of the District with which we are concerned of any such limitation of the right of transfer, and I have ascertained that this is the case by reference to the officially published translations of specimen forms of *Wajib-ul-arz* adopted at the Settlement of 1863-76.

The rights of an occupancy tenant are to be found in custom and the Statutes, which will between them show what the essential nature of that tenure is. Of custom we have no record in the *Wajib-ul-arz* or elsewhere in this case. The law on the subject is to be found in section 6 of Act X of 1859. There is a long series of rulings of the Calcutta High Court on the question whether the tenure conferred and defined by this section could or could not be transferred without the consent of the landlord. The majority of them favours the view that a transfer under that section would not be valid against the landlord unless it had consent or subsequent ratification, and this view was finally adopted by a Full Bench of the Court consisting of Couch, C. J., Jackson, Phear, Ainslie and Morris, J.J., in 1874 in *Narendra Narayan Roy* v. *Ishan Chundra Sen* (4). Their Lordships ruled, on reasoning which is absolutely convincing, that the right of an occupancy tenant in his holding is what was subsequently described in the Transfer of Property Act of 1882 as "an interest in property restricted in its enjoyment to the owner personally," which would make it an exception to the rule of common law that all forms of property may be transferred by the holder. This view of the matter was consistently taken by this Court in the cases mentioned in the Columnar Digest of Rulings bearing the numbers 107 (decided in 1876) and 186, 196, 198, 199, 200, 201 and 202 (decided in 1877).

I agree, therefore, in holding that even before 1884 an occupancy tenant had no right in his holding which he was authorised to transfer. If he made such a transfer he himself would not be allowed in equity to avoid it, and if the landlord consented to it or subsequently ratified it he would be under the same estoppel. What the rule comes to then is that a transfer of an occupancy-holding is voidable at the instance of the landlord, unless he consented to the transfer at the time it was made or subsequently, and this rule was merely affirmed in the Tenancy Act of 1883. The appeal is dismissed and the appellant must pay all the costs.

Appeal dismissed.

(4) 22 W. R. 22; 13 B. L. R. 274 (F. B.).

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 134 OF 1913.

December 2, 1914.

Present:—Sir Charles Fox, KT., Chief Judge.

MAUNG YIN AND ANOTHER—APPELLANTS

versus

MA SAW MYAING AND OTHERS—RESPONDENTS.

Burmese Buddhists—One of the parents changing religion, effect of, on legitimacy of subsequently born child—Minors' Act (XL of 1858), person holding property by virtue of certificate under—Trustee—Limitation.

If after marrying according to the Burmese Buddhist custom of marriage, the father becomes a Christian and the mother remains a Buddhist, the marriage does not become thereby dissolved and the legitimacy of the child born after the father's change of religion is not thereby affected.

A person who holds property by virtue of a certificate granted under Act XL of 1858 holds it as an express trustee for the children of the deceased, who are as such entitled to the property, and limitation does not run against them.

Mr. *May Oung*, for the Appellants.

Mr. *R. N. Burjorjee*, for 1st and 3rd Respondents.

JUDGMENT.—Ma Saw Myaing's parents were originally Burmese Buddhists. They were married according to the Burmese customary form of marriage. Her father subsequently became a Christian: her mother remained a Buddhist. Their marriage was not thereby dissolved. Ma Saw Myaing, who was born after her father's change of religion, was born in lawful wedlock, and there can be no question about her legitimacy. The Judge's decision on the 1st issue was correct.

The decision on the 2nd issue, however, appears to be erroneous. Whether the certificate under Act XL of 1858 was rightly granted is immaterial. Maung Yin has held

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the property by virtue of that certificate as an express trustee for the three children. Limitation does not run against any of them. They were each entitled to a third share. If Ma The Hmya and Maung San Ye have received anything towards their shares, the amounts must, of course, be taken into consideration in the final adjustment of the estate, and of the shares of the three children.

The case will be returned to the District Court to be proceeded with.

Maung Yin will be allowed his costs of this appeal out of the estate. Advocate's fee 2 gold *mohurs*.

Case returned.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 281-B OF 1913.

July 22, 1914.

Present:—Mr. Stanyon, A. J. C.

BALKISHAN—DECREE-HOLDER—APPELLANT

versus

ATMARAM AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Mortgage—Foreclosure decree—Extension of time for payment of money—Good cause—Appeal—Civil Procedure Code (Act V of 1908), ss. 105 (1), 99, O. XXXIV, r. 3, O. XLIII, r. 1 (o),—Preliminary order incorporated in decree may be questioned in appeal—Redemption decree passed by implication—Preliminary decree—Foreclosure—Redemption decree must be drawn up.

No appeal lies against an order extending time for the payment of mortgage-money.

Where a non-appealable order is incorporated, or results, in a decree, section 105 (1) of the Civil Procedure Code allows the order to be questioned in an appeal from the decree.

Where the order of a Court amounts impliedly, though not expressly, to a redemption decree, it may be treated as such under section 99 of the Civil Procedure Code.

Though no extension of time for payment of money in satisfaction of a foreclosure decree can be granted without "good cause," those words should be liberally interpreted with leniency towards the debtor in the case of a first enlargement.

The "good cause" is not to be assumed either from non-payment or delayed payment. Order XXXIV, rule 3, requires that it should be shown to the satisfaction of the Court.

For each extension of time, subsequent to the first, a stronger case must be made out.

Every preliminary decree in a mortgage suit must lead to a final decree, either of foreclosure or of redemption; and when a preliminary decree is followed by redemption, a final decree for redemption should always be drawn up. An order extending time merely opens the way to payment, and when the payment is duly made, a final decree for redemption is as necessary as is a final decree for foreclosure. Where payment is not made, one or the other is consequential of the terms of the preliminary decree.

Appeal against the decree of the Additional District Judge, Akola, dated the 15th March 1913, confirming that of the Junior Munsif, Akola, dated the 18th November 1911.

Messrs. *F. W. Dillon* and *P. S. Kotwal*, for the Appellants.

Messrs. *J. Mittra* and *M. Chuckerbutty*, for the Respondents.

JUDGMENT.—The facts material to this appeal are not in dispute. On the 3rd May 1909, the appellant obtained a preliminary decree for foreclosure, the *dies datus* in which was the 3rd November 1909. This decree was made by the District Court, reversing the decree of the first Court, dated the 9th December 1908, which had dismissed the mortgage suit. Against the above preliminary decree the defendants—who are the respondents now before me—appealed to this Court. That appeal was dismissed on the 29th June 1910. On the 10th February 1911 the decree-holder applied for a final decree, on the ground that the decretal debt had not been paid on the 3rd November 1909, as ordered by the preliminary decree—a date which was not extended by this Court. Notice of the application for a final decree was issued to the judgment-debtors, calling upon them to appear on the 6th May 1911, and show cause why the decree should not be made absolute. On the 4th April 1911 one Ratan Bobde, professing to act on behalf of one of the judgment-debtors, Devidas, deposited the full decretal debt, namely, Rs. 236-6-11, in Court. Devidas had so far been a minor, but on the 6th May 1911 he appeared, and, stating that he had attained majority, asked for an amendment of the record so as to show him *sui juris*. The decree-holder also appeared and refused to receive the money deposited, pressing for the final decree claimed by him. Devidas asked the Court to extend the time and allow redemption. The case went to the 22nd July 1911, on which date a written statement was filed on behalf of Devidas of the reasons why time should be extended from the 3rd November 1909 to the 4th April 1911, when

the money was paid into Court. The substance of the reasons given was this :—

(1) Devidas was a minor when the preliminary decree was passed, and he paid as soon as he attained majority.

(2) The money had been offered to the decree-holder out of Court and refused.

(3) The Court had accepted the money before any final decree was passed.

(4) The parties had awaited the result of the final appeal, and it was the practice in Berar to pay the decretal sum after notice of an application for a final decree had been received by the judgment-debtor.

The first Court held these reasons to be sufficient for an extension of time, but made a somewhat confused order in these terms :—

"The defendant No. 4 having taken proper steps to satisfy the plaintiff's claim by depositing in Court on the 4th April 1911, the plaintiff should accept the same in payment of his claim in full. And in case he would decline to do so, the defendant No. 4 is permitted to withdraw the money and pay it to the plaintiff within a week with interest at Rs. 6 per cent. per annum from the 3rd November 1909 to the date of payment."

It is difficult to put any common sense into the second part of this order. The decree-holder appealed to the District Court, but the appeal was dismissed on the 15th March 1913. The decree-holder has, therefore, made this second appeal. The appeal is stated to be against the order extending time and allowing redemption. The grounds of appeal are substantially as follows :—

(1) The Courts below have failed to realize that they were bound to make the foreclosure decree final in the absence of proof of "good cause" for non-payment on the *dies datus*.

(2) The reasons stated for such non-payment did not constitute "good cause."

(3) Payment was wrongly allowed to be made by a third party who had no interest in the suit.

Though the point was not argued before me, it seems necessary to decide whether an appeal lies in this case. The order of the first Court extending time was an order made under Order XXXIV, rule 3, of the Code of Civil Procedure, 1908, as applied to Berar. It is clear from the language of Order XLIII, rule 1 (*o*), read with section 105 (1) of the same Code, that no appeal lies against an order extending time for the payment of mortgage-money, but only where there is an order refusing such extension. The present appeal is based only on the ground that time was wrongly extended, and in effect it is an appeal against the order of extension. When a non-appealable order is incorporated, or results, in a decree, then section 105 (1) aforesaid allows the order to be questioned in an appeal from the decree : *Pandhari* v. *Mahadeo* (1). As pointed out in *Laxmi Bai Naikin* v. *Ramchandra Malhar* (2), every preliminary decree in a mortgage suit leads to final decree, either of foreclosure or of redemption. In the present case (owing to a prevailing laxity of procedure), the first Court only impliedly made an order extending time. By that order it directed

(1) that the plaintiff should receive the sum of Rs. 236-6-11 deposited in Court, in full satisfaction of his decree ; but if he refused, then

(2) that the defendant Devidas should withdraw it from the Court and pay it to the plaintiff within one week, with interest at 6 per cent. per annum from the 3rd November 1909 to the date of payment made. It will be seen that here there is no order—

(1) expressly extending time ;

(2) expressly dismissing the application for a final decree for foreclosure ; or

(3) expressly ordering the issue of a final decree for redemption.

I need hardly add that no formal redemption decree has ever been drawn up : and yet that alone could be the foundation for a legal appeal in this case. It goes without saying that the lower Appellate Court took no notice of the above defects. Contrary to the provisions of the Code of Civil Porcedure, it accepted and decided an appeal against an order impliedly extending time and directing a payment in future which, when made, would have been the foundation for a final decree for redemption in favour of Devidas.

Technically, the present appeal is not maintainable, because there exists no formal decree of the first Court, out of which could arise a legal first appeal on which this second appeal could be founded. But it is here that section 99 of the said Code comes to

(1) 12 Ind. Cas. 795; 7 N. L. R. 162.
(2) 3 N. L. R. 146 at p. 154.

the rescue, and allows me to treat the order of the first Court as what that Court intended and what the parties and the lower Appellate Court interpreted it to be, namely, a redemption decree: and I, therefore, entertain this appeal, and will use it for the purpose of amending the form of the first Court's orders.

I now come to the merits of the appeal. The decisions of this Court in *Nand Lal* v. *Ram Ratan Lodhi* (3); *Seth Bagwandas* v. *Shridhar* (4) and *Laxmi Bai Naikin* v. *Ramchandra Malhar* (2) have been strongly pressed upon me, and it seems to me that those rulings have conveyed an impression that the *dictum* in *Govinda* v. *Gangaram* (5) has been entirely overruled. That is not the case. It must be conceded that in the first of the above cases the remark at page 143 that "the mere fact that the money is lodged cannot by itself explain failure to pay punctually" seems to be in conflict with the *dictum* in *Govinda* v. *Gangaram* (5) that "where a few days after the fixed time the mortgagor pays down the whole of the mortgage-money he should not ferfeit his estate." But the conflict is apparent rather than real. A judgment-debtor who negligently fails to pay on or before the due date is in a very different position from one who, with the exercise of due diligence, succeeds in raising the money, but only after the due date is past. Under both the rulings in question time would not be given to the former and would be given to the latter. The later rulings merely draw attention to the law that time is not to be extended unless for sufficient cause. They do not lay down any measure or standard of sufficient cause. That is necessarily a question of fact to be decided according to the circumstances of each particular case and the discretion of the Court in dealing with the same. In *Seth Bagwandas* v. *Shridhar* (4) it was said that *Nand Lal Lodhi* v. *Ram Ratan* (3) "should go far to disperse the erroneous practice which has grown up of allowing redemption as a matter of course on payment being made at any time in the course of proceedings for an order absolute." That was the object of these later rulings, and it was not their purpose to fetter the discretion of the Courts in granting extensions of time within legal limits. The *dicta* of Crosthwaite, J. C., in *Govinda* v. *Gangaram* (5) that (1) the Court may, *on proper grounds being shown*, enlarge the time for payment, and (2) a very strong reason is not necessary for a first enlargement, stand as good law at the present day and have been in no way modified by any later reported ruling of this Court.

It must be remembered that the primary object of a mortgage is to secure the payment of a debt, usually much below the market-value of the property mortgaged. It is not intended, at least by the mortgagor and ostensibly also by the mortgagee, to work as a forfeiture of estate. Therefore a mortgagee who gets back his money, with compensation for any delay which the mortgagor could not reasonably avoid, suffers no hardship. Before a decree of Court takes the place of the contract, the right of redemption is unaffected, except as to the amount payable, by failure to pay on the due date. The deed of mortgage usually provides, expressly or impliedly, for *post diem* interest as compensation for delay. It is the necessity of finality and early disposal in litigation and the growth of the incumbrance beyond the capacity of the mortgaged property to sustain it which demand that the transaction shall come to an end by payment or foreclosure as soon as may be equitably possible. Therefore, though no extension of time can be granted without "good cause," those words will be liberally interpreted, with leniency towards the debtor, in the case of a first enlargement. In matters of judicial discretion the Courts in India habitually follow the practice of the English Courts of Equity. This was done in *Gobinda* v. *Gangaram* (5) and *Nand Lal Lodhi* v. *Ram Ratan* (3). The following extracts from Chapter V, section III, paragraphs 1955 *et seq.* of Fisher's Law of Mortgage, 6th Edition, will sufficiently show the English practice :—

"The enforcement of the strict terms of that part of the judgment in a foreclosure suit which directs absolute foreclosure upon non-payment of the redemp-

(3) 2 N. L. R. 137.
(4) 3 N. L. R. 55.
(5) 2 C. P. L. R. 29.

tion money on a certain day, is in the discretion of the Court, which may relieve against it either by a postponement of that day, or by an actual opening of the foreclosure, after the day has been suffered to pass without payment. * * * * It is only in a foreclosure action, as a general rule, and not in an action for redemption, that this indulgence is granted; because, in the latter case, the mortgagor comes to the Court for the relief, professing that his money is ready; but, in a foreclosure suit, he redeems by compulsion. * * * But, under special circumstances, the time for payment has been enlarged even in a suit for redemption. * * * * * * Upon good cause shown, the Court does not stop at a single enlargement in a foreclosure suit. Relief has been given three, and even four, times in succession. * * * * * But the time is not enlarged as of course even upon the first application. Some reason (though a very strong one is not necessary) must be given; as that the defendant has used his best endeavours to find an assignee without success, but that if time be granted there is a reasonble prospect of getting the money, or that negotiations for that purpose are actually pending. And the magnitude of the sum involved, and of the arrears of interest, are circumstances to which weight will be given. * * * * But something more than the above excuses seems necessary upon subsequent applications; such as evidence that some steps have been actually taken, as the result of which the money is likely to be forthcoming. And a strong case of unexpected delay or difficulty must be made out to support a third or fourth application. * * * The period granted upon the first application is usually six months, and it does not appear that any longer time has been granted at once. The like period has also been given on a subsequent application, but the period has then varied from five to three months according to the circumstances. The order commonly directs * * payment * * * of interest and costs. * * * * * The general condition of payment of interest will not be relaxed by reason of the infancy of the person entitled to redeem. * * * * * The condition for payment of interest and costs will not be imposed where the foreclosure is opened by reason of the mortgagee's own acts. * * * * * * * * * * * The occasions upon which the Court will give * * * relief, and the terms upon which it will give it, depend upon the circumstances of each case. The expectation that the money will be ready, founded upon a treaty already commenced with a proposed assignee; * * * * * ignorance or mistake as to the state of the proceedings or the day fixed for payment; irregularity in the proceedings before the order absolute; the illness, or accidental inability to travel, of the person charged with payment of the money; * * poverty which could be shown to be but temporary; * * * that the property has a special value for the mortgagor, may * * * be taken into consideration."

The English cases bearing on the above statement of the law are very numerous, and it is only necessary to cite *Campbell* v. *Holyland* (6); *Novosielski* v. *Wakefield* (7); *Edwards* v. *Cunliffe* (8); *Nanny* v. *Edwards* (9); *Eyre* v. *Hanson* (10); *Quarles* v. *Knight* (11); *Campbell* v. *Moxhay* (12); *Geldard* v. *Hornby* (13); *Coombe* v. *Stewart* (14); *Buchanan* v. *Greenway* (15); *Collinson* v. *Jeffery* (16); *Joachim* v. *M'Donall* (17); *Ford* v. *Wastell* (18); *Blackburn* v. *Caine* (19); *Kingsford* v. *Poile* (20); *Cocker* v. *Bevis* (21); *Ismoord* v. *Claypool* (22);

(6) 7 Ch. D. 166; 47 L. J. Ch. 145; 38 L. T. 128; 26 W. R. 109.
(7) 34 Eng. Rep. 161; 17 Ves. 417.
(8) 56 Eng. Rep. 106; 1 Madd. 287.
(9) 38 Eng. Rep. 752; 4 Russ. 124; 6 L. J. (o. s.) Ch. 20; 28 R. R. 24.
(10) 48 Eng. Rep. 1266; 2 Beav. 478; 9 L. J., Ch. 302; 50 R. R 253.
(11) 8 Price 630.
(12) 18 Jur. 641.
(13) 66 Eng. Rep. 1026; 1 Hare 251; 6 Jur. 78; 58 R. R. 60
(14) 51 Eng. Rep. 44; 13 Beav. 111.
(15) 50 Eng Rep. 1097; 12 Beav. 355; 85 R. R 117.
(16) (1896) 1 Ch. 644; 65 L. J. Ch. 375; 74 L. T. 78; 44 W. R. 311.
(17) 59 Eng. Rep. 379; 9 Sim. 314.
(18) 67 Eng. Rep. 1151; 2 Ph. 591; 17 L. J. Ch. 368; 12 Jur. 404.
(19) 52 Eng. Rep. 1245; 22 Beav. 614; 111 R.R. 506.
(20) 8 W. R. 110.
(21) 22 Eng. Rep. 695; 1 Ch. Cas. 61
(22) 59 E. R. 389; 9 Sim. 316n.

Nanfan v. *Perkins* (23); *Jones* v. *Creswicke* (24).

The cases in which time has been extended upon one ground or another, whether in England or India, must not be taken as exhaustive. They are merely illustrative of an equitable practice. In every case the Court has to be satisfied, in the exercise of a reasonable discretion, that there is good cause for extending time. This good cause is not to be assumed either from non-payment or delayed payment. Order XXXIV, rule 3, requires that it should be *shown*. That is to say, it must be conveyed to the knowledge of the Court by judicial procedure. For a first enlargement the affidavit of the applicant, or of some person on his behalf, *e. g.*, an intending assignee, should ordinarily be sufficient, unless there is a counter-affidavit, and the Court sees reason to doubt the truth of the applicant's statement, in which case evidence will be necessary. For each extension of time subsuquent to the first a stronger case must be made out. The case of *Karsondas* v. *Bai Gungabai* (25) was cited on behalf of the appellant as applicable in principle. It might so apply to a case where, after a final decree for foreclosure has been made, the judgment-debtor applies to re-open it so as to allow of redemption. But I do not think that any safe analogy can be drawn from the case of admitting a time-barred appeal for the purpose of deciding whether or not time shall be extended in a foreclosure decree. The policy of the law is diametrically opposed in the two cases. It is *against* a time-barred appeal and *in favour* of redemption of an unforeclosed mortgage

In the present case the learned Counsel for the appellant objects that the Courts below have not proceeded judicially in deciding that there was sufficient cause: that there has been no inquiry and there is no record on which the fact of good cause can be decided. To a certain extent this is a just criticism. Nevertheless, there is upon the record sufficient material to justify me in sustaining the order of the Court below with some modification. As a Judge of the High Court for Berar for the last ten years, it is within my judicial knowledge that the established practice in that territory, until very recently, was to allow redemption as a matter of right, upon payment made before an order absolute for foreclosure was actually passed. The defendant, Devidas, and his friends were obviously under the impression that a payment made before a final decree was passed, would satisfy the decree; and, under that impression, arrangements to pay were deferred until notice was given to show cause why the decree should not be made final. No doubt this mistake will receive less consideration as time goes on and the public generally become disabused of the error created by the above procedure. But at present the application of the Transfer of Property Act and the Central Provinces view of the matter before me is still sufficiently an innovation to excuse the above mistake. The minority of Devidas during the period fixed for payment is an admitted fact, and his payment of the debt as soon as he attained majority is another circumstance to be taken into consideration in making an equitable order. I think these facts afford good cause for a first enlargement. But it must be made in a legal form. For that purpose I allow the appeal, fixing Rs. 15 as Pleader's fees in this Court, and, reversing the informal decrees of the Courts below, I direct that a decree be drawn up ordering as follows:—

(1) that sufficient cause having been shown, time for redemption of the mortgage is extended from the 3rd November 1909 to the 4th April 1911, subject to the payment of simple interest on the decretal sum of Rs. 236-6 11 at 6 per cent. per annum for that period ;

(2) that the appellant do pay to the respondents and bear all the costs of these proceedings in the two Appellate Courts, and that such costs be set off against the price of redemption, but that the respondents do pay and bear the costs of the proceedings in the first Court;

(3) that inasmuch as the costs payable by the appellant to the respondents exceed the sum payable for interest during the period of extension, and the respondent, Devidas, paid the full decretal sum into

(23) 59 Eng. Rep. 376; 9 Sim. 308.

(24) 59 Eng. Rep. 374; 9 Sim. 304; 9 L. J., Ch. 113; 4 Jur. 2 6; 47 R. R. 249.

(25) 30 B. 329; 7 Bom. L. R. 965.

Court on the 4th April 1911, it is hereby declared that the mortgaged property has been duly redeemed and the respondents are entitled to recover by execution any surpluss due to them for costs.

In conclusion I would point out for the guidance of the Courts below that when a preliminary decree is followed by redemption, a final decree for redemption should always be drawn up. This will avoid confusion. An order extending time merely opens the way to payment, and the payment being duly made, a final decree for redemption is as necessary as is a final decree for foreclosure where payment is not made. One or the other is consequential of the terms of the preliminary decree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 347 OF 1914.

August 10, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

BALDEO PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

CHET RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Document, construction of—Intention of parties to instrument—Contents of document and evidence of surrounding circumstances to be considered—Payment of debt, right to enforce, not necessary in mortgage by conditional sale—Sale-deed providing for vendee to return property and cancel sale if consideration money paid within certain period—Mortgage by conditional sale—Transfer of Property Act (IV of 1882), s. 58 (c)—Redemption.

The intention of the parties to an instrument is to be gathered, not from the name given to it, but from its contents and the relations sought to be created by its terms, as also from such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the instrument was related to existing facts.

Bhagwan Sahai v. *Bhagwan Din*, 12 A. 387 at p. 391; 17 I. A. 98; 5 Sar. P. C. J. 557 and *Balkishen Das* v. *W. F. Legge*, 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601 referred to.

A right to enforce payment of the debt is not a necessary corrolary to a mortgage by conditional sale.

Balkishen Das v. *W. F. Legge*, 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601, referred to.

Where a sale-deed provides that if the vendor pays back the consideration money with interest within a certain period the vendee shall return the property conveyed and cancel the sale, the transaction evidenced by the sale-deed is not an absolute sale but a mortgage by conditional sale within the meaning of section 58 of the Transfer of Property Act, and a suit for its redemption can lie.

Bhagwan Sahai v. *Bhagwan Din*, 12 A. 387 at p. 391; 17 I. A. 98; 5 Sar. P. C. J. 557, *Balkishen Das* v. *W. F. Legge*, 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601, *Ali Ahmad* v. *Rahmatullah*, 14 A. 195; A. W. N. (1892) 42 and *Kalka Prasad* v. *Bhuiyan Din*, 2 Ind. Cas. 180; 31 A. 300; 6 A. L. J. 222, referred to.

Rama Kanta Sarma v. *Kalijoy Sarma*, 11 Ind. Cas. 124, *Ghulam Nabi Khan* v. *Niaz-un-nissa*, 9 Ind. Cas. 140; 33 A. 337; 8 A. L. J. 119 and *Vasudeo Bhikaji Joshi* v. *Bhau Lakshman Ravut*, 21 B. 528, distinguished from.

Appeal from the decree of the Subordinate Judge, Kheri, dated 14th May 1913, upholding that of the Munsif, Kheri, dated 23rd November 1912.

Syed *Nabi Ullah*, for the Appellants.

Babu *Basdeo Lal*, for the Respondents.

JUDGMENT.—Ghori Ram, the father of the plaintiffs-respondents, sold certain property to Baldeo Prasad, one of the defendants-appellants, in lieu of Rs. 300 on the 4th September 1896. The sale-deed provided that, if the vendor paid back the consideration money with the interest within two years from the date of the sale, the vendee shall return the property conveyed and cancel the sale (*iqala bai*).

The question for consideration in this case is whether the above terms operate to create a mortgage, capable of redemption under Article 148 of Act IX of 1908, or effect an absolute sale with an independent covenant for re-purchase within a specified period. The Courts below found that the transfer in question operated as a mortgage by conditional sale and gave the plaintiffs a decree for redemption.

Section 58, clause (*c*), of Act IV of 1882 states that where a mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale. The intention of the parties to an instrument is to be gathered, as observed by their Lordships of the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (1), not from the name given to it, but from its contents and

(1) 12 A. 387 at p. 391; 17 I. A. 98; 5 Sar. P. C. J 557.

the relations sought to be created by its terms. A document purporting to be one of sale, though accompanied by a contract reserving to the vendor a right to re-purchase the property sold on re-paying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage,—*Bhagwan Sahai* v. *Bhagwan Din* (1). But where a sale is made subject to the condition that the sale shall become void if the consideration money is re-paid within a certain period, the transaction is a mortgage by conditional sale within the meaning of section 58 of the Transfer of Property Act and a suit for its redemption can lie. In *Ali Ahmad* v. *Rahmat-ullah* (2), where a sale-deed provided that if the vendor or his heirs re-paid the entire consideration money on a certain date specified therein, the vendee without any objection or hesitation would receive the money and, returning the property sold, revoke the sale, it was held by Edge, C. J., and Tyrrell, J., that the deed was a *bai-bil wafa* or mortgage by conditional sale. There was a covenent for "*iqala bai*" or revocation of the sale in that case as in the present, and the effect of a payment in such a case is to render the conditional sale abortive and to restore the property to the transferor without necessity for a re-conveyance. In *Balkishen Das* v. *W. F. Legge* (3) their Lordships of the Privy Council, in dealing with a case in which a deed of sale of land for value was accompanied by a deed of agreement between the parties for re-purchase by the vendor of the land on payment of the consideration to the vendee on a date fixed, observed:—"Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Muhammadans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale, '*kutkubala*' or '*bai-bil-wafa*' that the mortgagor should make himself personally liable for the re-payment of the loan." They pointed out that the case must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the document was related to existing facts, and found that the two deeds taken together were intended to effect a mortgage by conditional sale. In *Kalka Prasad* v. *Bhuiyan Din* (4), a sale-deed of certain property accompanied by a simultaneous agreement to re-convey the same if the vendor re-paid the consideration money within a period of seven years was similarly held to amount to a mortgage by conditional sale.

The learned Counsel for the defendants-appellants relies on the decisions in *Rama Kanta Sarma* v. *Kalijoy Sarma*(5) and *Ghulam Nabi Khan* v. *Niaz-un-nissa* (6). But in the former case, though the sale-deed and the agreement were written on the same date, the parties to the sale and the agreement were not identical. In the latter case there was an express covenant that the sale had become absolute and final, that the vendor had no right left to any share in the property sold and that the contracting parties had no right to cancel the sale or to demand the restitution of the consideration money.

It has been argued on the strength of the decision in *Vasudeo Bhikaji Joshi* v. *Bhau Lakshman Raut* (7), that a mortgage implies the existence of a debt and that if there is a right to redeem property from a debt, there must also be a correlative right to enforce its payment. But it is not disputed that the sale in this case was made in lieu of certain pre-existing debts and a right to enforce payment of debt is not, as observed by their Lordships of the Privy Council in *Balkishen Das* v. *W. F. Legge* (3), a necessary corrolary to a mortgage by conditional sale. The absence of any covenant for re-conveyance and the existence of an agreement to cancel the sale and return the property indicate that the sale was not

(2) 14 A. 149; A. W. N. (1892) 42.
(3) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601.
(4) 2 Ind. Cas. 180; 31 A. 300; 6 A. L. J. 222.
(5) 11 Ind. Cas. 124.
(6) 9 Ind. Cas. 149; 33 A. 337; 8 A. L. J. 119.
(7) 21 B. 528.

VISHWANATH v. SITARAM.

absolute and that mortgage by conditional sale was intended.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 239 OF 1913.

June 29, 1914.

Present:—Mr. Batten, Offg. J. C.

VISHWANATH—PLAINTIFF—APPELLANT

versus

SITARAM—DEFENDANT—RESPONDENT.

Central Provinces Tenancy Act (IX of 1883), ss. 47, 48, 60, 71, 72—Sub-lease for more than a year—Sub-tenant cannot resist eviction after one year.

A sub-tenant, under an occupancy-tenant, cannot, after the expiry of a year from its commencement, plead as a ground for resisting a suit for eviction, a sub-lease for a period exceeding one year. The remedies provided by sections 47 and 48 and 71 and 72 of the Central Provinces Tenancy Act are for the protection of the tenant's heirs and of his landlords.

Appeal against the decree of the Additional District Judge, Wardha, dated the 30th January 1913, reversing that of the Munsif, Arvi, dated the 20th July 1912.

Messrs. *M. R. Dixit* and *W. V. Gharpure*, for the Appellant.

Messrs. *G. V. Deshmukh* and *T. R. Jabade*, for the Respondent.

JUDGMENT.—The plaintiff-appellant brought this suit to recover possession of a holding consisting of occupancy and ordinary fields, which have been in possession of the defendant since 1914. The plaintiff has only recently attained his majority, and the plaintiff, who claims to be the adopted son of Pandurang who was admittedly the original tenant, alleges that Pandurang's two widows sub-let the fields to the defendant from year to year. The case for the defendant is that the widows are the owners of the tenancy right and that the plaintiff has no title to the fields, and that the widows sub-let the fields to the defendant for ten years, which period had not expired at the date of the institution of the suit. The learned Additional District Judge has not decided the question of the plaintiff's title, but has dismissed the suit on the ground that the sub-lease for ten years is proved and that the period is not yet expired. The main ground of appeal is that a sub-lease for ten years is invalid and cannot be given effect to by the Courts. The appeal must, in my opinion, succeed.

According to section 60 of the Central Provinces Tenancy Act, "a lease granted to a sub-tenant by an occupancy or an ordinary tenant shall not be valid for a period exceeding one year." It appears to me that this provision can bear only one interpretation, namely, that a sub-tenant cannot, after the expiry of a year from its commencement, plead as a ground for resisting a suit for eviction, a sub-lease for a period exceeding one year. The learned Counsel for the respondent-defendant argues that the sole manner in which a sub-lease for over one year can be set aside is according to the provisions of sections 47 and 48, or 71 and 72, of the Tenancy Act, and reliance is placed on the ruling of Stanyon, A. J. C., in *Ganeshdas* v. *Shankar* (1). But in that case it has been held that no suit can be maintained in the Civil Court to avoid the transfer of an occupancy or ordinary tenant-right, if such transfer would be valid but for the prohibitions contained in section 46 or section 70. In the present case the sub-lease for over one year is declared invalid by section 60, so that it is not invalid only by reason of sections 46 and 70. Sections 46 and 70 and the remedies provided by sections 47 and 48, and by sections 71 and 72, appear to me to be for the protection of the tenant's heirs and of his landlord. Those sections do not enable a tenant himself to avoid a transfer effected by himself, though sections 48 and 72 contain a proviso by which a tenant can in certain circumstances step in and secure for himself the advantages of a sub-lease being set aside at the instance of his heir or of the landlord. Section 60 is a totally separate provision of law, which can be used directly as between the tenant and sub-tenant. I do not consider sections 46 to 48 or sections 70 to 72 are any bar to a tenant pleading the proviso to section 60 in a Civil suit.

On these grounds the reason for which the suit has been dismissed by the Addi-

(1) 13 Ind. Cas. 909; 8 N. L. R. 22.

tional District Judge is not, in my opinion, a good reason. I remand the appeal for decision on the other points at issue. Costs will be costs in the suit.

Appeal accepted; Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 42 OF 1912-13 OF BARA BANKI DISTRICT.

April 15, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Raja BHAGWAN BAKHSH SINGH—DEFENDANT—APPELLANT

versus

Chaudhri SHAFIQ-UZ-ZAMAN—PLAINTIFF—RESPONDENT.

Jurisdiction of Civil and Revenue Courts—Oudh Rent Act XXII of 1886), *s.* 127—*Ejectment by notice—Adverse proprietary possession pleaded*—Prima facie *case made out—Possession, actual, with tenants.*

Where a person claims as against the landlord adverse proprietary possession of a land cultivated by his tenants, and that claim appears to be probable, that person cannot be treated as a tenant under section 127 of the Oudh Rent Act, and a notice of ejectment issued against him as such ought to be cancelled. The matter is for the Civil Courts to decide.

Nisar Ali v. *Meghi*, Selected Decision No. 4 of 1913, followed.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 27th June 1913, upholding that of the Assistant Collector, Bara Banki, dated 26th July 1912.

Pandit *Sarjoo Prasad Misra*, for the Appellant.

Babu *Puttoo Lal*, for the Respondent.

JUDGMENT.—The case is essentially one between rival claimants to proprietary right. Appellant is the recorded proprietor. Respondent alleges that he is in adverse proprietary possession, that certain of the land is occued by or appurtenant to houses in his possession. Respondent's possession is without doubt of some standing and in all probability a question of adverse proprietary right will arise. The land which is cultivated is not cultivated by the respondent himself but by the respondent's tenants. The principles laid down in *Nisar Ali* v. *Meghi* (1) apply in their entirety to this case, which is one which should have been brought in the Civil Courts. The Commissioner rightly cancelled the notice and allowed the plaintiff's claim, inasmuch as section 127 cannot be considered to be applicable.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

(1) Selected Decision No. 4 of 1913.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 333-B OF 1913.

January 6, 1914.

Present:—Mr. Mittra, Offg. A. J. C.

BAPU—DEFENDANT—APPELLANT

versus

BHIWAJI—PLAINTIFF—RESPONDENT.

Hyderabad Assigned Districts Courts Law of 1889, *ss.* 7 (2) (b), 9 (1) (*a*)—*Assistant Commissioner invested with powers of Deputy Commissioner for trying original suits* only *whether can appoint a guardian—Guardians and Wards Act* (*VIII of* 1890), *ss.* 52, 53—*Court of Justice*—Ultra vires—*Majority Act* (*IX of* 1875), *s.* 3.

An Assistant Commissioner invested with the powers of the Court of a Deputy Commissioner for the trial of original suits exceeding five thousand rupees in value, without limit as regards the value, is invested only with *some* of the powers of a Deputy Commissioner, *viz.*, the power to try original suits, and is not the District Court for any other purpose. Therefere, if acting as the District Court, under the Guardians and Wards Act he appoints a guardian, his order is *ultra vires* and does not require to be set aside

Although the words "Court of Justice" in the Indian Majority Act are not qualified in express terms by the words "competent in this behalf", on general principles of law the act of a Court without jurisdiction is a nullity.

Appeal against the decree of the Additional District Judge, East Berar, dated the 3rd October 1912, confirming that of the Munssf, Morsi, dated the 20th December 1911.

The Hon'ble Sir *B. K. Bose* and Messrs. *F. W. Dillon* and *J. C. Ghosh*, for the Appellant.

Messrs. *G. V. Deshmukh* and *D. N. Khare* for the Respondent.

JUDGMENT.—The plaintiff sues to recover possession of his share in a field sold by himself on the 29th July 1898 to one Panjaubrao. The defendant is a transferee of Panjaubrao under a sale-deed dated the 23rd August 1899. It is not disputed that

the plaintiff was born in January 1878. On the 29th April 1893 one Gangaram was appointed the guardian of the plaintiff's person and property by Mr. Banduji Janardan, a Civil Judge. Again on the 16th June 1896, on the death of Gangaram, one Zingooji was appointed the plaintiff's guardian by the same Officer. The question for decision is whether the plaintiff attained his majority at the age of eighteen or at the age of twenty-one. If he attained majority at the age of twenty-one, as contended for by him, he was a minor at the date of the sale, otherwise he was major.

The Guardians and Wards Act (Act VIII of 1890) was applied to Berar, "so far as its provisions may be suitable," with effect from the 1st January 1891 (Foreign Department Notification No. 4284-1, dated Fort William, the 17th December 1890, published in Hyderabad Residency Orders, January 15th, 1891, Part I, page 10). This notification cancelled Foreign Department Notification No. 212-J, dated the 24th October 1873, in so far as it relates to Act XL of 1858 (Minors) and also Home Department Notification No. 618 (Judicial), dated the 15th May 1878, relating to Act IX of 1861 (Minors). The Guardians and Wards Act was then the sole statutory provision in force in Berar from 1st June 1891 in regard to the appointment of guardians for minors.

By Notification No. 93, dated the 4th April 1892 (published in Residency Order, 16th April 1892, Part I, page 86), in exercise of the powers conferred by section 9 (1) (*a*) of the Hyderabad Assigned Districts Courts Law of 1889, the Resident was pleased to invest Mr. Banduji Janardan with the powers of the Court of a Deputy Commissioner for the trial of original suits exceeding Rs. 5,000 in value without limit as regards the value, and to declare that the powers shall be exercised within the area of the district to which he may be attached.

By Notification No. 307, dated the 3rd October 1893 (Residency Orders, dated 16th October 1893, Part 1, page 195), Mr. Banduji Janardan, Civil Judge at Amraoti, was invested with the powers of the Court of a Deputy Commissioner under section 7 (2) (*b*) of the Hyderabad Assigned Districts Courts Law in respect of (amongst other Acts) Act XL of 1858. At this date the Act XL of 1858 had been repealed by the Guardians and Wards Act as introduced into Berar.

By notification No. 53, dated the 27th February 1896 (Residency Order, dated 2nd March 1896, Part 1, page 45), the Notification No. 307 mentioned in the preceding paragraph was cancelled.

For the defendant-appellant it has been argued that the action of the Resident in investing Mr. Banduji Janardan with the powers of the Deputy Commissioner under Act XL of 1858 or Act VIII of 1890 was *ultra vires*. In support of this argument reliance is placed on an opinion expressed by Stevens, J. C., in *Kauhoji Ran* v. *Gangabai* (1) and the circular referred to in that case at page 21. For the respondent it is contended that too narrow a construction has been placed in that ruling on the power of the Local Government to invest Officers with the powers of a Deputy Commissioner other than powers to try original civil suits. It is, however, unnecessary for me to express any definite opinion in this case on the point raised. The appointment of Gangaram by Mr. Banduji Janardan was made before the Notification No. 307 investing him with powers of a Deputy Commissioner under the Minors Act. The second appointement of Zingoo also took place after Notification No. 307 was cancelled.

The question now for decision is narrowed down to this. Was the Court of Mr. Banduji Janardan the District Court within the meaning of the Guardians and Wards Act? He was an Assistant Commissioner of the first Class invested by Notification No. 93 (*supra*, paragraph 3) with the powers of the Court of a Deputy Commissioner for the trial of original suits exceeding five thousand rupees in value without limit as regards the value.

There can be no doubt that the Court of the Deputy Commissioner is the District Court or principal Civil Court of original jurisdication in the district [section 7 (2) (*b*) of the Hyderabad Assigned Districts Courts Law, 1889].

The Resident may, by order in writing, invest any person with all or any of the powers of the Court of the Deputy Commissioner under

(1) 9 C. P. L. R. 19.

the Hyderabad Assigned Districts Courts Law, 1889. A person so invested with the powers of a Deputy Commissioner is designated Civil Judge.

Under section 9 (3) of the Hyderabad Assigned Districts Courts Law, 1889, the Court of a Civil Judge shall, *for all purposes connected with the exercise of the powers with which the Civil Judge has been invested*, be deemed to be the Court of a Deputy Commissioner.

In the view taken by Stevens, J. C., in the case cited above, Mr. Banduji Janardan would have been incompetent to try applications under the Gurdians and Wards Act even if he had been invested with "*all*" the powers of a Deputy Commissioner under the Hyderabad Assigned Districts Courts Law, 1889, the wording of the latter Act being almost the same as that of the Central Provinces Courts Act (XVI of 1885). As a matter of fact, that Officer was only invested with *some* of the powers of a Deputy Commissioner, *viz.*, the power to try original suits. In Miscellaneous Appeal No. 162 of 1902, Mr. Hare, Officiating Judicial Commissioner, Berar, accordingly held that Mr. Banduji Janardan in 1902 had no powers to hear applications under the Guardians and Wards Act. This ruling of Mr. Hare appears to me to be perfectly sound. The Court of Mr. Banduji was the District Court only so far as the trial of original suits is concerned. It was not the District Court for any other purpose—not the District Court for the purposes of the Guardians and Wards Act.

It is unnecessary for me to express any opinion in this appeal as to the powers of Mr. Banduji so long as Notification No. 307, mentioned in paragraph 4 of this judgment, was in force.

This is not a case where long and uninterrupted contemporaneous usage can be relied on to justify a particular construction of a Statute on which its usage proceeded. The illegality of the practice of Civil Judges trying cases under the Guardians and Wards Act was pointed out by Mr. Hare in 1902, and I ought to follow Mr. Hare's judgment especially as my own opinion coincides with his.

The result is that the two appointments were made by a Court not competent to make such appointments under the only statutory provisions then in force—the Guardians and Wards Act as applied to Berar "so far as its provisions may be suitable." I do not see how the last words relied on by the respondent can affect the decision of the question before me. There is nothing in the laws of Berar which makes the exercise of exclusive jurisdiction by the District Judge or Deputy Commissioner under that Act unsuitable.

The lower Appellate Court has held that although the appointment of the guardian was *ultra vires* in this case, yet as there was in fact a guardian appointed by a Court of Justice, the plaintiff is entitled to the benefit of the extended period of minority. In the argument for the respondent, it is suggested that the Legislature meant to draw a distinction between the case where a guardian is appointed by a Court of Justice and one where the appointment is by any other authority. Reference is made to section 52 and section 53 of the Guardians and Wards Act. As regards a Court of Justice, it is contended that the appointment is good unless set aside, even if made by a Court not competent in this behalf, but competency, it is argued, is expressly required of any other authority making an appointment. I am, however, unable to agree with this contention. If the act of the Civil Judge was *ultra vires*, it did not require to be set aside. There was no appointment of a guardian in the eye of the law, the proceedings being null and void. Although the words "Court of Justice" in the Indian Majority Act are not qualified in express terms by the words "competent in this behalf," it follows from general principles of law that the act of a Court without jurisdiction is a nullity.

The plaintiff, therefore, attained his majority at the age of eighteen, and the sale sought to be impeached is, therefore, binding on the plaintiff as he was not a minor at the date of the sale.

The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed with costs in all Courts.

Suit dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 90 OF 1914.

October 23, 1914.

Present:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

LAL HANWANT RAM—PLAINTIFF—APPLICANT

versus

Raja MUHAMMAD ABUL HASAN KHAN AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Ex parte *proceeding—Minor defendants—Guardians* ad litem *not informed—Service, insufficient, of notice—Civil Procedure Code (Act V of* 1908), *O. XXXII, rr.* 3, 4.

A case cannot be heard *ex parte* against minor defendants where their guardians *ad litem* were appointed without notices having been sent to the proposed guardians or to the minors as required by Order XXXII, rule 3, Civil Procedure Code, and on this irregularity being brought to light, notices were issued against them but were not sufficiently served.

Application against the order of the Subordinate Judge, Gonda, dated 26th May 1914.

Pandit *Gokaran Nath Misra*, for the Applicant.

Mr. *Muhammad Wasim*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed by the Subordinate Judge of Gonda, directing a suit to be heard *ex parte*. It appears that certain persons were appointed guardians *ad litem* of certain minor defendants in this case without notices having been sent to the proposed guardians of the minors and to the minors concerned, as required by Order XXXII, rule 3, of the Code of Civil Procedure. When the irregularity was subsequently brought to the notice of the Subordinate Judge, he directed the said notices to issue. The process-server was not, however, able to find the persons concerned, and affixed the notices on their houses, reporting at the same time that he was informed that they had gone elsewhere. The service was clearly insufficient, but the learned Subordinate Judge treated it as sufficient and directed the case to be heard *ex parte* against the minors concerned. His order is, under the circumstances, unsustainable.

We allow the application and, setting aside the order of the Subordinate Judge, direct that he should not proceed to hear the case against the minors without complying with the provisions of Order XXXII, rules 3 and 4, of the Code of Civil Procedure.

No order is made as to the costs.

Application accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 500 OF 1913.

June 29, 1914.

Present:—Mr. Hallifax, A. J. C.

RAJARAM—DEFENDANT—APPELLANT

versus

VITHAL RAO AND OTHERS—PLAINTIFFS—RESPONDENT.

Transfer of Property Act (IV of 1882), *ss.* 63, 72 (b)—*Improvement by mortgagee—Construction of well—Compensation.*

If a mortgagee in possession of agricultural land, without the express or implied consent of the mortgagor, constructs on the land a well the separate possession or enjoyment of which is not possible apart from the land and the construction of which is not necessary to preserve the property from destruction or even deterioration, the well must be delivered with the land to the mortgagor at redemption.

Ringayya Chettiar v. *Parthasarathi Naicker*, 20 M. 120; *Krishna Patter* v. *Srinivasa Patter*, 20 M. 124, distinguished

Arunachella Chetti v. *Sithayi Ammal*, 19 M. 327, followed.

Sandon v. *Hooper*, 49 Eng.Rep. 820; 6 Beav. 246; 12 L. J. Ch. 309; affirmed on appeal 14 L. J. Ch. 120; 63 R. R. 72; *Shepard* v. *Jones*, 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308, referred to.

Appeal against the decree of the District Judge, Betul, dated the 23rd June 1913, modifying that of the Munsif, Betul, dated the 26th February 1913.

Mr *Atmaram Bhagwant*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—Both plaintiffs and defendant have appealed against the judgment of the lower Appellate Court. The appeal of the former is Second Appeal No. 513 of 1913, and both appeals will be governed by this judgment. The plaintiffs sued to redeem certain absolute occupancy fields mortgaged in 1884 by their deceased father with the defendant and his deceased father as security for a loan of Rs. 200. The property was placed in the possession of the mortgagees who were to enjoy the usufruct in lieu of interest. The defendant resisted redemption on the ground that about a month after the execution of the mortgage-deed, the mortgagor executed a simple bond for Rs. 331 in

favour of the mortgagees, in which he agreed that that amount should be charged on the property along with the amount already secured by the mortgage. There is a concurrent finding of both the Courts below based on a full consideration of all the evidence given by the defendant, that he has failed to prove execution of this bond by the father of the plaintiffs, which the plaintiffs denied. The whole of the defendant's second appeal is based upon this bond, and as we are now bound by the finding of fact that it was never executed by the plaintiffs' father, that appeal must be dismissed. I may say that if I had the power to interfere with that finding, I could find no reason for doing so.

The plaintiffs' appeal has reference to the question of addition to the price of redemption of the cost of a permanent improvement to the mortgaged property by the mortgagee in possession. The defendant constructed on the property a brick well at a cost of Rs. 300, which is still in existence, without obtaining the consent, express or implied, of the plaintiffs or their father. In the first Court the defendant's claim to recover the cost of this well was disallowed, on the ground that "there is nothing in section 72 of the Transfer of Property Act under which he can claim the value of any such improvements." In appeal the learned Distrcit Judge added the Rs. 300 to the amount decreed as the price of redemption, and it is on this point that the plaintiffs are now appealing.

The learned Judge first refers to the two Madras cases of *Rangayya Chettiar* v. *Parthasarathi Naicker* (1) and that immediately following it in the reports, *Krishna Patter* v. *Srinivasa Patter* (2). In the first of these, he says, "the Madras High Court has emphatically denied the right of the mortgagee to any allowance for improvements," but in the second he finds the principle enunciated that compensation is payable, provided the improvement is permanent and existent in reasonably good condition at the time of redemption. "This too," he writes, "has been the view taken in *Rashidunissa* v. *Bhup Singh* (3), where allowance was made for a *pacca* well which had been made, but not for mud houses for tenants or the cost of manure distributed to the tenants."

All three cases have been misunderstood. In the first Madras case the person held not to be entitled to compensation for improvements was not the mortgagee but the purchaser of the equity of redemption. As it happened, the same person was first mortgagee of the property, but he did not figure in the suit nor was he in possession of the property in that capacity. All that the judgment says on the matter under discussion is this: "The claim for alleged improvements said to have been effected by the first mortgagee since his purchase cannot, we think, be allowed. In this respect he is in no better position than the mortgagor himself who may choose to spend money on his property. We cannot accede to the view that the improvements were made by the purchaser in the character of mortgagee, for in that capacity he is not shown to have been entitled to possession."

In the second case, *Krishna Patter* v. *Srinivasa Patter* (2), their Lordships were dealing, not with a claim for compensation for improvements, but with a decree which had already allowed that claim, and that not under the ordinary law but under an implied covenant arising out of local custom in reference to mortgages by way of *kanom* in Malabar. The matter before the High Court was one of the diminution in the value of improvements that took place between the decree and the redemption, and it was held that the mortgagor could not be called upon to pay for improvements not in existence at the time of redemption, even though they had existed when the decree for redemption was passed.

The reference to the third case seems to be wrongly stated. In Gour's Law of Transfer in British India it is given as 2 A. L. J. 24 (s. n.) indicating, I understand, the "Short Notes" of other cases attached to the full reports of more important cases in the Allahabad Law Journal. I have been unable to find the reports in the Short Notes,* but if, as is probable, the learned Judge got his report of the case from Dr. Gour's Treatise, where it is mentioned, he has mis quoted it. He speaks of a well being *made* Dr. Gour's account of the case speaks of a

(1) 20 M. 120.
(2) 20 M. 124.
(3) 3 A. L. J. 24 *s. n.*

* The Short Note in question is given in 3 A. L. J. 24.—*Ed.*

well being *re-constructed.* Clause (*b*) of section 72 of the Transfer of Property Act leaves no doubt of the right of the mortgagee in possession to re-construct a well on agricultural land at a reasonable cost.

The case, as it appears to me, is governed by section 63 of the Transfer of Property Act. The leading cases of *Sandon* v. *Hooper* (4) and *Shepard* v. *Jones* (5) are not under that Act. None the less the former enunciates exactly the principle of section 63 and the latter was not a redemption suit but a suit by the mortgagor for an account of the proceeds of a sale effected by the mortgagee under his power of sale. The only case directly in point seems to be *Arunachella Chetti* v. *Sithayi Ammal*(6), where the liability of the mortgagor to pay for any improvements except such as are mentioned in clause (*b*) of section 72 was emphatically denied, unless the improvements were made with his consent given in circumstances making it equivalent to a promise to re-imburse the mortgagees. This restriction of the kind of assent necessary to bind the mortgagor may be, as Dr. Rash Behary Ghose suggests on page 556 of his work on Mortgages, too narrow, but the ruling is otherwise merely an affirmation of section 63 of the Transfer of Property Act.

It was argued here that the word "accession" in section 63 does not include improvements or additions of the kind with which we are now concerned. That this is entirely untenable is clear from the words of the last three of the four paragraphs of the section, and still more so from the second instance of an "accession" appended as an illustration to section 70 of the same Act. It is clear that separate possession or enjoyment of the well apart from the land is not possible. It must, therefore, be delivered with the property. This has been the case of both parties all along. It is also clear that its construction was not necessary to preserve the property from destruction or even deterioration, nor did the mortgagor ever consent to its construction in any way. He is, therefore, not bound to pay its cost to the mortgagee.

The decree of the lower Appellate Court will, therefore, be modified by the substitution of Rs. 200 for Rs. 500 as the amount payable for redemption. The amount of Rs. 200 was deposited in Court before the institution of this suit which was made necessary by the defendant's refusal to accept it as sufficent. The defendant must, therefore, pay the whole of the costs of this litigation in all three Courts.

Decree modified.

(4) 49 Eng. Rep. 820; 6 Beav. 246; 12 L. J. Ch. 309; Affirmed on Appeal 14 L. J. Ch. 120; 63 R. R. 72.
(5) 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308.
(6) 19 M. 327.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 133 OF 1914.
November 16, 1914.
Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

FARZAND ALI KHAN—PLAINTIFF—APPLICANT
versus
Mir AMIR HAIDER—DEFENDANT—OPPOSITE PARTY.

Forma pauperis, *leave to sue in, application for—Personal right—Death of applicant before leave granted—Legal representative not entitled to continue application—Civil Procedure Code (Act V of 1908), O. XXII, r. 3.*

The right to make an application for leave to sue in *forma pauperis* is a personal right, and if the applicant dies before the leave is granted and the suit is pending in Court, his legal representative cannot be allowed to continue the application, although he may present a like application fresh and independent.

Lalit Mohan Mandal v. *Satish Chandra Das*, 4 C. L. J. 234; 33 C. 1163, followed.

Application against the order of the Subordinate Judge, Rai Bareli, dated 29th June 1914.

Mr. *Muhammad Siddique*, for the Applicant.

Babu *Aditya Prasad*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge of Rai Bareli passed in the following circumstances.

One Dalel Khan made an application to the Subordinate Judge for permission to sue in *forma pauperis* for the recovery of possession of a *talukdari* estate. While his application

for such permission was pending Dalel Khan died on the 22nd March 1914, and on the 15th of April 1914 an application was presented to the Court by one Farzand Ali Khan, who described himself as the son of Dalel Khan. The application purported to be under the provisions of Order XXII, rule 3, of the Code of Civil Procedure. The petitioner asked that in the proceedings connected with the application for permission to sue in *forma pauperis* his name might be substituted in place of the name of his father. He alleged himself to be the legal representative of his deceased father. The application was refused by the learned Subordinate Judge on the ground that the terms of Order XXII, rule 3, did not apply to the case. In support of his order the learned Judge relied upon the case reported as *Lalit Mohan Mandal* v. *Satish Chandra Das* (1). In that case it was held that where there is only an application for leave to sue in *forma pauperis* but no suit pending in Court and the applicant dies before the leave is granted, the right cannot survive in the legal representative of the deceased applicant. At page 1168 the learned Judges observed:—"The right to make such an application (that is, an application for leave to sue in *forma pauperis*) is obviously a personal right, and cannot survive in the legal representative, who may or may not be a pauper himself." It appears to us that the law on the subject is perfectly clear and has been correctly laid down in the judgment of their Lordships of the Calcutta High Court just referred to. The applicant here was not entitled to go to the lower Court and ask that he should be allowed to continue the application presented by his father, merely on the ground that he had become the legal representative of his father after the latter's decease. It was open to the applicant to present a fresh and independent application asking for leave to sue in *forma pauperis*. He did not, however, take that course because, as would appear from the admission made by the applicant's Counsel here, that any suit brought by the present applicant now would be beyond time. We agree with the view of the law taken by the lower Court. This application fails and is dismissed with costs.

Application rejected.

(1) 33 C. 1163; 4 C. L. J. 234.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 280-B OF 1912.

September 17, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

JAMNA DAS—DEFENDANT No. 2—APPELLANT

versus

PAIKU—DEFENDANT No. 1 AND ANOTHER—PLAINTIFF—RESPONDENTS.

Waste Land Rules, 1876—Izaradar—*Mortgage by occupancy-tenant—Expiry of* izardar's *term—Subsequent mortgage in favour of third party—Priority.*

In order to secure the premium of a permanent lease, defendant No. 1 executed in favour of the plaintiff, a registered mortgage-deed of his right in a field, and an *izaradar* on the village becoming *khalsa* on the expiry of the mortgagee-*izaradar's* term, the defendant-mortgagor was recorded as the occupant of a survey number. Subsequently he mortgaged his right to defendant No. 2:

Held, that the mortgagor's title as a permanent tenant under the plaintiff did not come to an end on the village becoming *khalsa* and that as he did not acquire a new, independent title unconnected with his title under the plaintiff, the plaintiff's mortgage was enforceable as against the subsequent mortgagee.

Second appeal against the decree of the Additional District Judge, East Berar, Amraoti, dated the 5th March 1912, confirming that of the Munsif, first class, Yeotmal, dated the 8th July 1911.

Mr. *G. V. Deshmukh*, for the Appellant.

Mr. *M. R. Dixit*, for the Respondents.

JUDGMENT.—The plaintiff Jagoba was an *izaradar* of *Mouza* Khorad Khurd in the District of Yeotmal under the Waste Land Rules of 1876. Paiku, the first defendant in this suit, entered into a transaction which has been described as a sale of field No. 15. This is obviously a misdescription, for Paiku appears to have agreed to pay rupees six as the annual rent for the field. The sale-deed is not on the record. The consideration for this transaction was rupees two hundred and fifty. If the transaction were a sale, it would be the price, but if, as I hold it to be, a permanent lease, it was only a permium. To secure payment of this sum of Rs. 250 an unregistered mortgage-deed of Paiku's right in the field was executed. Subsequently, on the 27th August 1904, a registered mortgage was given in favour of the plaintiff. The *izaradar* had only a limited term of years which expired, it seems, on the 31st March 1905. Under the rules Jagoba became a Patel of the village. Paiku was recorded as the occupant of a survey number on the village becoming *khalsa*. On the 30th March 1907, Paiku

mortgaged his rights to the defendant No. 2, now appellant before me. The sole question raised before me is whether the mortgage in favour of Jagoba, the plaintiff, is enforceable as against the subsequent mortgagee. Ordinarily this would be the case. The point for decision is whether the title of Paiku as a permanent tenant under Jagoba came to an end and whether on the village becoming *khalsa*, Paiku acquired a new and independent title unconnected with his original title under Jagoba.

The Transfer of Property Act was not applicable to Berar in 1904. The lower Appellate Court has rightly pointed out that section 43 of the Transfer of Property Act has, therefore, no application to this case. It does not by any means follow that the principle of law underlying the section cannot be applied as a rule of equity, justice and good conscience. I am not able to agree with the learned Judge in the lower Appellate Court that section 18 of the Specific Relief Act has any bearing on the case. That section obviously refers to contracts to be specifically enforced. This is not a case for specific performance of a contract. We are dealing here with a conveyance under a registered instrument by way of a mortgage. Cases have been cited in the lower Courts without a clear comprehension of the principles laid down therein. For example, the case of *Jaggannath* v. *Dibbo* (1) is merely an illustration of the well-known principle that a mere *spes successionis* is not the subject-matter of a transfer operating *in præsenti*, whatever equities may arise out of such a transaction. The case of *Gangabai* v. *Baswant* (2) is one of sale of property inalienable at the time of the sale. In this case, the *izaradar* had a fixed term of years, but he was to be made at least Patel of the village on the expiry of the term. But it seems to me that the tenancy which he created during his term could not be altogether ignored by the Government. Rule V of the Waste Land Rules of 1876 says "that the lessee will make his own arrangements with his tenants during the period of his lease. * * * His tenants will hold on terms mutually agreed on and will enjoy such rights and privileges as they may be entitled to under the laws and rules in force." The arrangements to be made are not stated to be *for* the period of the lease, but *during* the period of the lease. The rules do not contemplate ejectment of existing tenants who have brought waste land under cultivation, provided they are willing to pay the Government assessment. This liability to pay a possibly higher rent does not make Paiku's tenure a new and independent tenure not arising out of his original tenure. In the absence of an express rule declaring the determination of all existing tenancies, it must be held that Paiku had a legal right to be recognised as an occupant of a survey number on the expiry of Jagoba's lease, provided he accepted the Government assessment to be fixed by competent authority. During the *izara* period, the *izaradar* represented the Government, just as a *thekadar* represents the *malguzar* in the Central Provinces. The power to create a tenancy is presumed. in the absence of a stipulation to the contrary, in the lease or *theka*. This power is expressly given by rule V above-quoted to the *izaradar*. On the termination of the *theka* the *malguzar* cannot treat a tenant put into possession by the *thekadar* as a trespasser, if it was within the scope of his authority to create a tenancy. When the Government steps back into the shoes of the *izaradar* on the expiry of the *izara*, the Government is not empowered by the rules to treat the existing tenants as trespassers. The possibility of enlargement or curtailment of existing rights does not make the tenancy a new tenancy so as to extinguish all incumbrances on it. The Bombay case quoted has no application as Paiku's rights during the *izara*, as granted to him by the *izaradar*, were alienable. The case of *Gaya Din* v. *Kashi Gir* (3) is one where the property was not vested in the transferor at the time of the transfer. The present case is analogous to that of renewable lease-holds, and in such cases it has been held that "if the mortgagor renew, although not in accordance with the covenant to renew, the new lease will be held to be a graft on the old one, and subject in equity to the same mortgage as affected the old lease." (Robbin's Law of Mortgage, edition 1897, page 165.)

(1) 1 Ind. Cas. 818; 31 A. 53; 6 A. L. J. 49; A.W. N. (1908) 284.

(2) 5 Ind. Cas. 866; 34 B. 175; 12 Bom. L. R. 143.

(3) 29 A. 163; 4 A. L. J. 57; A. W. N. (1907) 7.

Applying the above principle to this case, the mortgage was valid in its inception. It did not come to an end in 1905. It fastened itself on Paiku's right as an occupant of a survey number. It is, therefore, enforceable against the appellant.

The appeal is dismissed with costs.

Appeal dismissed

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 102 OF 1913.

July 1, 1914.

Present: Mr. Kanhaiya Lal, A. J. C.

ABDUL BASIT AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHODA BAKHSH—PLAINTIFF AND ABDUS SALAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Evidence, extrinsic, admissibility of—Transaction, real nature of, can be proved by oral evidence—Conduct and acts, subsequent, of parties to transaction—Sale really mortgage.

Extrinsic evidence as to acts and conduct of parties to a transaction is admissible to show the real nature of the transaction (*e. g.*, to show that a sale-deed is really a mortgage-deed), not by what they intended to do, but by what they did or have been doing.

Khankar Abdur Rahman v. *Ali Hafez*, 28 C. 256; 4 C. W. N. 351; *Mahomed Ali Hossein* v. *Nazar Ali*, 28 C. 289; 5 C. W. N. 326; *Preonath Shaha* v. *Madhu Sudan Bhuiya*, 25 C. 603; 2 C. W. N. 562; *Kashi Nath Dass* v. *Hurrihur Mookerjee*, 9 C. 898; 3 C. L. R. 11; 5 Shome L. R. 75; 8 Ind. Jur. 89 and *Baksu Lakshman* v. *Govinda Kanji*, 4 B. 594, referred to.

Achutaramaraju v. *Subbaraju*, 25 M. 7; 11 M. L. J. 370, dissented from.

Balkishen Das v. *W. F. Legge*, 22 A. 149; 27 I. A. 58, 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; explained.

Appeal from the decree of the Subordinate Judge, Bara Banki, dated 31st January 1913, reversing that of the Munsif, Sanehighat, dated 21st September 1912.

Mirza *Sami Ullah Beg*, for the Appellants.

JUDGMENT.—The plaintiff brought this suit for redemption of a mortgage of 21st September 1880, on the basis of a deed of sale, on the allegation that, the Muhammadan Law forbidding the taking of interest, the document of title was prepared in the form of a sale-deed, and not in that of a deed of mortgage. The defendants denied that any mortgage was effected, but insisted that the transaction was one of sale. They denied any oral agreement as to redemption of property and they relied upon section 92 of the Evidence Act to protect them. The Court of first instance in a very elaborate judgment dismissed the claim, finding that the deed was a deed of sale, that probably oral evidence varrying its contents should not have been allowed, but that, if the evidence recorded were properly admitted, it failed to prove the oral agreement relied upon.

The lower Appellate Court followed the rulings in *Khankar Abdur Rahman* v. *Ali Hafez* (1) and *Mahomed Ali Hossein* v. *Nazar Ali* (2) and dissented from the ruling in *Achutaramaraju* v. *Subbaraju* (3). It ruled that evidence of the acts and conduct of the parties could be admitted. It proceeded to consider the evidence as to the acts and conduct of the parties, and came to the unhesitating conclusion that the transaction in reality was, and was intended to be, a mortgage.

Appeal is laid on the grounds that no oral evidence is admissible to prove that the transaction is a mortgage-deed and not a sale-deed.

In *Achutaramaraju* v. *Subbaraju* (3) the plaintiff brought a redemption suit against the defendant on what purported to be, on the face of it, an unconditional deed of sale and contended that he was entitled to adduce evidence of subsequent conduct of himself and the defendant to show that the transaction was in fact not a sale but a mortgage. The learned Judges dissented from the two rulings reported as *Khankar Abdur Rahman* v *Ali Hafez* (1) and *Mahomed Ali Hossein* v. *Nazar Ali* (2), and refused to allow the evidence. Their argument was that evidence which consisted of the acts and conduct of the parties, was evidence from which an inference might be drawn that there was an oral agreement to vary the terms of the contract; and that, therefore, such evidence could not be allowed. I have no hesitation in agreeing with the view which has been taken by the Calcutta

(1) 28 C. 256; 4 C. W. N. 351.
(2) 28 C. 289; 5 C. W. N. 326.
(3) 25 M. 7; 11 M. L. J. 370.

DIWAN SINGH *v.* RANDHERA.

High Court and in disagreeing with the Madras view. In *Kashi Nath Dass* v. *Hurrihur Mookerjee* (4) it was held that subsequent conduct and surrounding circumstances can be given in evidence to show in certain circumstances the real nature of the transaction. This was followed in *Preonath Shaha* v. *Madhu Sudan Bhuiya* (5) and in the two instances in *Khankar Abdur Rahman* v. *Ali Hafez* (1) and *Mahomed Ali Hossein* v. *Nazar Ali* (2). In the case reported as *Baksu Lakshman* v. *Govinda Kanji* (6), Melvill, J., delivered a judgment, which was cited with much approval by several Courts subsequently, in which he put the matter in a nutshell: "If it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage." This principle is not at variance with the provisions of section 92, if they are carefully considered. The appellant relies upon the well-known Privy Council ruling in *Balkishen Dass* v. *W.F. Fegge* (7), where their Lordships refused to admit oral evidence of intention for the purposes of construing a deed or ascertaining the intention of the parties. No evidence is offered of any oral agreement or of any statement.

In Ameer Ali's Evidence Act, Second Edition, page 620, reference is made to an unreported ruling of the Calcutta High Court (Second Civil Appeal No. 696 of 1899) in which it is said that evidence of intention is obviously inadmissible, but, in conformity with the established principles, the Courts may always, in order to judge of the nature of a transaction, have recourse to the acts and conduct of the parties and to the circumstances, as for example, where it is sought to show that an apparent sale was really only a mortgage, to the circumstance that property which was worth Rs. 250 was apparently sold for Rs. 35. Evidence in short is admissible in order to show the true nature of the transaction, not by what the parties intended to do, but by what the parties did or have been doing.

(4) 9 C. 898; 13 C. L. R. 11; 5 Shome L. R. 75; 8 Ind. Jur. 89.
(5) 25 C. 603; 2 C. W. N. 562.
(6) 4 B. 594.
(7) 22 A. 149 (P. C.); 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601.

In the present instance the evidence is remarkably clear that the parties acted upon, and treated this document as a mortgage from its very inception.

Mutation was applied for by the defendant as mortgagee; and he is so recorded in the Government papers; and it is further proved that he had executed several other ostensible deeds of sale between 1876 and 1879 which were in reality deeds of mortgage, in which the consideration money was re-paid, the property restored, and the deeds returned to the so-called vendors from whose custody they were produced.

For the above reasons the appeal is dismissed. The respondents may have their costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 470 OF 1913.
November 11, 1914.
Present:—Justice Sir George Knox, KT.
DIWAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
RANDHERA—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 95—Jurisdiction—Suit for declaration that plaintiff is an occupancy tenant—Jurisdiction of Civil or Revenue Court.

A suit for a declaration that the plaintiffs are occupancy tenants of a certain land and that the defendant is not joint with them in such holding is cognizable by a Revenue and not by a Civil Court.

Second appeal from the decision of the District Judge of Aligarh, dated 14th January 1913.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *Sawhny*, for the Respondent.

JUDGMENT.—This is a suit brought by the plaintiffs who are appellants in this Court. The relief which they ask for is that the fact may be declared that they, the plaintiffs, are the occupancy tenants of 10 *bighas* 19 *biswas pukhta* of land entered in the schedule to the plaint and that the defendant is not joint with them in the said holding. Both the Courts below have dismissed the claim. The lower Appellate Court has dismissed it on the following ground. It declines to go into the question at all whether the respondent has or has not

occupancy rights of his own in the land. That is, it says, not the question for a Civil Court and it declines to touch it. But it goes on to say that in its opinion, upon the facts which have been found to be admitted and proved, the respondent is a sharer with the plaintiffs and that he was really a partner with the plaintiffs. One of the partners cannot get rid of the other summarily as he could have a labourer. A partner cannot be ejected unless he has contravened the terms of partnership. There is no suggestion that this has been done and it does not appear that the respondent has ever denied the title of the plaintiffs-appellants. On these grounds also it is not proper to make the declaration asked for. In this Court the pleas taken in appeal are that the plaintiffs are entitled to a decree on these findings, that it is inconcievable that occupancy rights should accrue in favour of one only of two partners, and that the fact found that occupancy rights accrued in favour of Ram Kuar, the predecessor of the appellants, only shows that she was the only tenant. Now the matter in dispute between the parties is really whether Randhera is or is not an occupancy tenant of the holding in dispute. The appellants could have made an application to determine this matter by action taken in accordance with section 95 of the Agra Tenancy Act of 1901. The objection raised that the *zemindas* are no parties to this suit is, in my opinion, entitled to no weight. Granted that the appellants wanted to have this matter decided, it is open to them to join the land-holder or land-holders and Randhera in a suit under section 95 of that Act. This being so, no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which a suit might be brought under section 95 of the said Act. I dismiss this appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVNUE PETITION NO. 5 OF 1913-14 OF BARA BANKI DISTRICT.

April 16, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Raja UDIT NARAIN SINGH—DEFENDANT —APPELLANT

versus

GUR CHARAN AND OTHERS—PLAINTIFFS —RESPONDENTS.

Heirs of tenant, occupation by—Notice of ejectment, delay in issue of, effect of—Landlord's conduct—Acquiescence—Unstamped notice—Statutory period, fresh, commencement of.

Where the heirs of a deceased tenant continued to hold for three years after their right to hold as such had ceased, and the landlord received no rent for that period but took measures for that purpose and eventually issued an unstamped notice of ejectment;

Held, that the landlord must under the above circumstances be taken to have acquiesced in the heirs' holding, so as to give them a fresh statutory period, and that thus the unstamped notice was insufficient.

Appeal from the decree of the Commissioner, Fyzabad, dated 14th July 1913, reversing that of the Assistant Collector Bara Banki, dated 1st March 1913.

FACTS.—An ordinary tenant whose term of tenancy was to expire in 1318 *Fasli*, died in 1313 *Fasli*, and after his death his sons, the plaintiffs, began to cultivate the land. The defendant landlord did not realise any rent from the plaintiffs for 1318 *Fasli*, but distrained their crops in 1319 *Fasli*, appointed a receiver for the purpose, but subsequently released the distraint and did not put the crops to auction; he did nothing in 1320 *Fasli*, but issued against the plaintiffs an unstamped notice of ejectment for 1321 *Fasli*.

Now, the plaintiffs' possession of the land up to 1318 *Fasli* being one authorised under section 48 of the Oudh Rent Act, the points to decide were,—*firstly*, whether the defendant could under the circumstances be said to have acquiesced in the plaintiffs' holding the land, so as to give them a fresh statutory period from 1318 *Fasli*, and thus, *secondly*, whether the unstamped notice was insufficient.

The Court of first instance decided both the points in the negative, while the Commissioner on appeal recorded findings in the affirmative on those points.

Babu *Ram Chandra*, for the Appellant.

Babu *Hem Chandra Sen*, for the Respondents.

NARAYAN v. MAHADEO.

JUDGMENT.—I see no reason to differ from the Commisioner's finding. There was a delay of three years in issuing the notice and I think that the Commissioner has correctly held that an unstamped notice could not in these circumstances issue and that a new statutory period has begun.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 103 OF 1912.

February 14, 1914.

Present:—Mr. Hallifax, A. J. C.

NARAYAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHADEO—DEFENDANT—RESPONDENT.

Mortgage—Foreclosure suit—Subsequent mortgagor made party at his own request—Suit barred as against him—Whether he can plead limitation—Suit, whether to be dismissed—Proper order to pass.

Where in a suit for foreclosure a subsequent mortgagee was made a co-defendant at his own request and with the consent of the plaintiff but after the period of limitation as against him had expired:

Held, (1) that the suit against him was barred;

(2) but that, inasmuch as he was made a defendant at his own request, he could not raise the plea of limitation;

(3) that the suit against him ought not to be dismissed, but that the order making him a defendant should be set aside.

First appeal against the decree of the Additional District Judge, Nagpur, dated the 23rd July 1912.

Mr. *S. C. Dutt Chaudhari*, for the Appellants.

Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT.—The plaintiffs sued on a mortgage executed in 1893. The plaint was signed on 30th of July and presented on the 5th of August 1910, so that it was only just within time. The defendant Lakhmichand holds a mortgage over a portion of the property, which is dated the 13th of July 1910. He was not impleaded in the suit at its institution, but applied himself to be made a defendant in July 1911. The plaintiffs asked for time to consider the matter and on the 7th Augnst 1911 their Pleader stated that they had no objection to his being made a defendant. This was accordingly done and Lakhmichand was called upon to plead. His main plea was as follows: "The defendant No. 5 has been joined as a co-defendant to this suit after the limitation for filing the suit as against him had expired. The plaintiffs are not, therefore, entitled to have any foreclosure decree passed as against him. The plaintiffs' suit is barred by time and should be dismissed with costs and the defendant's costs certified against them." He then went on, in the alternative, to deny execution and attestation and receipt of consideration, and to plead satisfaction, estoppel by conduct, absence of any agreement to pay the interest claimed, collusion between the plaintiffs and the mortgagors and failure to join several necessary parties both as plaintiffs and defendants.

The plaintiffs replied that they had never heard of the fifth defendant's mortgage before, which seems highly probable when we consider the date of its execution, a fortnight before the plaint was signed, three weeks before it was presented and less than a month before the period of limitation for the claim, and all other such claims between twelve and sixty years old, ran out. They went on to plead that limitation was no bar to their getting a decree against Lakhmichand because he had come into the suit at his own request, with what was practically an offer to redeem if the mortgage should be found to be valid, and his right of redemption was not barred by time. They further traversed all his pleas of fact, which they described as inconsistent with considerable truth. The first issue framed was: "Is the claim barred against defendant No. 5 because he was joined after the period of limitation for filing the suit had expired?" It was, of course, held that the suit against Lakhmichand was barred by time. So much of the suit was accordingly dismissed, but Lakhmichand was ordered to pay his own costs because he had been made a defendant at his own request.

It will be convenient to confine the discussson to this portion of the case for the present. In their petition of appeal the plaintiffs pray that their claim shall be decreed against Lakhmichand as well. Their

learned Pleader has, however, retired in argument from this obviously untenable position and urges now that Lakhmichand should only be discharged from the suit as an unnecessary party and that the suit against him should not be dismissed. That no decree for foreclosure could be passed against Lakhmichand is very clear from the ruling of the Allahabad High Court in *Sanwale Singh* v. *Ganeshi Lal* (1), and the ruling of a Full Bench of the Calcutta High Court in *Ramkinkar Biswas* v. *Akhil Chandra Chaudhuri* (2). The case now put forward is that Lakhmichand in effect pleaded a paramount title and was, therefore, not a necessary party to the suit, and he should, therefore, have been discharged from it: *Sanwal Singh* v. *Ganeshi* (1) and *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (3). This is practically what is urged in the petition of appeal, though the relief asked is overstated.

The respondent Lakhmichand's reply is that as the plaintiffs agreed to his being made a party to the suit and accepted his challenge to try out the question of limitation and went to trial on that issue, they cannot be allowed to urge in appeal for the first time that he was not a necessary party to the suit. The rulings quoted in support are the latter part of the same Calcutta case of *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (3) and the ruling of this Court in *Kasham Khan* v. *Musammat Savitri* (4). This argument is based on a misconception of the facts. The plaintiffs never accepted any challenge to have the question of limitation tried out, nor did any such issue arise from the pleadings. They admitted that their suit for foreclosure was barred by limitation against Lakhmichand, as it very obviously was, but pleaded that, as he had come in at his own request, the suit ought to be treated as a redemption suit filed by him, which was not so barred.

The defendant came in with an offer which the plaintiffs were quite justified in regarding as an offer to waive the question of limitation and to redeem their mortgage if it were found to be valid, in order to save himself the trouble and expense of a redemption suit. It was to all appearance a challenge to have the suit tried out on the merits. That they did regard it in this light is clear from their reply to the defendant when he put in his plea of limitation after being made a party, and from their petition of appeal. It was obviously on that understanding that they agreed to his being made a party. The Calcutta ruling and that of this Court which have been quoted on behalf of Lakhmichand seem to me, therefore, to operate much more against him than against the plaintiffs, and to debar him from asking that the suit against him should be dismissed. On the other hand, there is nothing in the principles laid down in them to prevent the plaintiffs asking that the order making Lakhmichand a party, to which they had agreed under a misapprehension raised and encouraged by him, should be cancelled and that his name should be removed from the list of defendants. This is what they mean when they speak of his being discharged, though the Civil Procedure Code contains no mention of the discharge of a defendant.

I am bound to admit that I am still unable to see what difference it makes to either party whether the defendant is "discharged," or the suit against him is dismissed. If the suit is dismissed the plaintiffs cannot foreclose against Lakhmichand, but their right to do that and so to compel him to redeem them was dead long before he asked to be made a party to the suit. If Lakhmichand or the mortgagors should choose to redeem the plaintiffs' mortgage within the time allowed by the decree in this suit, no question between Lakhmichand and the plaintiffs will ever arise. But if that mortgage is not redeemed and they get possession of the property they will then be able to redeem Lakhmichand as they will then stand in the shoes of the mortgagors. No plea of *res judicata* can be raised against them out of the result of the decision of this suit, which is apparently what both they and Lakhmichand anticipate, because their right to redeem will only come into existence when they get possession of the property on foreclosure. Both parties have, however, contested this appeal very strenuously, and their advisers seem to be convinced that each of them has a lot to gain or lose by i.

(1) 20 Ind. Cas. 41; 35 A. 44; 11 A. L. J. 630.
(2) 35 C. 519; 11 C. W. N. 350 (F.B.); 5 C. L. J. 242; 2 M. L. T. 137.
(3) 33 C. 425; 3 C. L. J. 205.
(4) 19 Ind. Cas. 547; 9 N. L. R. 38.

I am not prepared to say that there is no possibility of future advantage or disadvantage to either party from the decision of this point though I am unable to imagine any such possibility. I order, therefore, that the name of Lakhmichand be removed from the list of defendants, and that the words in the decree dismissing the suit as against him be expunged therefrom.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 92 OF 1912-13 OF GONDA DISTRICT.

April 7, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

NAGESHAR—DEFENDANT—APPELLANT

versus

RAM TAHAL—PLAINTIFF—RESPONDENT.

Ejectment—Ex-proprietary tenant, out of possession—Possession with vendee—Vendee occupying as sub-tenant, no proof as to—Sub-tenant, vendee not to be treated as.

A person in whose favour ex-proprietary rights accrued but who has been out of possession, cannot assert them twelve years after the sale by virtue of which those rights accrued, and cannot, in the absence of any proof to the effect that the person now in possession occupied the land as his sub-tenant, eject that person as such.

Appeal from the decree of the Commissioner, Fyzabad, dated 4th July 1913, reversing that of the Assistant Collector, Gonda, dated 14th March 1913.

FACTS.—The defendant was formerly a *zemindar* and held certain land as *sir*. In 1902 he sold away his proprietary rights and the plaintiff purchased them and took possession of the *sir* land, which from that time began to be recorded as his *khudkasht*. About twelve years after the sale the defendant treating the plaintiff as his sub-tenant, issued a notice of ejectment against the latter who contested it on the ground that the relation of tenant and sub-tenant did not exist between the parties. The defendant failed to prove that he had been declared to be an ex-proprietary tenant of the land in suit or that when ex-proprietary right had accrued to him the plaintiff occupied the ex-proprietary holding as his sub-tenant. On the contrary it was shown that the defendant's claim under section 36 (4) of the U. P. Land Revenue

Act (III of 1901) had been dismissed on the ground that he was not in possession of the *sir* land. It was, therefore, found by the Commissioner that even assuming that ex-proprietary rights had accrued to the defendant, he voluntarily relinquished those rights in ignorance or intentionally, and was not now entitled to treat the plaintiff as his sub-tenant. The matter was further contested in appeal before the Board.

Babu *Rudra Dat Singh*, for the Appellant.

Babu *Aditya Prasad*, for the Respondent.

JUDGMENT.—There can be no doubt that the Commissioner's decision is correct. It seems clear that the appellant has been out of possession since his proprietary rights were sold in 1902 and even if it be assumed that ex-proprietary rights accrued in his favour at that time he certainly cannot assert them now. The respondent is his landholder and if the respondent's possession was wrongful, the appellant's only remedy was a suit under section 108, clause (10), to be re-placed in possession. He certainly cannot proceed twelve years later by issue of a notice of ejectment.

The appeal is dismissed with costs on the appellant.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 34 OF 1912-13 OF BARA BANKI DISTRICT.

April 14, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Chaudharain SHAIBUNNISSA—PLAINTIFF—APPELLANT

versus

KARAMAT ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 107B—"Judicial decision," interpretation of—Settlement Court decree declaring muafidar *to hold* muafi *heritably—Resumption.*

A Settlement Court decree declaring a person as entitled to hold certain land rent-free so long as there are heirs to succeed to him, is a "judicial decision" as contemplated by section 107B of the Oudh Rent Act.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 2nd May 1913, upholding that of the Deputy Commissioner, Bara Banki, dated 16th July 1912, uphold-

ing the order of the Assistant Collector, Bara Banki, dated 27th April 1912.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *Hakimuddin* and Babu *Rajeshwari Prasad*, for the Respondents.

JUDGMENT.—The sole question for decision is whether the respondent holds under a judicial decree within the meaning of section 107B. The decision on which the respondent relies is that of a Settlement Officer at the first Regular Settlement. An application had been filed by the predecessor-in-interest of the respondent asking that he might be declared to be the holder of a *muafi* tenure of which the numbers were specified and in which the numbers now in suit are included. In reply, the predecessor-in-interest of the appellant admitted the right of the respondent's predecessor to hold rent-free so long as there were heirs to succeed to him and a declaration was made accordingly. This, in my opinion, is a judicial decision as contemplated by section 107B. It is a decision by a Court empowered to resume or to assess rent, holding that the respondent and his successors were entitled to remain in rent-free possession so long as there was a succession by legal heirs. In my opinion, the Commissioner correctly held that the land was held under a judicial decision and dismissed the suit. The remarks made by the Deputy Commissioner as to whether the land is or is not an under-proprietary holding are *obiter dictum* and need not be referred to except to put upon record that they are of no value.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 747 AND 748 OF 1913.

November 24, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

NAGARAJA PILLAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

IN S. A. NO. 747 OF 1913.

SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TANJORE—DEFENDANT NO. 10—RESPONDENT

IN S. A. NO. 748 OF 1913.

JAGANNATHA PILLAI AND OTHERS—DEFENDANTS NOS. 2, 3, 4, 6 AND 8—RESPONDENTS.

Easements Act (V of 1882), ss. 4, 15—Easement against Government—Period of user—User for sufficiently large number of years—Burden of proof, shifting of—Evidence Act (I of 1872), ss. 124, 126—"Communication in official confidence," meaning of—Report by one officer to another, admissibility of—Detrimental to public interest—Sufficient cause—Public officer in charge of record, opinion of, whether final—Presumption—Finding of fact—Second appeal.

A plaintiff who claims a right of easement by prescription against Government must prove sixty years' open peaceful and uninterrupted user under section 15 of the Easements Act.

The rule of law that where a plaintiff in a suit against the Government has proved his possession for a sufficiently large number of years, the burden of proof is shifted on to the Government, applies to suits for possession and if applied to suits for easement as well the plaintiff will have no right to claim the privilege where he has not even completed the period of prescription necessary against a private individual.

Secretary of State for India v. *Kota Bapanmma Garu*, 19 M. 165; *Sri Raja Chetikani Rama Rau* v. *Secretary of State for India*, 5 Ind. Cas. 882; 33 M. 1; 7 M. L. T. 128; 20 M. L. J. 66; *Krishna Iyer* v. *Secretary of State for India*, 5 Ind. Cas. 121; 33 M. 173; 6 M. L. T. 306; 20 M. L. J. 71; *Venkatarama Iyer* v. *Secretary of State for India*, 5 Ind Cas. 118; 33 M. 362; 7 M. L. T. 139; 20 M. L. J. 71 distinguished.

The words "communication in official confidence" used in section 124 of the Indian Evidence Act import no special degree of secrecy and no pledge or direction for its maintenance but include generally all matters communicated by one officer to another in the performance of duties. These words have the same meaning as "professional confidence" used in section 126 of the Evidence Act.

Where, therefore, the document that was sought to be put in evidence was a report made by one officer to another, after inspection of a spot in person, and where that was objected to on the ground that its production would be detrimental to public interest, that is a sufficient cause for a Court to refuse to compel its production. The

public officer in charge of the record is the sole Judge of the detrimental character of the document, and his assertion as to its character is final and binds the Court.

Venkatachella Chettiar v. *Sampathu Chettiar*, 1 Ind. Cas. 705; 32 M. 62; 4 M. L. T. 317; 19 M. L. J. 263, distinguished.

Goodall v. *Little*, (1851) 20 L.J Ch. 132; 1 Sim.(N.S.) 155; 15 Jur. 309; 61 E. R. 60; 89 R. R. 56; *Ex parte Campbell, In re Cathcart*, 5 Ch. 703; 23 L. T. 289; 18 W. R. 1056; *Framji Bhicaji* v. *Mahansingh Dhansingh*, 18 B. 263; *Stace* v. *Griffith*, 1867) 2 P. C. 420; 6 Moore P. C. (N. S.) 18; 20 L T. 197; 16 E. R. 633; *Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. (N. S.) 780; 2 L. T. 378; 8 W. R. 544; 120 R. R. 839; *Hughes* v. *Vargas*, (1893) 9 T. L. R. 551, followed.

Where the presumption which a Court ought to raise to shift the burden of proof on facts proved before it, is fixed by no rule of law, the privilege of raising that presumption is entirely with the Court of fact; and it is not open to the High Court sitting in second appeal to direct what presumption the Court should have raised, and how to vary the burden of proof in the progress of the trial of a case.

Hall v. *Venkatakrishna*, 13 M. 394; *Folkestone Corporation* v. *Brockman*, (1914) A. C. 338 at p. 349; 83 L. J. K. B. 745, followed.

Obiter dictum. In English Law, the privilege as to production of public documents before Courts of law extends even to those which pass from hand to hand, in a public office, in the usual course of business with no special mark of secrecy upon them and the ground upon which the privilege rests is that it would be detrimental to the public interests to produce it.

Second appeals respectively against the decrees of the Court of the Subordinate Judge of Mayavaram, in Appeal Suits Nos. 39 and 40 of 1912, preferred against those of the Court of the District Munsif of Mayavaram in Original Suit No. 112 of 1909.

S. A. No. 747 of 1913.

Mr. *T. R. Ramachandra Aiyar*, for the Appellants.

The *Government Pleader*, for the Respondents.

S. A. No. 748 of 1913.

Mr. *T. R. Ramachandra Aiyar*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The plaintiffs, the appellants, hold survey fields Nos. 46, 63 and 64 of Tirumananjeri village. Of the defendants the respondents in the two second appeals, the 1st to 9th and 11th defendants are *ryots*, whose alleged interest in the irrigation, the subject of dispute, the Secretary of State, the 10th defendant, has protected by the issue of orders in the Revenue Department. It is admitted that the channel immediately adjacent to the plaintiffs' lands in the Mylam channel, belongs to the Cauvery system. But, as the plan, Exhibit H, shows there is at a short distance to the west the Mangudi channel in the Vikramaneri system. The plaintiffs contended that they were entitled to take water by a *kanni* or subsidiary channel running east from Mangudi to Mylam and so to their fields, though they would obviously affect the supply from the former on which 1st to 9th and 11th defendants depend, by doing so. The channels are artificial and there is, therefore, no question of natural right; nor is any grant relied on by plaintiff. Their case, in favour of which the District Munsif found, was based on prescription, that is, on section 15 of the Indian Easements Act. The lower Appellate Court has held that no prescription was established.

I reserve two objections based on exclusion of evidence and, subject to them, consider what the lower Appellate Court has found on the facts and what questions are open for argument in second appeal. The points for decision are set out clearly and, it is not disputed, comprehensively in the judgment before us, and the findings on them are that (1) the Mylam channel was plaintiffs' recognised source of irrigation, (2) the *kanni* is not shown to have been in existence before 1888, (3) plaintiffs have since then taken water by it, and (4) such taking created no prescriptive right, because it was not proved to have been open, peaceful or uninterrupted. No objection has been made to the first of these findings. Against the others, it is urged generally that they are vitiated, because they are based on an adoption of the District Munsif's treatment of the oral evidence, which has been misunderstood, inasmuch as one sentence of his judgment has been extracted and regarded as conclusive, though a conclusion in the opposite sense was eventually reached. This is not sustainable. For in fact, the District Munsif, after disparaging plaintiffs' oral evidence in the sentence extracted and others, reached his finding with the aid of the documents; and the lower Appellate Court has not professed to adopt that finding or more than the sentence referred to, but, has reached its conclusions independently. Those conclusions so far as they are of fact, must, therefore, be accepted. It is with reference only to the fourth that further

argument in second appeal is legitimate. In short, the result is that the burden of proof of such a user as section 15 of the Indian Easements Act contemplates being on plaintiffs, they have adduced evidence calling for consideration with reference only to their user from 1888 until 1907, when the Revenue Authorities first forbade it. The decision must, therefore, turn on the nature of the acts of user found proved by the lower Appellate Court, as fulfilling the requirements of the law, and the sufficiency of the period over which they extend.

The plaintiffs' case depended on oral evidence, one document, Exhibit B, and the presumption that as the *kanni* was in existence in 1888, it must have been in use from then onwards. On the oral evidence, the lower Appellate Court was entitled to form and, as, already observed, did form its opinion, which is final. It no doubt has not referred separately to the evidence of the existence of remnants of a masonry structure on the ground in 1906; but that evidence was indefinite and there is no reason for doubting that it was considered. As regards Exhibit B, there was ground, referred to in the judgment, on which the lower Appellate Court could treat the mention of a *kanni* in it as open to suspicion. It is urged that there was no evidence to support the conjectural explanation that it was mentioned through the connivance of the Village Officers. But there was such evidence in the statement of 2nd plaintiff that 1st plaintiff was a District Board member, a Municipal Councillor and owner of large property, and, therefore, a person whom the Village Officers might be ready to oblige, and in the evidence (Exhibit G,) that the Village Munsif concerned, plaintiffs' witness No. 6, has undergone punishment in consequence of his partiality for plaintiffs in this affair. As regards the lower Appellate Court's refusal to make the presumption proposed, it was for it to estimate the reasons for and against doing so, and it has been shown that clear reason was available on plaintiffs' side, which it neglected. The further facts, which it detailed, the absence of reference to the *kanni* in accounts, in which it would naturally have been referred to, and the indirect character of plaintiffs' attempts to assert their right, when it was disputed, ending in their obtaining a recognition of the existence of a sluice for the *kanni* from a Public Works subordinate with authority to give it, were legitimate grounds of decision. The suggestion here that the mention of Mylam as the source of plaintiffs' irrigation in the accounts in question, Exhibit XIV, does not negative plaintiffs' right to the *kanni*, because it, in fact, brought water into Mylam, is unsound, because Exhibit XIV specifies not only the channel, but also the irrigation system, which serves each field and does not specify against plaintiffs' fields the Vikramanar system to which Mangudi belongs. In these circumstances it cannot be said that the lower Appellate Court has failed to consider plaintiffs' case or considered it on erroneous principles. Its finding that they did not prove an open, peaceful and uninterrupted user from 1888 is one of fact, to which no valid objection has been made good and it must, therefore, be accepted. It entails that plaintiffs have established no prescriptive right.

Argument was attempted also with reference to the period of user, which plaintiffs were bound to prove, the assumption in the lower Courts having apparently been that sixty years were required. Here it is suggested first that twelve years would be sufficient because plaintiffs' masonry sluice, above referred to, stood on Government land the border of the Mangudi channel, not on their field and they are in fact claiming a declaration of their right to possession of its site, but this is unsustainable since their plaint contained no such allegations or prayer. They argue next that (1) they are bound to prove user for twenty years only, the necessary period against a private party, not sixty, and (2) if sixty years is the period, they have proved a user for a sufficient portion of it, to transfer the burden of proof in respect of the remainder. As regards (1) they rely on the *Secretary of State for India* v. *Kota Bapanamma Garu* (1). But that was a suit for possession of land, and it was held only that the sixty years' period under Article 149 of Schedule I of the Indian Limitation Act, applied to suits by the Secretary of State not to suits against him. That decision does not affect the duty of plaintiffs here to prove sixty years' user

(1) 19 M. 165

which is imposed by the last clause of section 15 of the Indian Easements Act. With reference to the transfer of the burden of proof *Sri Rajah Chetikani Rama Rau* v. *Secretary of State for India* (2), *Krishna Iyar* v. *Secretary of State for India* (3) and *Venkatarama Iyer* v. *Secretary of State for India* (4) are relied on. But those cases related to possession and are not in point; and here, even if plaintiffs' continuous enjoyment as of right had been established for the period from 1888 to 1907, the date (as appears from Exhibit IX) of the Deputy Collector's order, referred to in the plaint as forbidding it, plaintiffs' argument would still be untenable, since they would not have completed the period of prescription necessary against a private individual. It is then maintained that the burden of proof of a shorter period of enjoyment than that necessary for complete prescription, with reference to *Ponnusawmi Taver* v. *Collector of Madura* (5) and *Rajrup Koer* v. *Abul Hossein* (6), was on the defendants. But in them the prescription of a lost grant was the basis of the decision, and here that prescription is negatived by the absence of reference to any grant or its recognition in the records, where it would naturally occur, Exhibits XV, XIV and XVI. There is, therefore, no reason for dissent from the lower Appellate Court's decision on this ground. The remaining grounds of appeal argued relate to the exclusion of evidence by the District Munsif. The first complaint is that the Supervisor, who gave the permission, Exhibit I, for the re-building plaintiffs' sluices was not examined. The facts alleged are that he attended the Court on several occasions, that eventually for one hearing he could not attend as he was ill, and that plaintiffs then on 8th September 1911, applied for an adjournment to secure his evidence. On that day defendants had closed their case, after examining witnesses. Plaintiffs had closed theirs on 18th August 1911, so far as appears, without any reservation regarding the Supervisor and without insisting on his examination. In these circumstances the District Munsif was right in refusing to adjourn at the stage, at which he was asked to do.

The other point taken is of wider importance and is not covered by Indian authority. It is that the District Munsif should have insisted on the production of a report by the Supervisor made to the Sub-Divisional Officer after inspection of the spot, which plaintiffs summoned and in respect of which 10th defendant, the Secretary of State, claimed privilege under sections 123, 124 and 162 of the Indian Evidence Act, the Chief Engineer stating that public interests would suffer by its production. The District Munsif allowed the objection, when it was made at the hearing for production of documents, with reference to section 124 of the Indian Evidence Act. Before evidence was taken, the High Court refused to interfere with this ruling by way of revision in *Nagaraja Pillai* v. *Vythinatha Iyer* (7). The Court declined to say that the District Munsif erred in holding "that the communication in question being from a subordinate officer, was *prima facie* of a *confidential* nature." It observed that the petitioners, the plaintiffs, had not asked the District Munsif to take evidence on the point and that the latter's refusal to inspect the document in order to decide was not shown to have been a wrong exercise of his discretion. On this plaintiffs contend that (1) this Court's order left the question, whether evidence should be taken, open and the District Munsif erred in disallowing the examination of plaintiffs' witness No. 14 as to the confidential nature of the document and (2) the document, not being in fact a communication in official confidence, contemplated by section 124, should have been exhibited, *contra*, reliance is placed on section 167 of the Indian Evidence Act.

The effect of this Court's order can be dealt with shortly. It certainly did not amount to a direction or authorisation to the District Munsif to take evidence and it con-

(2) 5 Ind. Cas. 882; 33 M. 1; 7 M. L. T. 128; 20 M. L. J. 66.

(3) 5 Ind. Cas. 121; 33 M. 173; 6 M. L. T. 306; 20 M. L. J. 71.

(4) 5 Ind. Cas. 118; 33 M. 362; 7 M. L. T. 139; 20 M. L. J. 74.

(5) 5 M. H. C. R. 6.

(6) 6 C. 394; 7 I. A. 240; 7 C. L. R. 529; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530.

(7) 9 Ind. Cas. 672; (1911) 2 M. W. N. 369; 21 M. L. J. 484; 9 M. L. T. 273.

tained nothing repugnant to the conclusion, which has been pressed on us, that, if plaintiffs had wanted to adduce evidence, they should have asked leave to do so, when documents were being received and before the order refusing to receive the document now in question was passed. It is, moreover, not alleged that any notice was given to 10th defendant of the renewal of the attempt to get it exhibited during the trial, and in the absence of any, that attempt was open to grave objection. And further, even if the claim to raise the question on evidence was not made irregularly, it is contended that the District Munsif was not bound to take any, if he could decide without it, as his order of the 5th August 1910 shows that he did, that the document was a communication in official confidence. Whether that decision was well-founded is the question raised by plaintiffs' second contention.

The Indian Law as to Government privilege is contained in sections 123, 124 and 162 of the Indian Evidence Act. Of these, section 124 above is relied on here and need be considered, plaintiffs' contention regarding it being that the words "communications in official confidence" mean and include only what in official parlance are known as confidential communications, that is, communications which in virtue of some special mark on them or some special direction by their author are to be kept with particular secrecy, and do not include official communications generally, to which only the reticence, expected by every employer of his servants, is applicable. There are, it is contended, two categories, ordinary official communications and communications in official confidence; and it is only to the second that section 124 should be applied, the report now in question belonging to the first.

Plaintiffs have given no valid reason for this interpretation of the section in the shape of authority or otherwise. For in *Beatson* v. *Skene*(8)the existence of any general rule that "all public documents, including communication to heads of departments, are to be produced and made public, whenever a suitor thinks that his case requires such production", is negatived. On the other hand, it does not appear that their contention represents either certainty or convenience. It is clear that the dominant intention in the section is to prevent disclosures to the detriment of the public interests; and it is settled in this Presidency by *Venkatachella Chettiar* v. *Sampathu Chettiar* (9) that the decision as to such detriment is to lie with the officer, to whom the communication is made. It is then impossible to reconcile the plaintiffs' interpretation with these two conclusions. For, that interpretation would make the conduct of the author of the communication, his giving or failing to give (perhaps through caprice or negligence) an indication of its confidential character, decisive and enable it to prevail over the opinion of the recipient on the really important point, the effect of the disclosure on public interest. It would be wrong to sacrifice the two definite conclusions reached as to one portion of the section to a doubtful construction of the remainder. That construction, moreover, is not required by the wording. For, it rests on the special use of the word "confidential" in official parlance, which there is no reason for assuming that the Legislature had in mind. An easier and more probable explanation of the phrase "official confidence" is afforded by comparison with the references to "professional confidence" in connection with the privilege of legal advisers, as for instance, at Ameer Ali and Woodroff's "Law of Evidence", 1st Edition, page 794, Taylor on Evidence, 10th Edition, page 650, and in *Goodall* v. *Little* (10) and *Ex parte Campbell, In re Cathcart* (11) quoted in *Framji Bhicaji* v. *Mohansingh Dhansing* (12). It is true that a pledge of secrecy is referred to in the case last decided. But that reference in no way affects the utility of the comparison for the present purpose or provides an analogy supporting the plaintiffs' argument; for such a pledge is mentioned as material with reference to preliminary and collateral matters, which are outside the general privilege and have no resemblance to the report at present in question. In these circumstances, consideration of the section

(8) 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. (N.S.) 780; 2 L. T. 378; 8 W. R. 544; 120 R. R. 839.

(9) 1 Ind. Cas. 705; 32 M. 62; 4 M. L. T. 317; 19 M. L. J. 263.

(10) (1851) 20 L. J. Ch. 132; 1 Sim. (N. S.) 155; 15 Jur. 399; 61 E. R. 60; 89 R. R. 56.

(11) 5 Ch. 703; 23 L. T. 289; 18 W. R. 1056.

(12) 18 B. 263.

and of the consequences of the interpretation for which the plaintiffs contend, lead to the conclusion that the words "communication in official confidence" import no special degree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in the performance of their duties. The question whether such communication was made in the course of such performance, is for the Court to decide.

This view is at least consistent with the decisions. The order of this Court (already referred to) in the revision petition in the present case does treat the District Munsif's ruling as being that the report was a "communication of a confidential nature." But it does not appear that the plaintiffs' present contention was put forward, if at all, with any fulness; and it was not necessary, if it was, to deal with it in order to dispose of the petitions. In *Venkatachella Chettiar* v. *Sampathu Chettiar* (9), already referred to, section 124 was considered with reference to income tax returns made to a Government office. As the Court held that there was no basis for the plea that confidence of any kind was in question and that the Income Tax Act and rules justified none, the decision is inapplicable to the case of a report by one officer to another. The English cases must be applied with caution, because, they do not statedly distinguish between the principles embodied in sections 124 and 163 of the Indian Evidence Act. Reference may, therefore, be limited to those, in which the necessity for a preliminary decision by the Court as to the official character of the communication in question might have arisen. The decision, it will be found, did not turn on the degree of confidence involved or on the existence of any specially prescribed confidence between those concerned. Thus in *Stace* v. *Griffith* (13) there is nothing in the report to indicate that any special plea as to the confidential character of the communication was considered and the issue is stated as being only whether it was official. So also in *Beatson* v. *Skene* (8) already referred to.

In *Hughes* v. *Vargas* (14) there was nothing to show that the document under discussion was confidential in any special sense, in fact, it appears from the report to have been seen by the clerks in the public office concerned; and again the judgment is based not on that or any other fact bearing on the degree of confidence between the writer and recipient, but on the injury to public interest, certified to be involved. The result of the argument from authority is no doubt merely negative. But it is consistent with the decision already reached directly. The decision must, therefore, be that the District Munsif was right in refusing to insist on the Supervisor's report being produced.

It is also urged with reference to section 167, Indian Evidence Act, that the report would not have varied the decision if produced and, therefore, cannot be ground for ordering a new trial. We have not been told what matter of importance to plaintiffs the report is expected to contain or that it contains anything except the results of the Supervisor's inspection of the spot about two years, after the dispute began; and I should, therefore, if necessary, be inclined to refuse to interfere on this ground also.

I would dismiss the second appeals with costs.

TYABJI, J.—I have had the benefit of reading my learned brother's judgment. The plaintiffs' suit is in effect for a declaration that they are entitled to conduct water from the Mangudi channel (which has its source in the Vikramanar river) to the Mylam Kanni (a channel forming part of the Cauvery irrigation system) by a conduit called the Mudavan Kanni; and the plaintiffs ask for an injunction restraining the defendants from interfering with the conduit.

The right claimed is an easement falling within section 4, illustration (*c*) of the Indian Easements Act. The Mangudi channel takes the place of "B's stream," in the illustration, and the "fountains in the garden attached to the house" are here re-placed by the Mylam channel which has been found to be the source of irrigation to which the plaintiffs are entitled as the owners of the lands referred to in the plaint.

The District Munsif held that the plaintiffs were entitled to the reliefs claimed and

(13) (1867) 2 P. C. 420; 6 Moore P. C. (N. S.) 18; 20 L. T. 197; 16 E. R. 633.

(14) (1893) 9 T. L. R. 551.

decreed accordingly and his decision was reversed in appeal. We have now to decide whether the lower Appellate Court's decision is vitiated by any such error as requires our interference in second appeal.

The first point determined by the lower Appellate Court, is that the plaintiffs' recognised source of irrigation is the Mylam channel. This merely reduces the plaintiffs' case more definitely to the basis I have mentioned: a right that might have been claimed independently of an easement acquired by prescription is found not to inhere in the plaintiff. Their rights, therefore, could only be under an easement acquired by prescription.

For this purpose, it was necessary to determine the point of time, since when the right has been claimed as an easement and has been peaceably and openly enjoyed by the plaintiffs claiming title thereto as an easement, and as of right, without interruption. If the period during which the right has been so claimed and enjoyed is not less than sixty years it has become absolute and the plaintiffs must succeed (the Indian Easements Act, section 15, paragraphs Nos. 3 and 4 and last paragraph).

The Subordinate Judge has found that the conduit in question existed in 1888, and it must have come into existence a little before that, but that it has not been proved that the right to have the conduit has been exercised openly, peacefully or uninterruptedly.

This finding is conclusive against the plaintiffs. It has, however, been attacked on several grounds which may be dealt with under three heads.

First, it was argued that the Subordinate Judge did not consider or did not appreciate for himself the oral evidence but mistook the District Munsif's appreciation of it and adopted the view which he mistakenly considered to be that of the District Munsif. This argument is supported merely by seizing hold of an isolated sentence in the Subordinate Judge's judgment, paragraph No. 11. It seems to me that he appreciated the oral evidence for himself and found an independent opinion opposed to that of the District Munsif.

The next argument has reference to the presumptions of fact which the learned Subordinate Judge (it is contended) disregarded. There was evidence, however, on both sides, and to the arguments adduced before us under this head the remarks from Bowen, L. J.'s judgment set out in *Hall* v. *Venkatakrishna* (15) are a sufficient answer. To accede to the arguments of the appellants would be to decide in second appeals questions of fact by purporting to lay down on whom the burden of proof lay in a given state of facts or evidence. The question which a Court sitting in second appeal has to decide is thus stated by Lord Kinnear in *Folkestone Corporation* v. *Brockman* (16). The question seems to be whether it was still open to the tribunal to draw a further inference of fact one way or the other, or whether the necessary conclusion was already fixed by a rule of law. The question before the House of Lords then was whether the fact of dedication to the public of a highway had been proved, Lord Kennear points out the difference in the words of Parke, B., between "conclusive evidence" and "evidence on which those who have to find that fact may find that there was a dedication by the owner." "I think," he says later, "it is fallacious to assume dedication on a partial view of the evidence, and only after that has been done to inquire whether conflicting facts are strong enough to dislodge a conclusion already reached," (page 354). "The question is one of fact, turning upon probabilities of conduct, which cannot be estimated by antecedent rules of law" (page 356). "If the strength of the presumption can be increased or diminished according to circumstances, it is for the jury to determine the weight which should be given to it in any particular case" (page 357). The course of proceeding which the Court of Appeal followed in the case, and which Lord Kinnear described as fallacious is thus referred to by Lord Dunedin: "They fasten upon certain of the series of separable conclusions in fact which the Justices set out. These findings, say they, amount to a finding of user by the public. User by the public raises a presumption of dedication, and in the other facts found by the Justices. There is nothing sufficient to rebut the presumption" (pages 374 and 375).

(15) 13 M. 394.
(16) (1914) A. C. 338 at p. 349; 83 L. J. K. B. 745.

"With reference to the learned Judges, I do not think that is the proper way to approach the question, and its defect, to my mind, consists in regarding 'user' as an inflexible term, which, if found to apply, can lead to only one legal result. User is evidence, and can be no more, of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question no one can see into a man's mind, and, therefore, dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as matter for inquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to ascertain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication" (page 375). He concludes, "unless the evidence points all one way," "in the long run it all comes to this: Which is the more probable alternative?" (page 377).

It seems to me that for similar reasons, and as sitting in this Court, I have no jurisdiction to consider questions of fact, it is beyond my province to consider whether in appreciating or weighing the evidence, the lower Appellate Court has applied the presumptions referred to in *Sri Rajah Chetikani Rama Rau* v. *Secretary of State for India* (2); *Krishna Iyer* v. *Secretary of State for India* (3) and *Venkatarama Iyer* v. *Secretary of State for India* and *Secretary of State for India* v. *Kota Bapanamma Garu* (1) and *Ponnuswami Taver* v. *Collector of Madura* (5) in the same manner as I should have done if I had to adjudicate upon the facts, I have no jurisdiction to appreciate for myself the weight to be given to the circumstances on the one side and the other. The Legislature has given to the lower Appellate Court the right to pronounce finally on these questions.

In the cases relied upon by the appellants, adverse possession for 20 years or more against the Government had been proved, and the Government had not been able to show that any title in themselves subsisted. In the present case, however, the lower Appellate Court has considered the appellants' evidence insufficient to prove that the easement has ever been enjoyed openly, peaceably and uninterruptedly. The appellants desire us to fasten upon one piece of evidence and "after the manner of the Horatii and the Curiatii" to challenge the Government to bring forward any piece of rebutting evidence.

Lastly, it was argued that the lower Appellate Court wrongly excluded evidence sought to be adduced by the appellants. The learned Vakil for the appellants can, however, give us very few particulars about the document alleged to be improperly rejected, and as to the effect it would have on the evidence. It appears that it is a report made on 31st August 1908, and when pressed the learned Vakil, for the appellants, could only say that it might possibly point to there being earlier records which might be discovered, by the clue so obtained and which might turn out in favour of the appellants. Section 167 of the Indian Evidence Act precludes interference by a Court of Appeal on such hypothetical grounds. It is unnecessary, therefore, to deal with the question whether any evidence on behalf of the plaintiffs to show that the document was not a communication made in official confidence, was improperly rejected. But I entirely agree with my learned brother that the question whether or not a communication is made in official confidence cannot depend solely on the question whether it is marked "confidential."

I agree, therefore, that the second appeals should be dismissed with costs.

Appeals dismissed.

RAM SINGH *v.* GIRRAJ SINGH.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 28 OF 1914.

October 24, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji.

RAM SINGH—DEFENDANT—APPELLANT

versus

Rao GIRRAJ SINGH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901 *, ss.* 95 167—*Suit for ejectment—Revenue Court, whether competent to go into validity or invalidity of lease*—Res-judicata.

The plaintiff sued in the first instance in the Revenue Court to eject the defendant alleging that a certain lease and *kabuliat* upon which the defendant relied were given by his *karinda* without his authority. Upon the suit being dismissed he filed a suit in the Civil Court for a declaration that the lease and *kabuliat* were not binding upon him and averred that the present suit could not have been brought in the Revenue Court and that, therefore, the matter could not be said to be *res judicata*:

Held, that the subsequent suit was not maintainable inasmuch as the Revenue Court was competent to go into the question of validity or invalidity of the lease, and, therefore, its decision operated as *res judicata*.

Gomti Kunwar v. *Gadri*, 25 A. 138; A. W. N. (1902) 220, distinguished.

Letters Patent Appeal against the order of Mr. Justice Rafique, dated the 20th April 1914 and reported as 23 Ind. Cas. 705.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought a declaration that a certain lease and *kabuliat* were not binding upon him on the ground that they had been granted by a *karinda* who had no authority. The material facts are as follows:—The plaintiff sued in the first instance in the Revenue Court to eject the defendant-appellant. The allegation was that the defendant was a non-occupancy tenant from year to year. The defendant set up the lease and *kabuliat*. The plaintiff replied that the lease was given without authority. The Revenue Court went into the matter and decided that there was authority to create the tenancy and accordingly dismissed the plaintiff's suit. Thereupon the plaintiff instituted the present suit, claiming the relief we have already mentioned. It is argued on behalf of the plaintiff that the present suit could not have been brought in the Revenue Court and that, therefore, the matter cannot be said to be *res judicata*. On the other hand the defendant relies on sections 95 and 167 of the Tenancy Act, II of 1901. Section 95 provides that suits can be brought either by the tenant or the landholder for a declaration of various matters connected with the tenancy and amongst others for a declaration as to the class to which the tenant belongs. The section 167 is as follows :—"All suits and applications of the nature specified in the fourth Schedule shall be heard and determined by the Revenue Courts and except in the way of appeal as hereinafter provided no Court other than a Revenue Court shall take cognisance of any dispute or matter in respect of which any such suit or application might be brought or made."

The defendant contends that the plaintiffs might have sued under the provisions of section 95 for a declaration that the defendant was a non-occupancy tenant and that in such a suit it would have been competent for the Revenue Court to have taken into consideration the question of the validity or invalidity of the lease. The defendant further contends that the real 'dispute' between the plaintiffs and the defendant was whether or not the defendant was liable to be ejected from his holding on the ground that he was a tenant from year to year, and that this is one of the suits or matters referred to in section 167.

It is necessary for a moment to consider what is the real relief which the plaintiffs seek. It is clear that what they want is to eject the defendant from his holding. The declaration of the Civil Court on the question of the validity or invalidity of the lease would be quite useless except for the purpose of obtaining possession of the holding from the defendant. It is quite true that if we regard the form of the suit and disregard the *substance* of the dispute between the parties, the present suit is not a suit which could have been instituted in the Revenue Court. But the real substance of the matter is clearly a matter which could have been, and was decided in the Revenue Court. It cannot be denied for one moment that the present suit is an attempt to get behind the decision of the Revenue Court. We think that the real test of the matter is whether or not the Revenue Court in a suit for ejectment was competent to go into the question of the validity or invalidity of the lease. We can see no reason whatever why it should not

do so: if the lease was granted by a person who had no authority to make it, it was simply a piece of waste paper and had no more validity than if it had been forged. In our opinion it is impossible to argue that the Revenue Court in the proceedings before it, was not entitled to go into the question of the validity or invalidity of the lease.

The learned Advocate on behalf of the respondents cited the case of *Gomti Kunwar* v. *Gudri* (1). This case is no authority for the proposition that where in the Revenue Court in a suit for ejectment the defendant pleads that he holds under a lease, it is not competent for the Revenue Court to consider the question of the validity of the lease. The only matter that was decided in that case was whether or not the decision of the Revenue Court operated as *res judicata* in a subsequent proceeding in the Civil Court. The Court held that the matter was not *res judicata* on the ground that the Revenue Court could not have tried the subsequent suit. In that case, (which was no doubt somewhat similar to the case now before us), the provisions of sections 95 and 167 of the Tenancy Act were not referred to or considered.

In the case of *Rai Krishna Chand* v. *Mahadeo Singh* (2), the principle which we think ought to apply to the present case is stated in the following words:—"If the second and third defendants executed, in favour of the first defendant, he being a non-occupancy tenant, a lease which they had no power to execute on the landholder's behalf, the proper course for the plaintiff to adopt was to take proper proceedings under the North-Western Provinces Rent Act, 1881, for the ejectment of the tenant, ignoring the lease, and if the lease was set up in defence, showing that under the circumstances of its execution it was not binding upon him. As that course might have been adopted the provisions of section 95 of the Rent Act apply and the Civil Court could not entertain the suit so far as the setting aside of the lease was concerned."

We accordingly allow the appeal, set aside the decree of this Court and also of both the lower Courts and dismiss the plaintiffs' suit with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

(1) 25 A. 138; A. W. N. (1902) 220.
(2) A. W. N. (1901) 49.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 277 OF 1911
SECOND CIVIL APPEALS NOS. 1508 TO 1510 OF 1912.

September 8, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar

CHIPURAPALLI APPAYYA—DEFENDANT—APPELLANT

versus

Sri Rajah KAKARLAPUDI RAMACHANDRA RAJU BAHADUR GARU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 3 (2), 151, 179—Part of an estate, also an estate—Owner—Landholder—Jurisdiction of Revenue Courts.

The Estates Land Act is not intended to be confined in its operation only to estates in their entirety which fall under one of the five clauses of section 3 (2). Parts of an estate are also within the scope of the Act. Where the tenants of a part of an estate set up occupancy rights in defence to an action in ejectment by the landholder, Revenue Courts alone have jurisdiction.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 69 of 1910.

Mr. *V. Rama Doss*, for the Appellant.

Messrs. *B. N. Sarma* and *V. Ramesam*, for the Respondents.

JUDGMENT.

WALLIS, OFFG. C.J.—For the purposes of our decision the facts in Appeal Suit No. 277 of 1911 and Second Appeals Nos. 1508 to 1510 of 1912 may be considered to be the same. Both were suits in ejectment brought by the alienees of part of a village in the Uratla Estate, and the question is whether the jurisdiction of the Civil Courts is not barred under the provisions of the Madras Estates Land Act. The Uratla Estate is admittedly an estate within the meaning of the definition in section 3 (2) of the Act, while the portion of a village alienated to the plaintiffs does not itself form an estate within the meaning of the Act

as it does not come within any of the descriptions in sub clauses (*a*) to (*c*). The District Munsif and District Judge in the one case and the Subordinate Judge in the others are all agreed on this point, and are so far clearly right. They have, however, drawn the inference that because the land alienated to the plaintiffs does not itself form an estate within the definition, it is outside the general scope of the Act, and the provisions barring the jurisdiction of the Civil Courts in suits for ejectment are inapplicable. This view is opposed to several unreported decisions of this Court to which we have been referred, but as it has been held by all three Judges of the lower Court it may be as well to deal with the question on the merits. Though the plaintiff is not the owner of an estate, he is clearly the owner of part of an estate and as such a landholder within the definition, in section 3 (6); his tenants are *ryots* within the meaning of section 3 (15) and pay rent within the meaning of section 3 (11). As a landholder he may sue for ejectment before the Collector under section 151, and the right of the Civil Court to entertain such suits is barred under section 179, nor is there, as appears to have been imagined, anything inconsistent with the scheme of the Act in holding that the plaintiffs are landholders as owning part of the Uratla Estate although the portion which they own has been absolutely severed from the rest of the estate and the proprietor of the latter has no interest in it. As appears from the title and the preamble the general scope of the Act is to declare and amend the law relating to the holding of land in estates in the Presidency, that is, of course, in estates as defined in the Act to the exclusion of the large areas such as the *ryotwari* tracts which do not come within the definition. Again even in estate the general provisions of the Act are only applicable as between landholders and *ryots* as defined in the Act and do not apply to the relations between *ryots* in estates and thoss holding under them, except, of course, as expressly mentioned. In this state of things the Legislature was faced with the question whether estates as defined in the section which had become divided in ownership without being split into two or more estates should as between the several owner and the *ryots* under them be regulated by the general provisions of the Act, and it seems to me there were obvious reasons for so including them by providing that landholder should include a person owning part of an estate, that is of an area to which the general provisions of the Act were intended to apply. In any case the provisions of the Act are plain in my opinion and we are bound to give effect to them. The appeal and the second appeals are allowed and the decrees set aside; all the plaints will be returned for presentation to the proper Court. Costs to abide the result.

SESHAGIRI AIYAR, J.—The plaintiff sues to eject the defendants from certain lands in the village of Mallavaram. It is conceded that geographically these lands are within Uratla, a permanently settled estate. It is also not disputed that they belonged originally to the proprietors of the Uratla Estate; they were given to one Subadriah Garu in exchange for certain *maniam* lands situated elsewhere. The plaintiff purchased these lands from the son of Subadriah Garu. His allegation is that the defendant had no occupancy right in these lands and that he is entitled to eject him. The defendant demurs to the jurisdiction of the Civil Court. He pleads that he is an occupancy *ryot* and is entitled to remain in possession. The learned District Judge held that he had jurisdiction to entertain the suit: and holding that defendant was liable to be evicted, gave a decree to the plaintiff. The defendant has appealed.

I am of opinion that the Civil Courts have no jurisdiction. It is admitted that the lands in suit were originally *ryoti* lands, and the evidence is clear and uncontradicted that at the time of the exchange they continued to be *ryoti*. It is not necessary for the purpose of deciding the question of jurisdiction to determine whether both the *warams* vested in Subadriah Garu or only the *melvaram*: I do not think that the fact that the exchanged lands were *inams* has any bearing upon the question we have to decide. Our opinion in regard to them must depend upon their own character and not upon that of the property for which they were substituted.

The learned District Judge based his judgment mainly on the ground that Mallavaram is not an estate as defined in section 3 (2) of the Estates Land Act and

consequently the provisions of the Act do not apply to lands in that village; I am unable to agree with this view. It is clear that the Act was not intended to be confined in its operation only to estates in their entirety which fell under one of the five clauses of section 3 (2): I do not think it is open to us to attribute an intention to the Legislature which is inconsistent with the operative portions of the Act. Section 200 of the Act makes it clear that parts of an estate are within the Act. On principle, it seems clear that all lands in a permanently settled estate are to have the benefit of the Act, and the fact that a portion of the estate has been granted to a stranger should not make any difference in this behalf. In Second Appeal No. 1218 of 1911, it was held that the definition of 'estate' is not the governing factor in deciding the applicability of the Act. I am of the same opinion. Mr. Sarma's chief contention is that the word '*estate*' used in clauses 2, 5, 15 and 16 of section 3 refers to one as it existed at the time of the Estates Land Act and not to one with limits ascribed to it at the time of the Permanent Settlement. As a corollary from this, he argues that portions of the parent estate which either by operation of law or by act of parties ceased to belong to the permanently settled estate are not within the ambit of the Act. No authority has been quoted for this proposition, nor can such a contention be upheld even on grounds of expediency. As a matter of fact, portions of estates granted subsequent to the Permanent Settlement are included for revenue purposes within the estate. Their liability to be attached for arrears of revenue continues and unless separated and separately registered the lands continue to be part of the estate. The definition of *landholder* (section 3 clause 5) places the matter beyond doubt. There can be more than one landholder *within an estate* and each will have all the powers given to that class by the Act. I feel no doubt that Mallavaram is within the Uratla Estate even though the proprietor of that estate is not the landholder in respect of the village, and that the plaintiff is a landholder. I have already held that the land in suit was *ryoti* land; and it follows from the above that the defendant is a *ryot*. I am not deciding whether he has got occupancy right in the land. He has put forward that claim and it is upon that assumption that the question of jurisdiction has to be determined. From my findings about the nature of the land, and the characters of the plaintiff and the defendant section 151 of the Estates Land Act applies to the case; and under Article 17 of the Schedule only Revenue Courts have jurisdiction. This conclusion of mine is in accordance with the decisions in Second Appeals Nos. 168 of 1912, 323 of 1913 and *Sri Sri Sri Brundavana Chandra* v. *Pragada Rammayya* (1). I agree that the appeal should be allowed and that the plaint should be returned to the plaintiff for presentation to the proper Court. In the second appeals also, the plaint will be returned for presentation to the proper Court.

Appeal allowed.

(1) 25 Ind. Cas. 664; 26 M. L. J. 600; 1 L. W. 486.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1651 OF 1913.

November 25, 1914.

Present:—Mr. Justice Tudball.

KAMTA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PARMESHWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Grove—Grove on sir land—Right of grove-holder—Ejectment.

The plaintiff, *zemindar* of a village, permitted the defendant to plant grove on a *sir* plot on the payment of a nominal rent. Subsequently the plaintiff's *zemindari* right was sold but the grove existed as before:

Held, that the defendant grove-holder could not be ejected from the grove at the instance of the plaintiff.

Second appeal from the decision of the Sub-Judge of Cawnpore, dated the 5th of September 1913.

Mr. *Hamilton*, for the Appellants.

Mr. *Baldeo Ram*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit in ejectment. The Court below has found the facts to be as follows. Sometime prior to the year 1887 the predecessor-in-title of the plaintiffs was

the owner of certain *zemindari* plots, one of which was the grove land now in dispute. This was recorded as his *sir*, but with the sanction of this owner one Khushal Singh, uncle of Nathu Singh, planted a grove on the land and continued to pay a rent of Rs. 3-8. In 1887 Nathu Singh sold the grove to the predecessor-in-title of the present defendants and left the village. From that date up to the present time the defendants continued to hold the land on payment of a nominal rent of Rs. 3-8. Trees still stand upon it and still constitute a grove. The plaintiffs in the meantime had lost their *zemindari* and the land no longer belongs to them, although it is possible (if it were *sir* that when they lost their *zemindari* they acquired an ex-proprietary tenant right. They now sue to eject the defendants. In these circumstances the Courts below have refused to give the plaintiffs a decree for the ejectment of the defendants. It is a well-known custom in these provinces that when the owner of land allows another to plant trees and make a grove thereon the condition of the tenancy is that the land shall be held by the grove-holder so long as the trees constitute a grove and that when the trees are removed or the grove ceases to exist the land reverts to the land-holder. It certainly would be most inequitable in the circumstances of the present case to eject the defendants and to hand over the trees which they have grown upon the land to the plaintiffs without the breaking of any condition and merely at the will of the plaintiffs. Whatever may have been the right of the latter it is quite clear that a grove-holder has a right to continue holding the land so long as he fulfils the conditions on which the land is given. In my opinion the decision of the Court below is perfectly correct. The appeal, therefore, fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 692 OF 1913.

October 9, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

VINJAMURI VEERA VENKAYYA—PLAINTIFF—PETITIONER

versus

YENAMURTHI VEERABHADRUDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (5)—Lessee from transferee of zemindar—*Right to lease and cultivate—Estate-holder.*

A person obtaining a lease of land with the right of leasing it to others as well as of cultivating it himself from a person who derives his right by transfer from the *zemindar*, is an estate-holder within the meaning of section 3 (5) of the Estates Land Act; *Sivini Appalanarasimhulu* v. *Murada Sanyasi*, 17 Ind. Cas. 210, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Cocoanada, in Small Cause Suit No. 938 of 1911.

Mr. *P. Narayanamurthi*, for the Petitioner.

Mr. *B. Narasimha Rao*, for the Respondents.

JUDGMENT.—We follow *Sivini Appala narasimhulu* v. *Murada Sanyasi* (1), and attach importance to the provision in paragraph 7 of Exhibit I for plaintiff's leasing the land to others as well as cultivating it himself. There is also the fact that the plaintiff's predecessor derived his right by transfer from the original owner, the *zemindar* on these considerations. We agree with the lower Court that the plaintiff is a landholder within the meaning of section 3 (5) of the Madras Estates Land Act and dismiss the civil revision petition with costs.

Petition dismissed.

(1) 17 Ind. Cas. 120

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 711 OF 1913.

Present:—Mr. Justice Chitty.

LACHMI CHAND JHOWAR—PLAINTIFF

versus

HEMENDRA PRASAD GHOSH—DEFENDANT.

Evidence Act (I of 1872), s. 92 (2)—Promissory note silent as to interest—Contemporaneous oral agreement as to interest, whether provable.

Where a promissory-note is silent as to interest, evidence of a contemporaneous oral agreement as to the rate of interest, cannot be allowed under proviso (2) of section 92 of the Evidence Act as it would have the effect of materially adding to the terms of the written contract.

Sowdamonee Debya v. *A. Spalding*, 12 C. L. R. 163; *Ghanshiam Lalji* v. *Ram Narain*, 29 A. 33 (P. C.); 11 C. W. N. 105; 17 M. L. J. 35; 4 A. L. J. 29; 1 M. L. T. 427; 9 Bom. L. R. 1; 5 C. J. J. 7; 34 I. A. 6, referred to.

JUDGMENT.—This is a suit upon a negotiable instrument. Though written on a *hundi* stamp and purporting to be accepted, the document is in form a promissory note for Rs. 1,100 payable sixty days after date. The promissory note is admitted by the defendant. The only question is as to interest. The promissory note is silent as to interest, but the plaintiff pleads that the rate of discount agreed between the parties at the time the said *hundi* was drawn was 5 per cent. per mensem, and it was agreed between the plaintiff and the defendant that if the defendant should fail to pay the amount due on the said *hundi* as the same became due, he should pay interest on the amount so remaining due at the aforesaid rate of 5 per cent. per mensem. The defendant denies that he agreed to pay at the rate of 6 per cent. (it should be 5 per cent.) per mensem, but admits an agreement to pay at the rate of 12 per cent. per annum. The only point for my determination is whether the plaintiff can be allowed to give evidence of the agreement which he alleges. I am of opinion that he cannot. It is true that in the case of *Sowdamonee Debya* v. *A. Spalding* (1), evidence of a subsequent agreement appears to have been allowed. That was a reference from the Small Cause Court and the point does not appear to have been argued. The case of *Ghanshiam Lalji* v. *Ram Narain* (2) has no application as the collateral agreement there was in writing, and the question was whether such an agreement was enforceable, by reason of the provisions of section 80 of the Negotiable Instruments Act, 1881. In my opinion, evidence of the agreement now sought to be proved is excluded by the provisions of s. 92 of the Evidence Act. It is, as pleaded, a contemporaneous oral agreement which would have the effect of materially adding to the terms of the written contract. It cannot, I think, be allowed under proviso 2 to the section. It is true that the promissory note is silent as to interest, but that would be the case in most documents into which an additional stipulation is to be introduced. This too is a formal document, and it cannot be presumed that the parties intended to agree upon anything that was not inserted in it. It would, in my opinion, be very dangerous to allow evidence of such agreements, as the creditor would be thus enabled to adapt the rate of interest to the requirements of the case, and, when the debtor had once failed to pay, to enhance his claim accordingly.

The defendant admits the claim for interest at 12 per cent. per annum and this I think he must pay. There will be a decree for the plaintiff for Rs. 1,100 and interest on that amount at 12 per cent. per annum from the due date of the promissory-note till to-day, and costs on scale No. 2 and interest on judgment at 6 per cent. per annum.

Suit decreed.

(2) 29 A. 33 (P. C.); 11 C. W. N. 105; 17 M. L. J. 35; 4 A. L. J. 29; 1 M. L. T. 427; 9 Bom. L. R. 1; 5 C. L. J. 7; 34 I. A. 6.

(1) 12 C. L. R. 163.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REVISION PETITION NO. 2 OF 1913-14 OF BAHARAICH DISTRICT.

April 7, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

SURAJ BALI—DEFENDANT—APPELLANT

versus

DAN BAHADAR SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 26—Appellate Court, omission of, to fix time for filing objections to findings of lower Court—Irregularity, technical.

The omission of an Appellate Court to fix a time, as required by Order XLI, rule 26, Civil Procedure Code, within which either party may present a memorandum of objections to findings of the lower Court, is a mere technical irregularity and may be ignored if it does not in any way prejudice the party complaining of the same.

KUNWAR BAHADUR *v.* BINDRABAN.

Appeal from the decree of the Commissioner, Fyzabad, dated 8th September 1913, upholding the order of the Assistant Collector, Bahraich, dated 25th July 1913.

Babu *Aditya Prasad*, for the Appellant.

Mr. *F. O. O'Neill*, for the Respondents.

JUDGMENT.—This appeal is urged on the ground that when the Commissioner received the evidence on findings in the Court of first instance, he should under rule 26 of Order XLI have fixed a time within which either party might present a memorandum of objections. It is true that the Commissioner omitted to fix such a date, but the result is a purely technical irregularity and did not, in my opinion, prejudice the appellant. A very careful inquiry was made by the Court of first instance and a finding recorded, and this finding was considered by the Commissioner after hearing the Pleader for the appellant. I do not think that to order any further proceedings would serve any useful purpose whatsoever. The objection is purely technical and I see no reason to re-open the question decided and decided on grounds which admit of no doubt.

The appeal is dismissed with costs on the appellant.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 192 OF 1914.

December 15, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

KUNWAR BAHADUR—PLAINTIFF—APPELLANT

versus

BINDRABAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Hindu Law—Alienation by widow—Contest by remote reversioner—Cause of action—Limitation.

A suit for a declaration that an alienation made by a Hindu widow is not binding on the plaintiff, a remote reversioner, is governed by Article 120 of the Limitation Act.

The cause of action accrues on the date of alienation.

Second appeal from the decision of the Subordinate Judge of Farrukhabad, dated 3rd November 1913.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—This is a second appeal by a plaintiff whose suit for a declaration has been dismissed by the lower Appellate Court as barred by limitation. Debi Das, father of the plaintiffs, had two brothers, Jwala Parshad and Prag Das; they lived separately. Jwala Parshad died childless, leaving a widow, *Musammat* Rukmani. This lady, while in possession of the property of her late husband with a Hindu widow's estate, executed a deed of sale on February 12th, 1898, transferring to certain persons, who appear as defendants Nos. 1 and 2 in the case, a house which had belonged to her late husband. By the present suit instituted on April 11th, 1913, the plaintiff sought a declaration that this sale-deed was ineffectual as against him and enforceable only during the life-time of *Musammat* Rukmani. He impleaded this lady as a defendant, and also his own father, Debi Das, and his uncle, Prag Das. Only the defendants-vendees contested the suit, no appearance being entered by any of the others. Ordinarily the plaintiff would not be permitted to maintain such a suit he not being the nearest reversioner to the estate of Jwala Parshad in the presence of his own father and uncle. The plaintiff accordingly pleaded that Prag Das had colluded with *Musammat* Rukmani and with the vendees at the time of the sale; with reference to Debi Das he pleaded that the latter had long since severed himself from all connection with mundane affairs and elected to reside in solitude in a certain garden. He claimed that a cause of action accrued to him on February 13th, 1910, the date on which a suit by his father or his uncle became barred by limitation under the provisions of Article 125 of the first Schedule to the Indian Limitation Act (IX of 1908) and that his suit was within time under Article 120 of the same Schedule. It may be noted that the plaintiff gave his own

age as thirty years in June or July 1913, so that he attained majority within three years of the execution of the sale-deed in question. There is, therefore, no question of any extension of period of limitation on the ground of the plaintiff's minority.

The learned Subordinate Judge has found clear authority, in certain decisions of the Madras High Court referred to in his judgment, for the proposition that the plaintiff's cause of action accrued to him on the date of the execution of the sale-deed of February 12th, 1898, and that the period of limitation for the same is that provided by Article 120 of the Schedule to the Limitation Act. He has not, therefore, thought it necessary to examine in any detail the precise pleadings in this particular case. Yet these are sufficient in themselves to make the plaintiff's position a very difficult one, even if the propositions of law contended for on his behalf are correct. So far as his uncle Prag Das is concerned, the plaintiff's allegation that a cause of action accrued to him on February 13th, 1910, will not bear a moment's examination. He says that Prag Das colluded with the vendor and vendees at the time of this sale, so that he had his cause of action complete on that date or at latest on the date on which the fact of Prag Das' collusion became known to him. As regards the plaintiff's father, the point may not be quite so clear because the facts have not been gone into. A comparison of the plaint and the written statement certainly suggests that the parties intended to plead, and did in fact plead, that Debi Das' withdrawal from all interest in worldly affairs took place prior to the execution of the contested sale-deed. The plaintiff uses the vague expression "long since," the defendants, while admitting the correctness of the paragraph in the plaint regarding Debi Das' withdrawal from the world, pleaded that the deed in suit had been executed with the knowledge and information of, and in consultation with, the plaintiff and his uncle, Prag Das. The fact that it would have been useless for the vendees to attempt to obtain the consent of Debi Das was presupposed by the pleadings and the frame of the issues. If this fact be admitted, it seems clear that the plaintiff, on his own showing had a complete cause of action the day on which he knew that Prag Das had wrongfully colluded with the vendor and vendees to execute the sale-deed in suit. Whether he had a valid cause of action, is of course, quite a different question and one as to which we express no opinion; it is enough to find that it was a cause of action which had become barred by time long before the institution of the present suit.

When the facts above noticed were brought out in the course of arguments before us, a strong appeal was made to us not to decide the matter on these grounds without remitting issues to the Courts below, the point taken being that neither of those Courts had considered the question of limitation in this particular light. We are not disposed to remit issues. It cannot be said that such a question as the date of the retirement of Debi Das from all interest in wordly affairs, or the precise nature of that retirement, was ever put in issue on the pleadings. The parties went to trial on the admission that this retirement took place so long ago that its precise date was quite immaterial and practically also on the admission that this retirement was so effective and complete that Debi Das had put himself in such a position that he could not be expected to do anything to protect the interests of his son from the nefarious schemes of the other defendants.

Apart from this, as the question of law involved was argued before us at length, we think it right to say that we are not prepared to accede to the proposition of law on which the plaintiff-appellant's case rests. In the case of an alienation by a Hindu widow the person or persons who would be entitled at any given moment to succeed to the estate of her late husband, have a cause of action from the date of the alienation and a right to sue under Article 125 of the first Schedule to the Indian Limitation Act within twelve years of the date of such alienation. The contention for the appellant is that their failure to do so within twelve years *ipso facto* creates a cause of action for the next reversioner or reversioners, which action may be brought within

a further period of six years under Article 120 of the same Schedule. It would follow that the expiration of this period would create a fresh cause of action with a further period of limitation for the reversioner or reversioners one degree further removed and so on for the whole lifetime of the widow. No direct authority can be quoted for propositions so remarkable.

The principal cases referred to in argument may be noted below:—

Rani Anund Kunwar v. *Court of Wards* (1); *Abinash Chandra Mozumdar* v. *Harinath Shaha* (2); *Jhula* v. *Kanta Prasad* (3); *Bhagwanta* v. *Sukhi* (4 ; *Ayyadorai Pillai* v. *Solai Ammal* (5); *Govinda Pillai* v. *Thayammal* (6).

In the first of these their Lordships of the Privy Council were dealing with a suit to set aside an adoption, a suit for which a period of twelve years from the date of the adoption is specifically provided, by whomsoever the suit may be brought. It is certain, therefore, that when they spoke of some act or omission on the part of the nearest reversioner by which the latter disabled himself from suing, they were not thinking of the reversioner's merely allowing the prescribed period of limitation to run out. In the Allahabad case no question of limitation arose. The cases in *Abinash Chandra Mozumdar* v. *Harinath Shaha* (2) and *Govinda Pillai* v. *Thayammal* (6) turned on the minority of the plaintiff in each of those cases. The truth appears to be that the various Articles in the Schedule to the Limitation Act dealing with such suits as the present and cognate suits to contest an adoption by a widow were framed with special reference to the provisions of section 42 of the Specific Relief Act (I of 1877). The Schedule, therefore, made no express provision for the rare cases in which a suit like the present is permitted to be brought by a more remote reversioner by reason of collusion or wilful default on the part of the nearest reversioner or reversioners. The result, no doubt, is that such suits must necessarily be referred to Article 120 of the Schedule. It does not follows however, that a remoter reversioner is thereby entitled to sit still and wait for limitation to run out against every reversioner nearer in degree than himself. An improper alienation by a Hindu widow is a wrong to the entire body of reversioners, and in a sense it affords an immediate cause of action to all of them. The reason why such action is ordinarily required to be brought by the nearest reversioner in degree and the special cases in which this rule may be relaxed, have been pretty well settled since the decision of the Privy Council in *Rani Anund Kunwar* v. *Court of Wards* (1). But it is for more remote reversioners to be on the watch to safeguard their own interests and when they find that no action is being taken by the nearest reversioner or reversioners, to inquire into the reasons for such inaction and call upon the person or persons entitled to do so to protect the interests of the whole body of reversioners. For the purposes of the present case it is quite sufficient to say that it must lie heavily on the plaintiff in a suit like the present to explain why he took no action before the period of limitation prescribed for a suit by the nearest reversioner had expired. It is not necessary for us to go the full length of the Madras rulings relied on by the learned Subordinate Judge in order to arrive at the conclusion that he has rightly dismissed the present suit as time-barred. So holding we dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) 6 C. 764; 8 C. L. R. 381; 8 I. A. 14; 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63.

(2) 32 C. 62; 9 C. W. N. 25.

(3) 9 A. 441; A. W. N. (1887) 91.

(4) 22 A. 433(F. B.); A. W. N. (1899) 159.

(5) 24 M. 405.

(6) 28 M. 57; 14 M. L. J. 209.

VENKATACHALAM CHETTY *v.* NARAYANAN CHETTY.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 184 OF 1912.

December 15, 1914.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

VENKATACHALAM CHETTY—DEFENDANT No. 1—APPELLANT

versus

A. N. R. M. NARAYANAN CHETTY AND OTHERS—PLAINTIFFS Nos. 1 TO 5 AND DEFENDANTS No. 2 TO 5—RESPONDENTS.

Contract Act (IX of 1872), *ss.* 201, 209, 218—*Principal and agent—Suit to recover money—Limitation—Moveable property—Money, whether moveable property—Agency, termination of—Limitation Act (IX of* 1908), *Sch. I, Arts.* 89, 115—*Agent's contract to account, suit on—Article applicable.*

As money is moveable property within the meaning of Article 89 of Schedule I of the Limitation Act, a suit by a principal against his agent for money received and not accounted for is governed by Article 89 of the Limitation Act and is barred if not brought within three years of the date of the termination of the agency.

An agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue.

Therefore, where an agent in obedience to a telegram sent by his principal hands over the charge to another person, his agency terminates that very day as his authority is revoked.

An agent's contract to account to his principal, whether express or implied, is specially provided for in Article 89 of Schedule I of the Limitation Act and it cannot be included under Article 115 of the Act.

Babu Ram v. *Ram Dayal*, 12 A. 541; A. W. N. (1890) 99; *Fink* v. *Buldeo Dass*, 26 C. 715; 3 C. W. N. 524, dissented from.

Hurrinath Rai v. *Krishna Kumar Bakshi*, 14 C. 147 (P.C.); 13 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P.C.J. 751, *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Chowdhry*, 5 Ind. Cas. 59, 14 C. W. N. 122, *Asghar Ali Khan* v. *Khurshed Ali Khan*, 24 A. 27; 3 Bom. L. R. 576; 28 I. A. 227 (P. C.), followed.

Mati Lal Bose v. *Amin Chand Chattopadhy*, 1 C. L J. 211, distinguished.

Shib Chandra Roy v. *Chandra Narain Mukerjee*, 32 C. 719; 1 C.L.J. 232; *Hafezuddin Mandal* v. *Jadu Nath Saha*, 35 C. 298; 12 C. W. N. 820; 7 C. L. J. 279, referred to.

Per *Seshagiri Aiyar, J.*—In an agent's contract the fixing of a date for rendering accounts cannot stop the termination of the agency.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 145 of 1910.

Mr. *C. S. Venkatachariar*, for the Appellant.

Messrs *C. V. Ananthakrishna Aiyar*, *K. V. Krishnaswami Aiyar* and *N. Duraisawmy Iyengar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The first defendant was employed by the plaintiffs, a firm of Nattukottai Chetties of Devakotta in the Ramnad District, to carry on business at certain places in Burmah as their agent under the terms of a document, Exhibit A, known as a salary *chit* executed by the 1st defendant on his appointment. By this he undertook to carry on the business under the direction of the 1st plaintiff and stipulated that on bringing back the cash and accounts to Devakotta and rendering the same, he was to get back the salary chit. It is explained that in the case of these agents the return of the salary *chit* means that the agent has passed his accounts and that his conduct has been satisfactory. The present suit is brought by the plaintiffs for an account of his dealings, and the question is whether it is barred by limitation. The 1st defendant continued to represent the plaintiffs in Burmah after the expiry of the three years originally agreed upon, and the plaintiffs who were dissatisfied with his conduct had some difficulty in getting rid of him, as appears from the correspondence. As early as the 24th November 1906 they wired to him to give the keys, accounts, and a power to the 4th defendant who was to succeed him, and at length on the 2nd March 1907, having executed a power-of-attorney in favour of his successer apparently with a view to facilitate the collection of debts owing to the firm, he handed over charge to his successor, who gave him Exhibit IV, a signed receipt, and a list of outstandings which were stated to have been checked, and also apparently Exhibits G and G1, certain further particulars signed by his successor, which he subsequently handed over to the plaintiffs at Devakotta.

He then received a sum of Rs. 200 for his travelling expenses and for sweets and other presents to be purchased for the principals. According to the evidence taken on commission for the plaintiffs, Exhibit VIIIA, this sum was not given as a loan, but he could do what he liked with it. It is customary to pay such sums to agents

when they are returning. It is not very easy to reconcile this with the earlier statement made by the witness that if any surplus remained, it was to be handed over to the principal or an account rendered. On his arrival at Madras on the 19th March 1907, the 1st defendant wrote Exhibit H, and wired Exhibit H-1 to plaintiffs announcing his arrival and stating that he was coming in two days. According to the evidence for the plaintiffs, he came later and handed over Exhibits G and G1, but he never accounted for his agency or got back his salary *chit*.

The question then is, whether in these circumstances the suit is barred. It is now well settled that money is moveable property within the meaning of Article 89 of the Limitation Act. That Article applies to suits by a principal against an agent for moveable property received by the latter and not accounted for and time begins to run "when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates." The 1st defendant in the present case relies on the termination of the agency. Under section 201 of the Indian Contract Act an agency is terminated, among other ways, by the principal revoking his authority, or by the agent renouncing the business of the agency, or by the business of the agency being completed, and it is from this point, under Article 89, that time is to begin to run in a suit by the principal for money received or not accounted for. Under section 218 of the Indian Contract Act the agent is, no doubt, bound to pay the principal the sums received on his account, but it cannot be said that until he does so, the agency is not determined because the business of the agency is not completed, for the terms of Article 89 necessarily involve that the agency may be terminated before the payment is made. I am, therefore, with great respect, unable to agree with the observations in *Babu Ram* v. *Ram Dayal* (1) and *Fink* v. *Buldeo Dass* (2), which do not seem to have been necessary for the decision as there were other grounds for holding that the agency had not been determined. The better view appears to be that the agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue.

Article 89 was worded in the present form for the first time in the Act of 1877, but in *Hurrinath Rai* v. *Krishna Kumar Bakshi* (3), a case under Act IX of 1871, their Lordships of the Judicial Committee observed that whether Article 60 or Article 90 or Article 118 of that Act applied, time must be counted from the day when the defendant ceased to discharge the duties of *dewan* by departing from the plaintiff's service. That was a case of termination of the agency by the agent renouncing the business of the agency within the meaning of section 201 of the Indian Contract Act. The present would appear to be an equally clear case of termination of the agency by the principal revoking his authority and the agent handing over charge to his successor. I think that on the facts set out above, his agency was determined before he left Burmah and that as the suit was instituted more than three years later it is barred if Article 89 applies.

It is said, however, that under Exhibit A the 1st defendant was bound to return to Devakotta, hand over the money and accounts and pass his accounts, and that Article 89 is inapplicable as there was an express agreement that the 1st defendant should pass his accounts on his return. The plaintiffs rely on a decision in *Jogesh Chandra* alias *Dhala Ghose* v. *Benode Lal Roy Chowdhury* (4), that where there was a definite contract to render an account yearly, Article 115, and not Article 89, would be the Article applicable in the case of unregistered contracts. This case proceeded to some extent on the authority of a decision in *Mati Lal Bose* v. *Amin Chand Chattopadhy* (5), that in the case of a contract in writing registered, Article 89 does not apply, but Article 116. The authority of the latter decision has been doubted in *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (6) and *Hafezud-*

(1) 12 A. 541; A. W. N. (1890) 99.
(2) 26 C. 715; 3 C. W. N. 524.
(3) 14 C. 147; (P. C.); 13 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P. C. J. 751.
(4) 5 Ind. Cas. 59; 14 C. W. N. 122.
(5) 1 C. L. J. 211.
(6) 32 C. 719; 1 C. L. J. 232.

din Mandal v. *Jadu Nath Saha* (7), and it is not in my view conclusive of the present case.

As regards the present question, it seems to me that the agent's contract to account to his principal, whether express or implied, is specially provided for in Article 89, and if that be so, it cannot, having regard to the language of Article 115, be brought under that Article. I am, therefore, unable with great respect to follow the decision in *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Chowdhury* (4), and hold that the suit was barred and that the appeal must be allowed, and the suit dismissed with costs throughout.

The memorandum of objection is not pressed and is dismissed.

SESHAGIRI AIYAR, J.—I agree with the learned Chief Justice. The suit is by the plaintiffs, the principals, for an account against the 1st defendant, the agent. The Subordinate Judge disbelieved the plea that the accounts were finally rendered and passed a preliminary decree for the taking of accounts. Mr. C. S. Venkatachariar for the 1st defendant in the appeal argues that the suit is barred by limitation.

With great reluctance I have come to the conclusion that the contention is well-founded. I do not see my way to holding that either Article 115 or Article 120 of the Limitation Act applies to this case, as contended for by Mr. C. V. Ananthakrishna Iyer for the respondents Nos. 1 to 5. Article 115 is the residuary Article relating to contracts and is made applicable only where there is no special provision relating to contracts. Article 120 is the general residuary Article. Article 89 in terms provides for an account respecting moveable property received by the agent from the principal. The Judicial Committee have laid down in *Asghar Ali Khan* v. *Khurshed Ali Khan* (8) that money is moveable property within the meaning of this Article. The suggestion of the learned Vakil for the respondents Nos. 1 to 5, that as the account claimed by the principal related to moneys lent out by the agent on his behalf, and which are still unrealised, the present claim is not for moveable property received from the principal, ignores the fact that the outstandings are part of the original advance made by the plaintiff to the defendant and of its augmentation. It was also contended that as Exhibit A provided for the rendering of the account at Devakotta on the return of the agent from Burma, the agency did not terminate till that was done. I am unable to accept this contention. Under section 201 of the Contract Act an agency is terminated by the principal revoking his authority or by the business of the agency being completed. In this case, the plaintiffs sent a telegram on the 24th November 1905 to the 1st defendant to hand over to one Muthiah the accounts (Exhibit VII) on the 18th December 1906; he asked the agent to start immediately (Exhibit VIB). A similar communication was sent on the 20th December 1906 (Exhibit VIIA). On the 2nd March 1907, the 1st defendant handed over the accounts to Muthiah and started for Madras. I am of opinion that the agency terminated on this date and as the suit was instituted more than three years after this date, it is barred by limitation.

The decisions in *Babu Ram* v. *Ram Dayal* (1) and *Fink* v. *Buldeo Das* (2) do not affect this conclusion. It was held in those cases that until an agent for the sale or purchase of goods pays the sale-proceeds or delivers the purchased properties to the principal, the agency does not terminate. This rests on the ground that the business is not completed with the effecting of the sale or purchase, because it is the essence of an agency in such cases that the sale-proceeds or the property purchased should be handed over to the principal.

It is said that the first defendant took Rs. 200 as passage money for which he had to render an account. There may be a separate accountability for this sum, but this is no part of the business carried on in Rangoon for which the defendant was constituted the agent. It is in evidence that the agent came to Madras and handed over some accounts to the plaintiff at Devakotta. That fact will not have the effect of intercepting the termination of the agency. The business on which the 1st defendant was engaged was completed when he handed over the accounts to Muthiah. That was

(7) 35 C. 298; 12 C. W. N. 820; 7 C. L. J. 279.
(8) 24 A. 27; 3 Bom. L. R. 576; 28 I. A. 227 (P. C.).

in obedience to the order of the plaintiffs in that behalf, thereby revoking the agency. The 1st to 5th respondents' Vakil relied on *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Chowdhury* (4) for the position that when there is a special contract fixing a date for the rendering of the accounts, the Article applicable to suits by principals against agents is Article 115 and not Article 89. The fixing of a date for rendering accounts cannot stop the termination of the agency. The authority relied upon in *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Chowdhury* (4) has been dissented from by Maclean, C. J., in *Hafezuddin Mandal* v. *Jadu Nath Saha* (7). Mr. Justice Mukerjee in *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (6) held that Article 89 would apply to a case like the present. I am, therefore, constrained to hold that the suit is barred by limitation.

Appeal allowed; Suit dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 23 OF 1914.

November 30, 1914.

Present:—Sir Charles Fox, KT., Chief Judge.

ESOOF EBRAHIM MOOLLA, ATTORNEY OF ASHA BEE—APPELLANT

versus

ESOOF SULAIMAN ABOO—RESPONDENT.

Probate and Administration Act (V of 1881), ss. 23, 30 and 41—Letters of Administration, limited grant of, when not allowed.

In granting Letters to administer the estate of a deceased person, a limited grant of Letters should not be awarded to the attorney of an absent sharer, if a sharer who is entitled to as much as the absent sharer is within the Province and is willing to administer the estate.

Mr. *Ormiston*, for the Appellant.

Mr. *Rutledge*, for the Respondent.

JUDGMENT.—The answer to the question involved in this appeal is free from doubt. The respondent was a person who, according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, is entitled to a part of the deceased's estate. He was the only one of such persons who applied for Letters of Administration, a full grant could be given to him under section 23 of the Probate and Administration Act 1881.

The appellant who also applied for Letters is the agent of another sharer in the estate who is absent from the Province. To such agent only a limited grant under Chapter III of the Act could be granted under section 30, and then only if no person as much entitled as his principal was willing to act. A sharer in the estate who is in this Province is willing to act, consequently a limited grant could not be made under section 30 to the attorney of the absent sharer in the estate. The respondent was entitled to a full grant as the Court saw fit to act under section 41 of the Act. No grounds were made out for taking this course.

The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 575 OF 1910.

April 20, 1914.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

Moulvi KARAR HASSAN—DEFENDANT—APPELLANT

versus

Syed MUSTAFA HASSAN AND MURTAZA HUSSAIN, REPRESENTATIVES OF SHARIF HUSSAIN, DECEASED, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Interpretation of Statutes—Pensions Act (XXIII of 1871), ss. 11, 12—Legislative enactment, retrospective effect of—Assignment of land revenue—Grant for political services—'Pension,' meaning of.

A legislative enactment is prospective and not retrospective in its operation, except (*i*) when the Act only affects the procedure of the Court, and (*ii*) when the intention of the Legislature is clearly to give it a retrospective effect.

Therefore, the Pensions Act has not a retrospective operation and no alienations made before the Act came into force are invalid under section 12 of the Act.

Imtiaz Begam v. *Liakat-un-nissa Begam*, 6 A. 630; A. W. N. (1884) 209; *Imtiaz Begam* v. *Liakat-un-nissa Begam*, 7 A. 886; A. W. N. (1885) 267; *Jamnadas* v. *Lalitaram*, 2 B. 294; *Dharamdas Sambhudas* v. *Hafasji*, 19 B. 250, referred to.

A mere assignment of land revenue as such does not come within the protection given by sections 11 and 12 unless it fulfils other requirements of those sections.

KARAR HASSAN *v.* MUSTAFA HASSAN.

Baha-ud-Din v. *Moti Lal*, 27 P. R. 1878; *Kundan Lal* v. *Dalip Singh*, 57 P. R. 1884; *Shankar Das* v. *Basant Singh*, 133 P. R. 1888, referred to.

An assignment of land revenue by Government may or may not be a pension, within the meaning of sections 11 and 12; therefore the answer to this question must depend on the facts of each case.

Ordinarily speaking, "pension" involves the idea of a fixed periodical allowance or stipend, and if it is granted on political considerations or for past services or as a compassionate allowance, it cannot be assigned.

Bodhraj Shah v. *Sirdar Amrikh Singh*, 137 P. R. 1890; *Muhammad Qamar-ud-Din Khan* v. *Lachmi Nath*, 95 P. R. 1906; 83 P. L. R. 1907; *Qamar-ud-Din Khan* v. *Mani Ram*, 96 P. R. 1906, 138 P. L. R. 1906, referred to.

Therefore, a grant of a fixed sum clearly made for political services is a political pension and comes within the protection afforded by section 12.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 30th July 1909, affirming that of the Additional District Judge, Ludhiana, dated the 15th March 1909, decreeing the plaintiffs' claim.

Lala *Lajpat Rai*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—This appeal arises out of a dispute between the descendants of two brothers, Sayed Rajab Ali and Sayed Rustam Ali. The plaintiffs, who are the descendants of Rajab Ali, sue Sayed Karar Hassan, son of Rustam Ali Khan, for the recovery of Rs. 817 on account of the *jagir* income for 1906, which has been realized by him, and for a perpetual injunction restraining him from recovering the *jagir* money from defendants Nos. 2 and 3, the *lambardars* of *Mauza* Aligarh, whose duty is to realise the land revenue from the proprietors and pay it to the person entitled to the *jagir*.

It is not disputed that the *jagir* was granted to Rajab Ali for political services and after his death has continued to be recorded in the names of his descendants. It appears that for nearly 50 years Rustam Ali Khan and Karar Hassan have been realizing the *jagir*, but whether this was in pursuance of a transfer of the *jagir* by Rajab Ali to his brother or for some other reason, is a point at issue between the parties and has not been decided by the Courts below. The defendant's contention is that in1847 Rajab Ali transferred the *jagir* to Rustam Ali Khan in lieu of the transfer of *Mauza* Mirpur and a share in a garden at Jagraon by the latter in favour of the former and that this exchange has all along been acted upon by the parties and their ancestors. This plea forms the subject-matter of issues Nos. 9 and 10 and has, as stated above, not been adjudicated upon by the lower Courts.

The suit of the plaintiffs has been decreed by the Courts below on the ground that the *jagir* in question is a political pension within the purview of section 12 of the Pensions Act, XXIII of 1871, and that the provisions of the Act apply to the transfer relied upon by the defendant. Any alienation, if made, is, according to the lower Courts, void under section 12 and cannot be binding upon the plaintiffs. On appeal to this Court, the correctness of these findings has been impugned by the defendant, Karar Hassan, and we have listened to the arguments advanced by Mr. Lajpat Rai and Mr. Muhammad Shafi in support of their contentions.

The first point which requires decision is whether the provisions of the Pensions Act are or are not applicable to the alienation set up by the principal defendant. On this point, we are of opinion that if the alienation took place before the date on which the Act came into force, it cannot be rendered invalid by invoking the aid of an enactment passed subsequent to the transaction. It is now a well-recognised canon of the interpretation of Statutes that a legislative enactment is prospective and not retrospective in its operation.

This rule admits of two exceptions: (1) when the Act only affects the procedure of the Court, and (2) when it appears clearly that the intention of the Legislature was to give a retrospective effect. Now, section 12 of the Pensions Act which avoids an assignment of a pension does not contain a rule of procedure, and the sole question is whether there are words in the Act which show clearly that it was intended to apply to contracts which were in existence at the date of its coming into force. We have read the section carefully and considered the arguments of Mr. Shafi and are unable to find any indication, much less a clear intention, that the section takes away vested rights. The construction contended for by the learned

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Counsel for the respondents would cause great inconvenience and injustice and give the section an operation which would deprive persons of the rights which vested in them long before the Act came into force. This would be manifestly unjust and contrary to the intention of the Legislature.

We are fortified in our view by the decision of the Allahabad High Court in *Imtiaz Begam* v. *Liakat-un-nissa Begam* (1), which overrules an *ex parte* judgment of that Court in *Imtiaz Begam* v. *Liakat-un-nissa Begam* (2), and of the Bombay High Court in *Jamnadas* v. *Lalitaram* (3) and *Dharamdas* v. *Sambhudas Hafasji* (4), which lay down the rule that the Pensions Act has not a retrospective operation.

In the absence of any other law rendering an assignment of *jagir* invalid, we are clearly of opinion that the lower Courts are in error in holding that the alleged alienation in favour of the defendant's father, even if it took place before the Pensions Act came into force, was null and void. The issue as to the *factum* and the date of the alienation should be tried by the Court of first instance and if it be found that the alienation took place prior to the date of passing of the Pensions Act, the transaction must be regarded as vaild.

The next question which we have to consider relates to the nature of the grant in favour of Rajab Ali. Suppose the transfer took place after the Pensions Act came into force, is it invalid under section 12 ? In other words, is it an assignment of *a political or service pension ?*

We find that section 4 of the Act has a wide operation and includes within its scope not only a pension but also a grant of money or land revenue. The same is the case with sections 5 and 8. When we come to sections 11 and 12 we find no mention therein of grants of money or land revenue. A compromise of the wording of the different sections of the Act leads us to the conclusion that an assignment of a grant of land revenue is not prohibited by section 12, unless such grant comes within the meaning of the word "pension" and is made for the consideration specified in section 11.

The authorities quoted by the learned Pleader for the appellant do not lay down the proposition that an assignment of land revenue can never be a pension for the purposes of sections 11 and 12.

In *Baha-ud-Din* v. *Moti Lal* (5), the assignment of land revenue was made to the custodian of a shrine for the benefit thereof and could not be a pension under sections 11 and 12, because the purpose for which it was made was not one of those specified in the sections.

The judgment in *Kundan Lal* v. *Dalip Singh*(6) contains a *dictum* that the income of a *jagir* is not protected from attachment either by section 266 (*g*) of the Civil Procedure Code or section 11 of the Pensions Act, but the *ratio decidendi* is not clear. To the same effect is the law laid down in *Shankar Das* v. *Basant Singh* (7). In both these cases property sought to be attached was assigned land revenue, and we have no hesitation in holding that a mere assignment of land revenue as such does not come within the protection given by sections 11 and 12 unless it fulfils other requirements of those sections.

The word "pension" has not been defined in the Act and we do not propose to lay down any definition which would be exhaustive. Ordinarily speaking "pension" involves the idea of a fixed periodical allowance or stipend and if it is granted on political considerations or for past services or as a compassionate allowance, it cannot be assigned. But a grant by Government does not, in our opinion, cease to be a pension because it takes the form of an assignment of land revenue [vide *Bodhraj Shah* v. *Sirdar Amrikh Singh* (8)].

In *Muhammad Qamar-ud-din Khan* v. *Lachmi Nath* (9) and *Qamar-ud-din Khan* v. *Mani Ram* (10), the *jagir* income was held to be a pension and exempt from attachment in execution of a decree.

The principle which we deduce from the

(1) 7 A. 886; A. W. N. (1885) 267.
(2) 6 A. 630; A. W. N. (1884) 209.
(3) 2 B. 294.
(4) 19 B. 250.
(5) 27 P. R. 1878.
(6) 57 P. R. 1884.
(7) 133 P. R. 1888.
(8) 137 P. R. 1890.
(9) 95 P. R. 1906; 83 P. L. R. 1907.
(10) 96 P. R. 1906; 138 P. L. R. 1906.

authorities cited before us is that an assignment of land revenue by Government may or may not be a pension within the meaning of sections 11 and 12 and the answer to the question must depend upon the facts of each case.

In the present case the material on the record does not give us sufficient information as to the origin and history of the grant. There is, however, one important document which throws a good deal of light upon the point before us. The *sanad* of 31st August 1868 in favour of Rajab Ali shows that the grant of Rs. 2,696, which was previously partly in perpetuity and partly for life, was made wholly a perpetual grant for the future and payable by the assignment of the land revenue assessed on *Mauzas* Tilondi Kalan and Aligarh. The grant was of a fixed sum and was clearly made for political services.

We, therefore, hold that the grant of the land revenue of *Mauza* Aligarh, which is the subject-matter of the contest between the parties, is a political pension and comes within the protection afforded by section 12.

The plea of estoppel raised for the appellant has no application to the present case and must be overruled.

As the decisions of the lower Courts have proceeded upon assumptions of facts and as there has been no proper trial of the suit, we must set aside the judgments and decrees of the Courts below and remit the case for re-decision.

We, therefore, accept the appeal, set aside the decrees of the lower Courts and direct the Court of first instance to decide the case with reference to the foregoing remarks. The Court-fees on the appeal to this Court and the Divisional Court shall be refunded and other costs shall be costs in the cause.

Appeal accepted; Case remanded.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 59 OF 1913.

September 2, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

VALLI ISE AMANJI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHMAD ADAM ASMAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 9, 10—Valuation determined by Commissioner—Plaintiff failing to pay additional Court-fee within prescribed period—Suit to be dismissed—Plaint not to be rejected—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Option to abandon part of claim for which Court-fee not paid in time.

If as the result of an inquiry under section 9 of the Court Fees Act a Court directs the plaintiff, if he wishes to continue the suit, to pay the required additional Court-fee within a time fixed by the Court and the plaintiff fails to do so, the plaint should not be rejected under Order VII, rule 11, Civil Procedure Code, but the suit itself should be dismissed under section 10 of the Court Fees Act.

A plaintiff who has not properly valued his claim or paid a sufficient Court-fee is not entitled at the last moment to an option to abandon part of his claim and retain only that part for which he has paid a sufficient Court-fee.

Appeal from an order passed by the District Judge of Broach, in Appeal No. 15 of 1913, reversing the decree passed by, and remanding the suit to, the first Class Subordinate Judge of Broach, in Civil Suit No. 266 of 1913.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *Ramlal Ranchhoddas*, for the Respondents.

JUDGMENT.—In this case we are of opinion that the order of the District Judge is wrong and must be reversed. The suit was brought in 1911, and there was a reference to a Commissioner in regard to the value of the houses and sites claimed in the suit for the purposes of Court-fees. The Commissioner reported unfavourably to the plaintiffs, who, however, did not accept the report and obtained a further inquiry by the Court. Ultimately the Court adopted the Commissioner's valuation with some modification and directed the plaintiffs, if they wished to continue the suit, to pay the required additional Court-fee. They were given a month in which to pay that Court-fee. They failed to do so. The Court then, acting under its powers under section 10 of the Court Fees Act, dismissed the suit. The

dismissal of the suit was of importance to the defendant, because it had only been filed just before the period of limitation elapsed for a suit of that nature, and any suit filed subsequently to the order of dismissal would be barred.

From the order of dismissal an appeal was preferred to the District Judge on the ground that the lower Court had misused its discretion in rejecting the plaintiffs' application for further time, that is to say, time beyond the 13th February 1913. The learned District Judge, however, thought that the discretion was wisely used. So then, as far as the exercise of discretion goes, both Courts were of the same opinion. The learned District Judge, however, thought the order should have been in the form of rejection of plaint under Order VII, rule 11, and that there was authority contained in *Raghubans Puri* v. *Jyotis Swarupa* (1) to show that an option should have been given to the plaintiffs to abandon part of their claim and retain only that part for which they had paid a sufficient Court-fee prior to the 13th February 1913. We are of opinion that the Allahabad decision referred to does not justify the conclusion of the learned Judge, and we are not aware of any provision of law or any authority which shows that a plaintiff who has not properly valued his claim or paid a sufficient Court-fee, is entitled at the last moment to an option such as was allowed to him by the District Judge. The plaintiffs have only themselves to thank for the result of the case in the first Court. The defendants are entitled to rely upon the important benefit that they have obtained through the order of dismissal. We, therefore, set aside the order of the District Judge and restore that of the first Court dismissing the suit with costs. The plaintiffs must pay the costs throughout. The cross-objections are also dismissed with costs.

Order set aside.

(1) 29 A. 325; A. W. N. (1907) 68.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 371 OF 1913.

September 3, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

SARIPALLI VENKATARAYAGOPALA RAJU—DEFENDANT—APPELLANT

versus

FOTA NARASAYYA—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 13, 32—Transaction—Admission against interest—Documents containing recitals as to whether property belongs to particular persons—Admissibility in evidence.

The word "transaction" in section 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons.

In a case where certain properties were claimed as the property of a particular family, the following documents were put in evidence:—

(1) Sale-deeds executed by the widows of the family asserting that the properties covered by them belonged to their husbands;

(2) written statements filed by them in suits to which they were parties and in which they had made recitals;

(3) Recitals in a sale-deed between third persons in which, in describing the boundary of the property sold, the suit property was described as that of the particular family.

Held, (Per *Ayling, J.*)—that the documents mentioned in (1) and (2) were admissible in evidence under section 13 (*a*) of the Evidence Act, as "transactions;" but the documents mentioned in (3) were not admissible in evidence either under section 13 (*a*) as a "transaction" or under section 32 as an admission against interest.

Per *Seshagiri Aiyar, J.*—That all documents were inadmissible in evidence.

Gujja Lal v. *Futteh Lall*, 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132, *In re Daddapaneni Narayanappa*, 8 Ind. Cas. 268; (1910) M.W. N. 668; 9 M. L. T. 91; *Ningawa* v. *Bharmappa*, 23 B. 63, dissented from.

In re Daddapaneni Narayanappa, 8 Ind. Cas. 268; (1910) M. W. N. 668; 9 M. L. T. 91, *Jones* v. *Williams*, 2 M. & W. 326; M. & H. 51; 6 L. J. Ex. 107; 46 R. R. 611, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 435 of 1911 (transferred from the Court of the Subordinate Judge, Ellore), preferred against that of the Court of the Additional District Munsif of Tanuku, in Original Suit No. 283 of 1909.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *B. N. Sarma*, for the Respondent.

JUDGMENT.

AYLING, J.—The sole ground of appeal argued before us is that the judgment of the lower Appellate Court is based on inad-

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missible evidence, *i.e.*, Exhibits A and A1, B and B1 and G.

As regards Exhibits A and A1, I am inclined to hold that they are covered by section 13 (*a*) of the Indian Evidence Act. Plaintiff has to establish the title of his vendors to the suit land; but this turns mainly on whether the land belongs to the Tangella family of which they are members. The case set up by defendants was not that the person entitled to dispose of it was some other member of that family. They pleaded that it never belonged to the Tangella family at all, but was acquired by 1st defendant's great-grandfather and that the name it bore ("Tangellavari Doddi") had no significance.

I think the right of the Tangella family to the plaint land was in question in this suit. Exhibits A and A1 are sale-deeds in which two widows of the Tangella family sold the same property to strangers, as if it was Tangella family property.

These are transactions by which other members of the Tangella family asserted the same right which is now in question. It is not necessary that the assertion should be by parties to the present suit or their predecessors. I consider that Exhibits A and A1 come under section 13 (*a*) of the Indian Evidence Act.

Exhibits B and B1 are copies of the written statements filed by the same two widows in subsequent litigation. They are mentioned, but hardly seem to be relied on by the Subordinate Judge. I do not regard such documents as "transactions" within the meaning of section 13 of the Indian Evidence Act. The words of this section must, in my opinion, be strictly construed. I would respectfully adopt the definition of "transaction" given by Garth, C. J., in *Gujja Lal* v. *Fatteh Lall* (1) as a "business or dealing which is carried on or transacted between two or more persons." The sale-deeds (Exhibits A and A1) fall within this definition, but not these written statements filed in the subsequent suit, and I consider the latter to be inadmissible.

Exhibit G is a sale-deed of an adjoining site between strangers which, in specifying boundaries, describes the suit land as belonging to Tangella Ramudu. This is a transaction, but it is not a transaction by which the right of the Tangella people is asserted, claimed or even recognised: it is a transaction in which the said right is incidentally mentioned. It is not admissible under section 13 (*a*) and I agree with my learned brother, following *In re Daddapaneni Narayanappa* (2), that it cannot be treated as an admission against interest.

I am, therefore, inclined to hold that Exhibits B and B1 and G are not admissible. But I agree with my learned brother that having regard to section 167 of the Indian Evidence Act, it is not necessary to interfere with the decree of the lower Appellate Court on this ground alone.

I would dismiss the appeal with costs.

SESHAGIRI AIYAR, J.—The plaintiff claimed the plaint property by purchase from Tangella Dharmayya and others. First defendant claimed it as his own. The main issue related to the title of the Tangella people. The Subordinate Judge, differing from the Munsif, came to the conclusion that the property belonged to plaintiff's vendors, the Tangella people, and not to 1st defendant. This finding is attacked on the ground that it is based on inadmissible evidence. Exhibits A and A1, B and B1, and G are objected to. A and A1 are sale-deeds by some widows of the Tangella family in which they said that the property belonged to their husbands. B and B1 are written statements by these widows in a suit wherein also they pleaded that the property belonged to their husbands. Exhibit G is a sale-deed of a piece of land by a neighbouring owner in which, in describing the boundaries, the plaint property is described as that of the Tangella people. The respondent's Vakil cited *Ningawa* v. *Bharmappa* (3) in support of the position that the recitals in these documents were evidence. That was a case in which the executants were dead and the learned Judges said that the recital in a mortgage-deed describing the plaint site as belonging to a particular person was a statement against the interest of the person executing the mortgage-deed, inasmuch as he did not lay claim to the

(1) 6 C. 171; 6 C. L. J. R. 439; 3 Shome L. R. 132.

(2) 8 Ind. Cas. 268; (1910) M. W. N. 668; 9 M. L. T. 91.

(3) 23 B. 63.

property which bound his. With all respect, I am unable to agree with this view. If this is correct, it would follow that any person who states that a particular property belongs to another should be held to have made a statement against his interest, because he lays no claim to it himself. I respectfully differ from *Ningawa* v. *Bharmappa* (3). I agree with Mr. Justice Krishnasamy Iyer in *In re Daddapaneni Narayanappa* (2) that such recitals are not evidence under section 32 of the Evidence Act.

The more difficult question for consideration is whether they can be admitted under section 13 of the Evidence Act. There is no authority for the proposition that the recital, in order that it may be admissible, must have been made by a party to the suit or by a person through whom he claims. The language of the section imposes no such restrictions. But I am inclined to think that these documents are not transactions *by which* the right in question was asserted or recognised. In the case of G, there can be no doubt that the transaction, namely, the sale-deed did not assert or recognise the right of the Tangella people. The definition of the term "transaction" given in the well-known case, *Gujja Lall* v. *Fatteh Lall* (1), makes it clear that the description of the boundary is not a transaction (see definition of 'transaction" per Jackson, J., and Garth, C. J., in that case). As regards A and A1 the widows state that the property belonged to their husbands. It is not a transaction in which the right of the vendors in this case was asserted. B and B1 are of the same character. It may be suggested that these documents came under clause (*b*) of section 13. In order to hold that the recitals in these documents are "instances", it must be shown, in the language of Baron Parke in *Jones* v. *Williams* (4), that there must be a common character of locality or of continuity to make the evidence let in, an "instance" of the question to be decided. I am of opinion that these statements in the sale-deeds are not *instances* as contemplated in clause (*b*).

I, therefore, hold that these documents are not admissible to prove the right of the Tangella people. Exhibits A and A1 are, however, admissible for another purpose. The land in dispute was known as the '*Tangella people's site.*' Evidence is admissible under sections 95 and 96 of the Evidence Act to explain this expression, and it is for this purpose the Subordinate Judge has used these documents. They show that the Tangella people laid claim to the suit site. This evidence repels the suggestion of the defendant that the expression is only descriptive of the property and does not mean that the Tangella people had a right to it. My conclusion is that A and A1 were rightly considered by the Subordinate Judge. Although I have held that the Subordinate Judge was wrong in referring to Exhibit G and that Exhibits B and B1 are not evidence I am of opinion that independently of these documents there was sufficient evidence upon which the Subordinate Judge was entitled to come to the conclusion at which he has arrived.

I am satisfied that these three documents did not materially influence him in his finding. Section 167 of the Evidence Act applies. It is, therefore, unnecessary to send the case down for hearing. I agree that the second appeal should be dismissed with costs.

Appeal dismissed.

(4) 2 M. & W. 326; M. & H. 51; 6 L. J. Ex. 107; 46 R. R. 611.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 84 OF 1913.

September 7, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

BHAVANISHANKAR BHAISHANKAR VYAS—PLAINTIFF—APPELLANT

versus

THE TALUKDARI SETTLEMENT OFFICER—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 80—Bombay Land Revenue Code (Act V of 1879), ss. 79A, 202—Gujarat Talukdars Act (Bom. Act VI of 1888), ss. 29B, 33 (2) (cc)—Notice of eviction served by Talukdari Settlement Officer under Bombay Land Revenue Code—Suit for injunction to restrain Settlement Officer from carrying out eviction—Notice of suit under section 80, Civil Procedure Code, whether necessary.

If, under the provisions of the Bombay Land Revenue Code, a Talukdari Settlement Officer serves a notice of eviction on a person whom he considers to be wrongfully in possession of any land, that person cannot, without giving a notice under section 80 of the Civil Procedure Code, sue for a

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permament injunction to restrain the Settlement Officer from evicting him from the land.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 280 of 1911, reversing that of the Assistant Judge at Ahmedabad, in Civil Suit No. 29 of 1909.

Mr. *D. A. Khare*, for the Appellant.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.—We do not think it necessary in this case to call upon the learned Pleader who appears for the Talukdari Settlement Officer in support of the judgment of the lower Appellate Court, for although, as at present advised, we think that the notification purporting to have been issued under section 29B of the Gujarat Talukdars Act was not a sufficient reference to the Talukdar-debtor and his property to extinguish the claim of the plaintiff, if the claim was not submitted under that section, the plaintiff's suit must fail because he has not given notice as required under section 80 of the Civil Procedure Code. The cause of action in the present case is the process initiated by the Talukdari Settlement Officer to enforce the eviction of the plaintiff from the property in question. Section 79A of the Land Revenue Code provides that: any person unauthorisedly occupying, or wrongly in possession of, any land, which he uses or occupies in contravention of any of the provisions of the Gujarat Talukdars Act of 1888, may be evicted summarily by the Collector. Then section 202 of the same Code provides that "whenever it is provided by this or by any other Act...that the Collector may or shall evict any person wrongfully in possession of land, such eviction shall be made in the following manner:—by serving a notice on the person or persons in possession, requiring them...to vacate, and if such notice is not obeyed, by removing... any person who may refuse to vacate." Therefore, the service of the notice which has led to this suit is the first act in the process of eviction provided by section 202 of the Land Revenue Code, and the suit being to restrain the accomplishment of the act of eviction is a suit against a public officer in respect of an act purporting to be done by him in his official capacity, and, therefore, section 80 of the Civil Procedure Code requires as a condition precedent to the institution of the suit a notice which has not been given. The suit must, therefore, be dismissed. Each party should bear his own costs throughout.

Suit dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 186 OF 1913.

September 22, 1914.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

P. GOVINDAN NAIR—PLAINTIFF—PETITIONER

versus

K. NANU MENON—DEFENDANT—RESPONDENT.

Promissory note executed by karnavan *but not signed as* karnavan—*Liability of* tarwad *property.*

Where a suit is based upon a promissory note executed by the deceased *karnavan*, who did not sign himself as *karnavan*, no decree can be given gainst the *tarwad* property.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat, in Small Cause Suit No. 1504 of 1912, dated the 15th November 1912.

Mr. *C. Madhavan Nair*, for the Petitioner.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondent.

JUDGMENT.—The suit has been treated as based on the promissory note executed by the deceased *karnavan* of the defendant's *tarwad*, and not on the original cause of action.

The decision in *Krishna Ayyar* v. *Krishnasami Ayyar* (1), therefore, does not apply, and there is no ground for making the *tarwad* property in the hands of the defendant liable in the present suit. The petition is dismissed with costs.

Petition dismissed.

(1) 23 M. 597.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 329 OF 1913.

August 21, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

MADHAVRAO KESHAVRAO AND ANOTHER —DEFENDANTS—APPELLANTS

versus

SAHEBRAO GANPATRAO AND OTHERS—PLAINTIFFS—RESPONDENT.

Sale—Mortgage—Agreement of re-sale—Mortgage by conditional sale—Construction of document—Intention of parties.

Where the defendant sold his property to the plaintiff for Rs. 300 and got on the same day a deed executed by the plaintiff to re-sell the property to him for the same amount and remained in possession on payment of Rs. 18 as rent and it was found that the real value of the land was something between Rs. 750 and Rs. 1,500 and that fair rent was Rs. 75 a year:

Held, that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale.

Second appeal from the decision of the Assistant Judge of Poona, in Appeal No. 260 of 1911, reversing the decree passed by the Subordinate Judge at Talegaon, in Civil Suit No. 66 of 1910.

Mr. *T. R. Desai*, for the Appellants.

Mr. *A. B. Gumaste*, for the Respondents.

JUDGMENT.

HAYWARD, J.—The plaintiffs sued as purchasers from the defendants to recover possession of the purchased lands which were subsequently leased to the defendants. The defendants pleaded that the transactions amounted really to a mortgage which they were entitled to redeem, and not to a sale and subsequent lease, owing to a contemporaneous agreement for a re-sale. The original Court held in all the circumstances that the two documents effected a mortgage and not a sale. The first Appeal Court held on a practically similar view of the circumstances that the two documents constituted a sale with an agreement for a re-sale.

The judgment of the learned Subordinate Judge is not as clear as it might have been and consists very largely of a vain repetition of the evidence without any indication of the particular bearing of the evidence quoted upon the issues to be determined. But it appears that the following material facts were held established. On the 16th of September 1892, a relation of defendants sold his interest in the lands for Rs. 300 to one Manikchand. On the 7th of November 1892 defendants bought out Manikchand for Rs. 300 raised by the sale and re-sale in suit. From 1895 onwards the defendants remained in possession as tenants of their purchaser with liability to pay the assessment amounting to Rs. 32 at a nominal rent of about Rs. 50. But as a matter of fact the assessment was not paid by the tenants but by the purchaser, so that the rent actually received was about Rs. 18 only, which would be interest at 6 per cent. on the purchase-money, Rs. 300, instead of the nominal rent of Rs. 50. There was, subsequent to the sale and re-sale a transfer of the names in favour of defendant No. 1, and not in favour of the purchaser, in the Revenue Records. There was evidence to show that Rs. 300 was a wholly inadequate price for the lands. Two Kulkarnis stated that a fair rent would have been Rs. 75 a year, so that the real value of the lands would have been anything from Rs. 750 to Rs. 1,500. It appears that these were the facts upon which the original Court held that the real intention of the parties in executing the two documents of sale and re-sale was to effect a mortgage, and not an absolute sale with agreement of re-sale.

The first Appeal Court appears to have accepted these facts generally though the learned Judge, without stating definitely that he considered Rs. 300 a fair price, cast some doubt upon the value of the lands as estimated. On those facts he came to the opposite conclusion, namely, that the proper construction of the two documents was that they effected an absolute sale with an agreement for re-sale.

On second appeal to this Court, it has been urged that in view of the facts established and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale. We have no doubt in all the circumstances that that is the proper construction and that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale. It was suggested on the other side that it was not open to us to speculate on the exact relations of the parties in this suit, which was in form one between a land-

lord and tenant, but it appears to us that the real nature of the leases as well as of the transactions of sale and re-sale have been called in question in this litigation, and that we are bound to consider them in view of the very wide terms of section 10A of the Dekkhan Agriculturists' Relief Act.

We must, accordingly, allow this appeal and restore the decision of the original Court and reverse that of the Appeal Court. Each party to bear his own costs of both appeals.

BEAMAN, J.—I concur in the judgment just delivered by my learned brother. I have no doubt but that the contemporaneous documents of 1892 do constitute what is known in this country as a mortgage by conditional sale. Neither have I the least doubt that that was the intention of the parties executing them. Such mortgages are legislatively recognised, and I have only to observe that in no true mortgage of this class will any debt be apparent. It is idle, therefore, to criticise mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments of the Courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is, whether upon an interpretation of documents alone the result is a mortgage by conditional sale or an out and out sale.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1518 OF 1913.

November 24, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

KALYAN SINGH—PLAINTIFF—APPELLANT

versus

Thakur DAMMAR SINGH—DEFENDANT—RESPONDENT.

Mortgage—Charge—Construction of deed.

Where by a deed of transfer the executant hypothecates his interest in the property and covenants to pay interest and also that he will not transfer the property so long as the debt remains unpaid, the deed constitutes a simple mortgage and not a charge.

Second appeal from the decision of the Additional Judge of Aligarh, dated 16th June 1913.

Dr. *S. C. Banerji* and Messrs. *B. K. Mukerjee* and *S. C. Chaudhri*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought on foot of a mortgage, dated the 14th of June 1889. A number of pleas were taken putting the plaintiff upon full proof. Both the Courts below have held that the mortgage was duly executed for good consideration. The Court of first instance decreed the plaintiff's claim. The lower Appellate Court reversed the decree of the Court of first instance, holding that the document did not amount to more than a charge and accordingly was barred by limitation, the suit not having been instituted until the year 1910.

In our opinion the decision of the lower Appellate Court was wrong. The mortgage is in form a simple mortgage, that is to say, the mortgagor states that he is hypothecating the interest he has and covenants to pay the interest, and that he will not transfer the property so long as the debt remains unpaid in whole or in part. This form of security has for many years been interpreted by this Court as a simple mortgage within the meaning of the Transfer of Property Act. It is admitted that if the property mortgaged had been ordinary *zemindari* rights the contention that it is not a simple mortgage would be unarguable. But it is said that the property which the mortgagor Muhammad Yusuf Ali had consisted of the rights of a usufructuary mortgagee jointly with certain other persons. In our opinion this can make no difference whatever. The property which was mortgaged by Yusuf Ali Khan was his interest in the mortgagee rights and the plaintiff is entitled to have a sale of those rights for the purpose of realising the amount of the mortgage, provided the suit was instituted within time. The present suit was instituted within time, having regard to the provisions of section 31 of the Limitation Act of 1908. We must allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts including in this Court fees on

the higher scale. We extend the time for payment to six months from this date.

Appeal allowed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 720 OF 1913.
August 24, 1914.
Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.
NAGINDAS JEKISONDAS AND OTHERS—DEFENDANTS—APPELLANTS
versus
NANABHAI DULLABHRAM—PLAINTIFF—RESPONDENT.

Construction of document—Sale or mortgage—Agreement to re-sell—Rent—Interest.

Where a vendor sold his house to his vendee for Rs. 399 and on the same day executed another document by which he took the house on hire from the vendee at Rs. 2-4-0 a month, and the vendee contemporaneously agreed by a third document that if within three years the vendor paid Rs. 399 as principal and paid the rent from month to month, he would re-sell the house to the vendor:

Held, that these three documents read together amounted to a mortgage of the house, that is to say, a transfer of the property with the right of redemption within a fixed period and an agreement to pay rent in lieu of reasonable interest.

Second appeal from the decision of the District Judge of Surat, in Appeal No. 10 of 1913, confirming the decree passed by the Subordinate Judge at Surat, in Civil Suit No. 149 of 1912.

Messrs. *D. A. Khare* and *P. D. Bhide*, for the Appellant.

Mr. *T. R. Desai* (with him Mr. *Ratanlal Ranchhoddas*), for the Respondent.

JUDGMENT.—This was a suit for redemption by the plaintiff to recover a house. The question for decision by the lower Courts was, whether the transaction with reference to which the plaint was instituted was a sale or a mortgage. On the 30th March 1900, three documents were executed. One of them purported to be a sale-deed. It recited that the house had been given in mortgage with possession to one Jagjiwandas Kaliandas in 1897, but the mortgagor had got possession of it as a tenant and continued to hold it as a tenant up to the 30th March 1900, and that a decree had been obtained by the mortgagee in 1900 and Rs. 175 was due. This amount had been paid by Ghelabhai Atmaram, the ostensible vendee, and the balance of Rs. 224 had been paid in cash making altogether Rs. 399, and consequently the house having been redeemed from the mortgagee was taken from the possession of the mortgagor and given into the possession of the ostensible vendee, who was made the absolute owner.

Another document executed between the parties at the same time was one by which the ostensible vendor said that he had taken the house on hire from the vendee at Rs. 2-4-0 a month, or Rs. 27 a year, but the vendee might at any time demand possession of the house and it was then to be given up to him.

The third contemporaneous document was one by which the vendee agreed that, if within three years the vendor paid Rs. 399 as principal and paid from month to month the rent accruing due under the rent-note passed that day for Rs. 27 as rent every year, he would re-sell the house to the vendor at his expense at any time within three years. Then there was a clause that, if the rent was not paid for three consecutive months, the agreement for re-sale should not be binding upon the vendee. The fourth clause, not following the law of landlord and tenant as expressed in section 108 of the Transfer of Property Act, provided that if within three years the house was destroyed by any calamity or *vis major*, still the vendee and his heirs and representatives had the right to recover the principal amount of Rs. 399 and the rent which might be due from the person or the property of the vendor, or his legal representatives, or from the land of the house, or from whatever other source he pleased, a provision suggestive of one of the remedies of a mortgagee under section 68 of the Transfer of Property Act. In the 6th clause there is again a reference to the principal sum of Rs. 399 and the rent which may be due.

Now the rent amounts to $6\frac{3}{4}$ per cent. upon Rs. 399, and we have no difficulty in arriving at the same conclusion as was arrived at by the Judges in the two lower Courts that these three documents read together amount to a mortgage of the house, that is to say, a transfer of the property with

the right of redemption within a fixed period and an agreement to pay rent in lieu of reasonable interest. It does not appear to us that the facts in the cases which have been relied upon, such as *Kapildeo Singh* v. *Ramrikha Singh* (1) and *Alderson* v. *White* (2), are so similar to the facts in this case that we ought to arrive at the same conclusion as was arrived at by the Courts in those cases. Agreeing as we do with the lower Courts, we confirm the decree and dismiss the appeal with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 484; 33 A. 237; 7 A. L. J. 1191.
(2) (1858) 2 De. G. & J. 97; 4 Jur. (N. S.) 125; 6 W. R. 242; 44 E. R. 924; 119 R. R. 38.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 35 of 1914.
October 27, 1914.
Present:—Mr. Justice Kumaraswami Sastri.
LAKSHMI AMMAL—PLAINTIFF—PETITIONER
versus
RAMASWAMY IYENGAR—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment of liability—Endorsement of receipt of money—No actual payment—Endorsement, whether operates as acknowledgment.

Where an endorsement of payment of money is relied on as an acknowledgment of liability under section 19 of the Limitation Act, the fact that no money was paid on that date does not make the endorsement inoperative if it was the intention of the parties that it should be treated as such.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Madura, in Small Cause Suit No. 2607 of 1913, dated 29th October 1913.

Mr. *C. S. Venkatachariar*, for the Petitioner.

Mr. *R. Rangasamy Aiyangar*, for the Respondent.

JUDGMENT.—The defendant admits on his evidence that he made the endorsement with a view to keep the document alive. The endorsement runs as follows: "Received towards interest of this promissory note Rs. 18." The Subordinate Judge finds that no money was actually paid and I see no reason to differ from him. It is alleged that Rs. 18 was paid in adjustment of

house rent, but this was never set up in the lower Court.

The next question is whether the endorsement is sufficient as an acknowledgment of liability. In Appeal No. 124 of 1911 it was held that an acknowledgment that ran as follows, "In respect of the *mustajari* lease * * * * * * Visvanadha Santo sent Rs. 20 * * * the same should be credited to the *chitta* (account) and receipt granted," was a sufficient acknowledgment of liability.

In Second Appeal No. 666 of 1913, their Lordships following the previous decision held that an entry in the terms, "paid in respect of this note," was sufficient acknowledgment of liability. I am bound to follow the above decision whatever my own views might be. The fact that no money was actually paid does not make the endorsement inoperative as an acknowledgment if it was the intention of the parties that it should be treated as one.

I reverse the decree of the Subordinate Judge and remand the suit for disposal on the other issue. Costs will abide and follow the result.

Decree reversed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 169 OF 1914.
September 8, 1914.
Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.
SATVAJI BALAJIRAO DESHMUKH—PLAINTIFF—APPELLANT
versus
SAKHARLAL ATMARAM SHET AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Decree directing payment of money within prescribed period—Provision for forfeiture of right to recover possession of land if money not paid within prescribed period—Payment made within prescribed period after decree's confirmation in appeal—Right to recover possession of land, whether forfeited.

Where the decree of a Court directs a party, as a condition precedent to his recovering possession of certain property, to pay to another party within a prescribed period a certain sum of money, and also provides that if the former fails to pay as directed within the prescribed period, he shall forfeit his right to recover possession of the property and the party so directed pays the requisite amount within the same period, not from the decree of that Court, but

from the decree of the Appellate Court which confirms the decree of the lower Court on that party's appeal, he does not forfeit his right to recover possession of the property.

Second appeal from the decision of the Additional Assistant Judge at Thana, in Appeal No. 20 of 1913, confirming the order passed by the Subordinate Judge at Murbad, in Darkhast No. 212 of 1912.

Mr. *P. D. Bhide*, for the Appellant.

Mr. *T. R. Desai*, for the Respondents.

JUDGMENT.—The suit in relation to which the execution proceedings now in question have been taken was brought by the plaintiff against the first six defendants as vendors, who denied his title as purchaser, and against the 7th defendant as mortgagee from the other defendants, to enforce his purchase against the vendors and to redeem the mortgage.

The original Court dismissed the suit, holding that the plaintiff's title as purchaser was not established as he had not paid the full purchase-money and was not ready and willing to perform his contract. The first Appeal Court, however, reversed the decree of the original Court and passed a decree that on the plaintiff paying defendants Nos. 1 to 6 the sum of Rs. 203-1-8 and paying all costs in the suit within six months from the date of the decree, he should be put in possession of the property and should then pay defendant No. 7 the sum of Rs. 997-8 found due on the mortgage with further interest from the date of recovering possession to date of payment on Rs. 633, by annual instalments of Rs. 150 payable in February of each year beginning with February 1912, and that if the plaintiff failed to pay the sum due to the defendants Nos. 1 to 6 and costs within six months from the date of the decree, he should forfeit his right to recover possession of the land.

None of the parties were satisfied by this decree. The plaintiff within ninety days filed an appeal to the High Court and the two sets of defendants filed separate sets of cross-objections. The decree was, however, confirmed by the High Court and the appeal and cross-objections were dismissed.

Within six months from the date of the High Court decree the plaintiff deposited in Court the amount payable by him. The defendant No. 7 then put in an objection that the plaintiff not having complied with the terms of the decree of the first Appellate Court, his right to recover possession in execution was forfeited.

Both the lower Courts have upheld this objection on the authority of *Ramaswamy Kone* v. *Sundara Kone* (1). There is, however, the direct authority of this Court to the contrary : see *Nanchand* v. *Vithu* (2). It was there said : "Both parties must be held equally bound or equally benefited by the result of this second appeal, and if the original respondents would have become entitled to execute the decree of the High Court in case it had reversed the decision of the lower Courts, we do not see any reason which prevents the present appellant from claiming his right to execute the decree of the High Court in his favour." These observations, which were based upon a similar state of facts, are applicable to the present case and the lower Courts should have followed that decision. It was in accordance with a decision reported in *Sakhalchand Rikhawdas* v. *Velchand Gujar* (3).

The decision of the Madras High Court followed by the lower Courts refers to the judgment of Sir John Edge in *Jaggar Nath Pande* v. *Jokhu Tewari* (4), which was based upon the express provisions of section 214 of the Civil Procedure Code applicable in decrees in pre-emption suits, but we do not understand that judgment as throwing any doubt on the Full Bench decision in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (5) delivered by the same learned Chief Justice and applied in *Sakhalchand Rikhawdas* v. *Velchand Gujar* (3) and *Nanchand* v. *Vithu* (2), or the Full Bench decision of the Allahabad High Court, *Shohrat Singh* v. *Bridgman* (6), explained and adopted in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (5). The observations of Banerji, J., in *Bhola Nath Bhuttacharjee* v. *Kanti Chundra Bhuttacharjee* (7), referred to in *Ramaswamy Kone* v. *Sundara Kone* (1) and relied on by the respondent's Pleader before us, were in a case where the decree of the lower Court had been dismissed and not confirmed ; and

(1) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.
(2) 19 B. 258.
(3) 18 B. 203; P. J. (1893) 79.
(4) 18 A. 223; A. W. N. (1896) 43.
(5) 11 A. 267; A. W. N. (1889) 55; 13 Ind. Jur. 427.
(6) 4 A. 376; A. W. N. (1882) 68.
(7) 25 C. 311; 1 C. W. N. 676.

BAHADRI v. EMPEROR.

Banerji, J., may have had in mind the possible distinction between dismissal and confirmation indicated by Jenkins, C. J., in *Kailash Chandra Basu* v. *Girija Sundari Debi* (8). Of the other cases cited for the respondent, *Patloji* v. *Ganu* (9) was a case where there was no decision on final appeal but only a dismissal for non-prosecution in the final appeal and similar, therefore, to the decision of the Judicial Committee in *Chaudhri Abdul Majid* v. *Jawahir Lal* (10), in which it was held that the time for executing a decree *nisi* for sale of mortgaged property ran from the date of the High Court decree confirming the decree of the first Court. *Aminabi* v. *Sidu* (11) was a case where the decree had been legally executed before the appeal and the defendant never applied for a stay of execution or tendered the money payable by him till after the dismissal of the appeal. We also think that the decision in *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (12) is an authority in the appellant's favour. What has to be looked at and interpreted is the decree of the final Appellate Court, in this case the High Court.

We reverse the decree of the lower Court, set aside the defendant's objection and remand the plaintiff's application in execution for disposal according to law.

Defendant No. 7 to pay the costs of the objection throughout.

Decree reversed.

(8) 14 Ind. Cas. 299; 39 C. 925; 16 C. W. N. 658.
(9) 15 B. 370; P. J. (1890) 336.
(10) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 16 M. L. T. 44; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485, 1 L. W. 483 (P. C.).
(11) 17 B. 547.
(12) 27 I. A. 209; 2 Bom. L. R. 978; 23 A. 152.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION No. 181 OF 1913-14.

August 31, 1914.

Present:—Mr. Maynard, F. C.

BAHADRI AND ANOTHER—APPLICANT

versus

EMPEROR—RESPONDENT.

Chenab Canal Colony - Confiscation of squares for absence from chak—*Habitable house.*

Throughout the whole of the Lower Chenab Colony the fact that a grantee has a habitable house in his *chak*, must be accepted as conclusive evidence that he is fulfilling the condition of residence.

Petition for revision against the order of the Commissioner, Lahore, dated 23rd December 1913.

ORDER.—(*March 26th*, 1914).—I shall be glad if the Commissioner will instruct an officer of standing, not lower than Tahsildar, to visit the *chak* and report whether the applicants have a residential house there which is fit to live in. The time has come in the Chenab Colony when the existence of a residential house fit to live in should be accepted as evidence of owner's residence.

(*May 25th*, 1914).—The facts of this case are that the ousted grantees have a substantial house in the *chak* which is fit to live in and is provided with all necessary furniture. From the *lambardar's* statement, in vernacular, it appears that the applicants have paid their share of expenses incurred in the building of the village mosque and the village drinking well. Not having obtained proprietary rights, they were technically liable to be ousted by reason of their non-residence and an order of confiscation was passed against them on March 28th, 1913.

The house is said to have been built 15 or 16 years ago, and I gather that the grant which has now been confiscated dates back to the early days of settlement on the Rakh Branch of the Lower Chenab Canal.

For the first 12 or 15 years of a new Colony's existence, the settlement is in some measure precarious and there is special justification for insisting meticulously on the condition of residence. Later on, when the Colony is firmly established, the absence or presence of a particular grantee becomes a matter of little or no public importance. If he has not acquired proprietary rights, he retains, no doubt, his technical liability to fulfil the condition of personal residence; but it becomes very undesirable to enforce this by confiscation and the proper course is to accept the existence of a habitable house as sufficient evidence of residence, and to make no further inquisition into the habits of the grantee. One great objection to the continuance of inquiries of this kind is the very undesirable power which they place in the hands of subordinate officials.

I hold, therefore, that the time has now come throughout the whole of the Lower

Chenab Colony when the fact that a grantee has a habitable house in his *chak*, must be accepted as conclusive evidence that he is fulfilling the condition of residence. In order to apply this principle in the present case, inquiry will be made as to the disposal of the square which was confiscated, and restoration will be ordered, if feasible.

(*August* 31st, 1914).—I now order the restoration of the confiscated square to the persons from whom it was taken.

Petition accepted.

MADRAS HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 53 OF 1913.

November 20, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

NACHIAPPA GOUNDEN, MINOR, BY HIS GUARDIAN, NALLAMMAL—DEFENDANT No. 2 —APPELLANT

versus

RANGASAMI GOUNDEN AND OTHERS—PLAINTIFF, DEFENDANT No. 3's LEGAL REPRESENTATIVE AND DEFENDANTS Nos. 4 TO 30 —RESPONDENTS.

Hindu Law—Widow, gift by—Consent of reversioner, effect of—Alienation—Surrender—Re-grant—Evidence—Presumption—Estoppel—Partial alienation—Inheritance—Full blood and half blood, preference between.

A man who takes a deed is not ordinarily bound by statements contained in it, but where it is open to a plaintiff, in his character of next reversioner of a last male owner, to avoid or recognize a gift made by a widow, his conduct in taking a mortgage of the property which was the subject of gift from the representatives of the donee, is a representation to persons afterwards dealing with the property, whether as transferees of his mortgage or purchasers, that he is satisfied as to the transaction and does not propose to question it as next reversioner, and he is estopped from questioning the alienation of that property by the widow.

Bijoy Gopal Mukerji v. *Krishna Mahishi Debi*, 34 C. 329; 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.), followed.

The effect of the consent of the next reversioner to an alienation made by a widow is conclusive.

Bajrangi Singh v. *Manokarnika Bakhsh Singh*, 30 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1 (P. C.); 35 I. A. 1; 17 M. L. J. 605, referred to

Per *Seshagiri Aiyar, J.*—The *sapindas* of the full blood should be preferred to those of the half blood. A person claiming both through a male and a female is to be preferred to one who claims through the male only.

Therefore, where of the three claimants to the estate of a *propositus*, who are related in the same degree to him as being the great-grandsons of his grandfather, the two are *sapindas* of the full blood while the third is that of a half-blood, those of the full blood have preference over that of the half blood.

Unless apt language has been employed suggesting a surrender and a re-grant, Courts should be slow to spell them out from stray recitals in documents.

A surrender by a widow of her estate to be valid must be of the whole of the property.

In case of an alienation by a widow with the consent of the reversioners, Courts are bound to presume the validity of an alienation when the next reversioner consents to it, until it is rebutted by clear and cogent evidence.

But such a presumption does not arise when a reversioner accepts a deed of conveyance in his own favour.

Per *Kumaraswami Sastri, J.*—The consent of a reversioner to a widow's alienation is only evidence of the necessity or propriety. An alienation would not, as against reversioners other than those that consent, confer an indefeasible title to the alienee apart from any question of necessity or propriety, unless such an alienation can be supported on the doctrine of surrender or estoppel.

A mere assent of one who would be the heir if a widow died at that moment, would not entitle the widow to make alienations at her pleasure or squander the estate.

The doctrine of validation by assent is founded on the doctrine that a person may well be presumed not to act against his interest.

Where, therefore, a person who would be entitled to avoid a transaction unless certain conditions are satisfied, assents to it to his prejudice, the safe inference to draw is that the conditions existed.

In a case of surrender of partial alienation the consent must be *bona fide* and not a devise for the purpose of enlarging the widow's estate.

The assent of the reversioner has a double aspect, not merely raising a presumption, but also raising an estoppel, against the person assenting even though he might not have received any consideration or benefit.

Where an alienation is sought to be supported on the ground of consent, there is no distinction between gift and other transfers.

Bakhtawar v. *Bhagwana*, 5 Ind. Cas. 270; 7 A. L. J. 121; 32 A. 176; *Abdulla* v. *Ram Lal*, 12 Ind. Cas. 601; 8 A. L. J. 13 8; 34 A. 129; *Umarao Kunwari* v. *Sheo Mangal Singh*, 24 Ind. Cas. 435; *Kuppier* v. *Kotta Chinnaramier*, 16 Ind. Cas. 493; (19 2) M. W. N. 758; *Kattamoody Raghupathy* v. *Kattamoody Kannamma*, 16 Ind. Cas. 710; 12 M. L.T. 325; (1912) M. W. N. 1223; 23 M. L. J. 363, referred to.

The widow and the next reversioner do not represent the entire inheritance and cannot deal with it as effectively as if the inheritance devolved on the next male heir.

Kuppier alias *Venkatasubbier* v. *Kotta Chinnaramier*, 10 Ind. Cas. 421; 9 M. L T. 356; 22 M. L. J. 488; *Mallick Sahib Abdul Saheb Gandigiwad* v. *Mallikarjunappa*, 22 Ind. Cas. 292; 15 Bom. L. R. 1142; 38 B. 224; *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* 3 Ind. Cas. 476; 9 M. L. J. 88; 5 M. L T. 122; 32 M. 206; *Pilu* v. *Babaji*, 4 Ind. Cas. 584; 11 Bom. L. R. 129; 34 B. 165, distinguished.

NACHIAPPA GOUNDEN *v.* RANGASAMI GOUNDEN.

Ramkrishna v. *Tripurabai*, 12 Ind. Cas. 529; 13 Bom. L. R. 940; *Debi Prasad Chowdhury* v. *Golap Bhagat*, 19 Ind. Cas. 273; 17 C. W. N. 701; 17 C. L. J. 499; 40 C. 721 at p. 746, followed.

It is not necessary that the assent or ratification on the part of the next reversioner should be before or at the date of alienation. It is enough if he ratifies the transaction.

Bajrangi Singh v. *Manokarnika Baksh Singh*, 30 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1 (P. C.); 17 M. L. J. 605; *Kuppier* alias *Venkatasubbier* v. *Kota Chinnaramier*, 10 Ind. Cas. 421; 9 M.L.T. 356; 22 M. L. J. 488; *Narayana Aiyar* v. *Rama Aiyar*, 20 Ind. Cas. 625; (1913) M. W. N. 588; 14 M. L. T. 89; 25 M. L. J. 219; *Chunder Dutt Misser* v. *Bhagwat Narain Thakur*, 3 C. W. N. 207; *Ismail Jolaha* v. *Jagannath*, 19 Ind. Cas. 255, referred to.

Appeal under clause 15 of the Letters Patent against the judgments of the Hon'ble Mr. Justice Miller and the Hon'ble Mr. Justice Sadasiva Aiyar, dated the 3rd March 1913, in Appeal No. 6 of 1910, reported as 20 Ind. Cas. 304, preferred against the decree of the District Court of Salem, in Original Suit No. 13 of 1908.

Mr. *A. Krishnaswami Aiyar*, for the Appellant:—My contention is two-fold: I say (1) that the document is a surrender by a widow of her life-estate in the part alienated, and such surrenders are valid; (2) if it is held that such partial surrenders are not valid in law, my argument is that the alienation being to the immediate reversioner, it is tantamount to consent, and such consents validate the alienation. There is a grant and re-grant to the widow. The reversioner need not consent to the widow being in possession.

[SESHAGIRI AIYAR, J.—You put it on the ground of partition?]

Mr. *A. Krishnaswami Aiyar*.—If the widow surrenders the whole estate to a third person with the consent of the reversioner it is a surrender of the whole estate.

[KUMARASWAMI SASTRI, J.—In that case, any alienation with the consent of the next reversioner is for the time being valid.]

Mr. *A. Krishnaswami Aiyar*.—As to surrender and re-grant, see *Bijoy Gopal Mukerjee* v. *Girindra Nath Mukerjee* (1) and *Adaikka Maistry* v. *Muthusami Ambalagaran* (2).

In *Rangappa Naik* v. *Kamti Naik* (3) there was a document.

[SESHAGIRI AIYAR, J.—In that case, a document was taken from the reversioner and that is a different case.]

[WALLIS, OFFG. C. J.—Have you got any case in which the English doctrine of surrender has been imported into India?]

Mr. *A. Krishnaswami Aiyar*.—In *Kattamoody Raghupathy* v. *Kattamoody Kannamma* (4), there is also another case.

[WALLIS, OFFG. C. J.—All these are put on the doctrine of merger.]

Mr. *A. Krishnaswami Aiyar*.—A distinction exists between surrender of the life-interest and alienation.

[SESHAGIRI AIYAR, J.—This was simply a notion of Hindu Law which by subsequent decision has ceased to be such.]

Mr. *A. Krishnaswami Aiyar*.—In *Karetti Brahmanaikudu* v. *Kareti Mahalakshmi* (5) the widow transferred the entire estate as a part of the transaction, some portion of the property being given to her.

In *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (6) Justice Sankaran Nair adheres to his view in *Rangappa Naik* v. *Kamti Naik* (3).

In *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7) there were isolated independent acts of alienation by the widow at different times and though assent was given, it was given to each alienation.

This doctrine of assent is founded upon the case of *Collector of Masulipatam* v. *Cavaly Vencata*

(1) 23 Ind. Cas. 162; 18 C. W. N. 673; 12 A. L. J. 711; (1914) M. W. N. 430; 19 C. L. J. 620; 16 Bom. L. R. 425; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533; 41 C. 793 (P. C.).

(2) 25 Ind. Cas. 144; 27 M. L. J. 24.

(3) 31 M. 366 at p. 381 (F. B.); 18 M. L. J. 309; 3 M. L. T. 355.

(4) 16 Ind. Cas. 710; 23 M. L. J. 363; 12 M. L. T. 325; (1912) M. W. N. 1223.

(5) 17 Ind. Cas. 487; 24 M. L. J. 533; (1913) M. W. N. 433; 13 M. L. T. 468.

(6) 31 M. 446.

(7) 30 A. 1; 3 M. L. T. 1; 12 C W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1 (P. C.); 17 M. L. J. 605.

Narrainapah (8). Judgment of Allahabad High Court analysed Consent *per se* validates the alienation consent based upon surrender validates the same.

[SESHAGIRI AIYAR, J.—The principle is that the consent of the reversioner validates the alienation and there are three modes by which such consent may be expressed.]

[WALLIS, OFFG. C. J.—So far the view that it is the consent that validates the alienation, do you mean to say that the Allahabad High Court do not attach any distinction between total or partial alienation ?]

[SESHAGIRI AIYAR, J.—*Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7) is not an authority for holding the surrender to be valid].

Mr. *A. Krishnaswami Aiyar.*—*Pulin Chandra Mandal* v. *Bolai Mandal* (9) is.

[WALLIS, OFFG. C. J.—Where there is a surrender, there is no question of consent.]

[SESHAGIRI AIYAR, J.—On bare principles of Hindu Law a partial surrender can never be upheld.]

Mr. *A Krishnaswami Aiyar.*—Suppose she retains something for her maintenance.

[SESHAGIRI AIYAR, J.—May be a good arrangement.]

Mr. *A. Krishnaswami Aiyar.*—Suppose she retains some interest herself.

[SESHAGIRI AIYAR, J.—Its validity may be open to question as a mere surrender.]

Mr. *A. Krishnaswami Aiyar.*—It is difficult to say where the limits are to be assigned.

In *Pulin Chandra Mandal* v. *Bolai Mandal* (9) there is a partial surrender, *i.e.*, half the entire property in favour of immediate reversioner.

In *Behari Lal* v. *Madho Lal Ahir Gayawal* (10) the *ekrarnamah* was in the nature of a testamentary disposition and the widow reserved a life-interest for herself. The Privy Council held that it was not valid.

[SESHAGIRI AIYAR, J.—According to your argument there is no distinction between a gift and alienation for consideration.]

Mr. *A. Krishnaswami Aiyar.*—There is no difference whatever.

[SESHAGIRI AIYAR, J.—That is rather a strong proposition. Do you say that there is no case of Privy Council which says that a reversioner can give his consent to a gift by a widow ?]

Mr. *A. Krishnaswami Aiyar.*—*Hemchunder Sanyal* v. *Sernamoyee Debi* (11) was referred to in *Pulin Chandra Mandal* v. *Bolai Mandal* (9).

[KUMARASWAMI SASTRI, J.—In *Nobokishore Sarma* v. *Harinath Sarma* (12) it is the whole estate that was surrendered].

M. *A. Krishnaswamy Aiyar.*—In *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7), read with *Behari Lal* v. *Madho Lal Ahir Gayawal* (10), both partial surrenders and partial alienations are valid.

[WALLIS, OFFG. C. J.—Then you do not base your future argument on surrender?]

Mr. *A. Krishnaswami Aiyar.*—The second point is that the alienation is not binding upon the reversioner. It is merely voidable by the reversioner. It is open to him to elect to stand by it. It is good until it is avoided. The particular person that assents to it cannot avoid it.

[WALLIS, OFFG. C. J.—How do you make out the title by estoppel ?]

Mr. *A. Krishnaswami Aiyar.*—In *Rup Narain* v. *Gopal Devi* (13), it is said that where the father himself is estopped the son is so. The case in *Modhu Sudan Singh* v. *E. G. Rooke* (14) clearly points out that it is open to the reversioner to elect to stand by it if it is not valid.

[WALLIS, OFFG. C. J.—That is a case where the reversioner recovered rent after the widow's death. It does not refer to any consent.]

Mr. *A. Krishnaswami Aiyar.*—In *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (15), the suit was for possession after the death of the widow.

[SESHAGIRI AIYAR, J.—In *Kuppier* v. *Kotta*

(8) 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

(9) 35 C. 939; 12 C. W. N. 837; 8 C. L. J. 280.

(10) 19 C. 236; 19 I. A. 30.

(11) 22 C. 354.

(12) 10 C. 1102.

(13) 3 Ind. Cas. 382; 36 I. A. 103; 13 C. W. N. 920; 6 A. L. J. 567; 11 Bom. L. R. 833; 10 C. L. J. 58; 36 C. 780; 19 M. L. J. 548; 5 M. L. T. 423; 93 P. R. 1909 (P. C.); 146 P. W. R. 1909; 68 P. L. R. 1910.

(14) 25 C. 1; 24 I. A. 164; 1 C. W. N. 433.

(15) 34 C. 329; 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

Chinnaramier (16) there is a similar question.]

Mr. *A. Krishnaswami Aiyar*.—In *Kuppier* v. *Kotta Chinnaramier* (16) the question is whether the widow is entitled to an assent from the nearest reversioner. *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7).

In *Rangappa Naik* v. *Kamti Naik* (3), Sankaran Nair, J., approves the case in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (12).

In *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (17) the Judges say that the actual parties are bound.

[SESHAGIRI AIYAR, J.—But that is a clear case of estoppel].

In *Ramkrishna* v. *Tripurabai* (18) there is no question of consent, it is enough if he consents to stand by.

In *Mallik Saheb Abdul Saheb Gandigiwad* v. *Mallikarjunappa* (19) a similar view is taken though no consideration was received.

(3) This is a family arrangement between the widow and the nearest reversioner. *Rup Narain* v. *Gopal Devi* (13).

(4) My next point is as to the share to which the plaintiff and the first defendant are entitled.

The principle is "to the nearest *sapinda*, the inheritance belongs."

The rule is worked out by saying that the nearer line excludes the more remote and this is the rule laid down by the *Mitakshara*. But the principles on which distinction is made between half brother and full brother is not clear.

[SESHAGIRI AIYAR, J.—The principle of nearness of heirship is that larger particles appear in the nearer heir than in the remote heirs.]

Mr. *A. Krishnaswami Aiyar* referred to Chapter II, s. 3, pl. 3, 5; s. 4, pl. 2, 4; s. 6, pl. 1, 3; s. 2, pl. 6, *Mitakshara*.

Association with religious rights makes her nearer *sapinda*.

[SESHAGIRI AIYAR, J.—Suppose we hold that there is a general statement of preference of full blood, then you have no question.]

Mr. *A. Krishnaswami Aiyar* referred to Chapter XI, section 5, of Smriti Chandrika, placitum 4.

In Chapter XI, section 4, the distinction between half brother and full brother is pointed out.

Saraswathi Vilasa, page 173 (Setlur's Book), placitum 494 page 178; placitum 539, page 184;

Mr. *T. R. Ramachandra Aiyar*, for the Respondent was not called to argue as to validity of surrender of a part of an estate. As to the full and half blood, see *Vallabha Valiya Raja* v. *Vedapurati* (24).

The *Mitakshara* does not give a list of heirs but only an indication of the principle and gives the names of a few heirs.

As to the construction of the document, unless fiction is adopted, the construction which the appellant wishes to have cannot have any effect.

If it is a partial surrender, it must be complete. *Batak Nath* v. *Munni Dei* (25); *Raj Lukhee Dabee* v. *Gokool Chunder Chowdhry* (26); *Sri Mahant Govind Rao* v. *Sita Ram Kesho* (27).

All these are referred to in *Debi Prosad Chowdhry* v. *Golap Bhagat* (28).

[KUMARASAMI SASTRI, J.—Why should the next reversioner's consent alone be enough when the Hindu Law requires that all the reversioners must consent?]

(16) 16 Ind. Cas. 493; (1912) M. W. N. 758.
(17) 3 Ind. Cas. 476; 32 M. 206; 19 M. L. J. 88; 5 M. L. T. 122.
(18) 12 Ind. Cas. 529; 13 Bom. L. R. 940.
(19) 22 Ind. Cas. 292; 15 Bom. L. R. 1142; 38 B. 224.
(20) 24 B. 104 at p. 107; 1 Bom. L. R. 466.
(21) 20 Ind. Cas. 625; 25 M. L. J. 219; (1913) M. W. N. 588; 14 M. L. T. 89.
(22) 19 Ind. Cas. 255.
(23) 3 C. W. N. 207.
(24) 19 M. 40; 5 M. L. J. 282.
(25) 23 Ind. Cas. 644; (1914) M. W. N. 437; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 36 A. 284; 1 L. W. 729 (P. C.).
(26) 13 M. I. A. 209; 12 W. R. 47 (P. C.); 3 B. L. R. 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 Eng. Rep. 529.
(27) 21 A. 53 at p. 71 (P. C.); 2 C. W. N. 681; 25 I. A. 195; 7 Sar. P. C. J. 370.
(28) 19 Ind. Cas. 273; 40 C. 721 at 746; 17 C. W. N. 701; 17 C. L. J. 499.

[SESHAGIRI AIYARI, J.—There must be evidence of *bona fides* and where a person who is not entitled to succeed gives his consent, there is no evidence of *bona fides*. In *Mallik Saheb Abdul Saheb Gaudigiwad* v. *Mallikarjunappa* (19) the next reversioner had given the consent. This is a new case.]

Mr. *T. R. Ramachandra Aiyar*.—He must show that, where the next reversioner is incapable of giving consent, anybody can else give it.

Mr. *A Krishnaswami Aiyar*, in reply.

This Letters Patent Appeal coming on for hearing on the 5th, 6th and 7th October 1914 respectively, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, OFFG. C. J.—I agree with the learned Judges as to the rest of the case and will only deal with the point on which they differed. The question is as to certain alienations made by the mother of the last male owner in 1893 by Exhibit I in favour of Ramasami Gounden who was at that time the nearest reversioner. He predeceased the lady, and on his death his two nephews, the 1st defendant and a brother since deceased and the present plaintiff, a Dayadi of theirs, became the next reversioners; and in this state of things in 1896 the present plaintiff purchased from the 1st defendant and his brother two of the items which had been conveyed to Ramasami Gounden under Exhibit I, and advanced Rs. 8,000 to them on a mortgage, Exhibit III, of a third item, which the 1st defendant sold in 1907 by Exhibit IV to the 3rd defendant from whom, as recited in Exhibit IV, he had borrowed money on mortgage to pay off the plaintiff's mortgage. The defendants pleaded among other things that the plaintiff had acquiesced in, and consented to, the alienations, and that by his subsequent dealings with the properties so alienated he was estopped from questioning them. These contentions formed the subject-matter of the 2nd and 3rd issues. Very little evidence was tendered on them at the trial and the 1st defendant apparently contented himself with filing by consent Exhibit I, the deed of alienation, dated the 24th November 1893, Exhibit II, the sale-deed, under which the plaintiff purchased two of the items included in Exhibit I on the 7th December 1896, and Exhibit III of the same date under which he took a mortgage of another item for Rs. 8,000 from the 1st defendant and his brother, and Exhibit IV, the sale-deed to the 3rd defendant. On this evidence the District Judge was of opinion that it did not show that the plaintiff had assented to the alienations under Exhibit I or was estopped from questioning them. He observed that the alienations under Exhibit I were good for the life of the widow who survived for ten years, and that all the plaintiff acquired under them from the 1st defendant and his brother was a temporary interest of uncertain duration. On appeal, Miller, J., was of opinion that, even if there was consent by the nearest reversioners to partial alienations, that would not render them valid and that there was no estoppel; while Sadasiva Aiyar, J., appears to have considered that the plaintiff's conduct showed that he assented to all the alienations effected by Exhibit I, and that the effect of the decision of their Lordships in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7) was to render partial alienations valid when effected with the consent of the next reversioner.

Now, in the first place, I am not satisfied on the evidence that the conduct of the plaintiff in subsequently purchasing two of the items and advancing money on mortgage of another can be regarded as consent with regard to all other items covered by Exhibit I. It seems to me, however, that it does show consent with regard to the three items which were the subject of the sale and mortgage and, as the items purchased are already in possession of the plaintiff, it will be sufficient to deal with the question as regards the mortgage. As to this I cannot agree with the conclusion of the District Judge that, in taking the mortgage from the 1st defendant and his brother, the plaintiff, who by that time had become their co-reversioner, dealt with them merely as holders of a temporary interest of uncertain duration limited to the life-time of Marakammal, the mother of the last male owner,

Exhibit III states that the mortgagors were hypothecating to the plaintiff the *mitta* which Ramasami Gounden acquired as a gift from Marakammal and which was in their possession and enjoyment, and that the plaintiff had advanced them Rs. 8,000 upon it. The net income of this item is given in the plaint as Rs. 550, and it seems to me that in making this large advance to the mortgagors on the security of this property the plaintiff clearly dealt with the mortgagors as full owners and must be taken to have recognised them as such. He must have known perfectly well that he was one of the next reversioners, and it was not suggested in evidence that he did not know. The recital also shows that he was perfectly well aware of the way in which the mortgagors had acquired the property. Here I may remark that though Exhibit I purports to be for consideration the District Judge states that this contention was abandoned at the trial, and it would, therefore, appear that in Exhibit III it was correctly described as a gift.

In these circumstances I cannot but regard his action in taking the mortgage as consenting to the alienation of this item by Marakammal and recognising the mortgagors' title to it. It must be borne in mind that the alienation by Marakammal was not void but only voidable according to the ruling of their Lordships of the Judicial Committee in *Bijoy Gopal Mukerje* v. *Krishna Mahishi Debi* (15). It may be that a man who takes a deed is not ordinarily bound by statements contained in it, but having regard to the fact that it was open to the plaintiff in his character of next reversioner of the last male owner to avoid or recognise the gift made by Marakammal, I think his conduct in taking a mortgage of the property, which was the subject of the gift, from the representatives of the donee was a representation to persons afterwards dealing with the property, whether as transferees of his mortgage or purchasers, that he was satisfied as to the transaction and did not propose to question it as next reversioner. The recitals in Exhibit IV, the subsequent sale-deed by the 1st defendant, the surviving mortgagor, to the 3rd defendant, show that the 3rd defendant relied on the plaintiff's conduct in taking Exhibit II and Exhibit III when he advanced money on mortgage to the 1st defendant to pay off the plaintiff and got the plaintiff's discharged mortgage as one of his title-deeds, and when subsequently he became the purchaser of the mortgaged property under Exhibit IV. In these circumstances I think the plaintiff is estopped from now questioning the alienation by Marakammal of this item, and that to this extent the third issue must be found for the defendants and the appeal so far be allowed.

I do not consider it necessary to express any opinion on the question whether a gift to the kindred of the last male owner, as distinct from an alienation for consideration, could be validated by the consent of the next reversioner, as the question was not fully argued before us. As regards the question whether the effect of the consent of the next reversioner to an alienation is conclusive or merely evidence of propriety, I agree with Sadasiva Aiyar, J., that the decision of their Lordships in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7) is authority for the former view, and will only remark that that was a case of partial alienations only, because as pointed out in the arguments before us and as appears from the report in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7), the suit was to recover not only the immoveable properties alienated by the widow but also other moveable properties alleged to form part of the estate, and it was nowhere suggested, either in argument or in the judgments of the High Court and the Privy Council, that the properties alienated formed the whole of the estate or that this fact would influence the result. This is important with reference to the authority of the judgment of the majority of the Court in *Rangappa Naik* v. *Kamti Naik* (3), because the judgment of the learned Chief Justice appears to have proceeded on the view that in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7) the whole of the estate had been alienated with the consent of the next reversioner, which was not the fact. Since then a Full Bench of the Calcutta High Court has held in *Debi Prosad Chowdhry* v. *Golap Bhagat* (28) that consent is only evidence of the propriety of the transaction, and their Lordships of the Judicial Committee, in a case in which this decision was cited,

let fall certain observations which are relied on by the respondents as supporting the same view, but the precise point did not arise nor were the observations necessary for the decision. In the result, I think the appeal should be allowed as regards the 1st item in the plaint and otherwise dismissed and that the appellant and the 1st respondent should pay and receive proportionate costs throughout.

SESHAGIRI AIYAR, J.—The last male owner of the properties in dispute was one Ramasami Gounden. On his death, his mother Marakammal succeeded to them. By Exhibit I, dated the 24th of November 1893, she gave away some of the properties to one Ramasami Gounden, who was the immediate reversioner to her son's estate at the time. This donee pre-deceased Marakammal who died in August 1907. At her death, the undoubted heirs were the plaintiff and the 1st defendant. The 3rd defendant also claimed the property on the ground that he stood in the same degree of relationship to the last male owner as the plaintiff and the 1st defendant.

The case for the plaintiff is that the deed of gift is not binding on him and that he is entitled to a half share in the properties of Ramasami Gounden. Defendants Nos. 1 and 2 (the 2nd being the son of the 1st) contend that the deed of gift operates as a surrender of Marakammal's estate, that it was assented to by the plaintiff and that, therefore, it is not open to him to question it. The 3rd defendant disputes the right of the plaintiff to a half share and claims a third share for himself. He sold his share to the plaintiff; consequently the plaintiff will be entitled to 2/3rds of the property if the 3rd defendant is also an heir.

The learned District Judge upheld the plaintiff's claim in all respects. The 1st and 2nd defendants appealed. On their appeal, Mr. Justice Miller was for confirming the decree of the District Judge, Mr. Justice Sadasiva Aiyar was for reversing it: hence this appeal.

The principal points for consideration are:—

(1) Whether Exhibit I is binding on the plaintiff, and

(2) whether the 3rd defendant is a claimant of equal degree with the plaintiff and the 1st defendant.

The first question involves a number of subsidiary questions. Although it was argued first, I shall deal with the second point before dealing with the first.

The facts relating to the second question are not in dispute. Sengottuvela Gounden, the common ancestor of the claimants, married two wives. The 3rd defendant is his great-grandson by the 1st wife. The plaintiff and the 1st defendant are his great-grandsons by the 2nd wife. The last male owner, Ramasami Gounden, was his grandson by the 2nd wife. Thus while all the three claimants are related in the same degree to the last male owner as being the great-grandsons of his grandfather, the plaintiff and the 1st defendant are *sapindas* of the full blood, while the 3rd defendant is a *sapinda* of the half blood. The point for determination is whether in this degree of relationship, those of the full blood should be preferred to the one of the half blood.

Mr. A. Krishnaswami Aiyar has addressed an elaborate argument to us on the question. This matter has been considered in three reported judgments. Mr. Justice Banerjee, in *Suba Singh* v. *Sarafraz Kunwar* (29), held that the *sapindas* of the full blood should be preferred to those of the half blood. Mr. Justice Ranade, in *Vithal Rao* v. *Ram Rao* (30), did not accept this position. Mr. Justice Mookerjee, in *Sham Singh* v. *Kishun Sahai* (31), agrees with Mr. Justice Banerjee. It is not, therefore, necessary to discuss the subject in great detail; still having regard to the divergence of judicial opinion above indicated and to the fact that the question is *res integra* in Madras, it is necessary to state our reasons for the conclusion at which we have arrived.

All the Smriti writers are agreed that the full brother is to be preferred to the half brother:—

"Among brothers, such, as are of the whole blood, take the inheritance in the first instance, under the text before cited. 'To the nearest *sapinda*, the inheritance next belongs', since those of the half blood are

(29) 19 A. 215; A. W. N. (1897) 53.
(30) 24 B. 317; 2 Bom. L. R. 837.
(31) 6 C. L. J. 190.

remote through the difference (*Matruviprakarshat*), the mothers." (*Mitakshara*, Chapter 11, section 4, placitum 5; *vide* also the Smriti Chandrika, Chapter XI, section 4, placitum 25, and the Dayabhaga, Chapter XI, section 5, placitum 9.) The Vyavahara Mayukha (see Daya Nirnaya, section VIII, placitum 16) is less favourable to the half brother, in that his place is after the full brother and his son under that law.

The argument of the learned Vakil for the appellant is that whereas an exception is made in the case of half blood brothers, no such differentiation appears in the case of the other half blood relations in the ascending or descending line. The only rule applicable to them is, "To the nearest *sapinda*, the inheritance next belongs." Consequently the preference to full over half blood has no application to those heirs.

In order to deal with the contention satisfactorily, it is necessary to point out that Vijnaneswara has given reasons in almost every case for the rules of succession which he has prescribed. In preferring the mother to the father, he relies upon the form of the conjunctive compound, *matapitram*, in which the term *mata* is placed before *pita* conformably with the rule which "requires the most revered object to have precedence." In the case of the daughter's son, his reason may be briefly stated as the "*putrikaputra*" theory. With regard to the wife, he calls to aid the spiritual theory of her being one in body with the husband. There are other reasons given whenever a question of preference has to be explained. It is not necessary to refer to them all.

It is not a necessary inference from these rules that all of them are special in their character and that the author did not intend that any one of them should be treated as indicating a general principle. The more correct view is that while some of the reasons are only applicable to the special cases mentioned, there are others which are of a wider application and from their context and their nature, intended to serve as guides to the exposition of similar positions elsewhere. One illustration of this statement may be given. I have referred to the rule of preference regarding the mother. Later on, in dealing with the succession of *bandhus*, the author had to decide between the father's kindred and the mother's kindred. He says:—

"Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors, in the first instance; on failure of them, his father's cognate kindred; or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." (The *Mitakshara*, Chapter II, section 6, placitum 2.)

From this, it is clear that the author does not want to extend the rule of preference which places the mother before the father to the mother's kindred, thereby indicating that the original ground was a special one. It is not an unnatural inference, therefore, to conclude that as no special rule is suggested regarding the full and the half blood in the ascending and the descending lines, the author intended that the general rule of *Matrisannikarshat* and *Matruviprakarshat* should apply.

I have examined very carefully the reasons given by Mr. Justice Ranade in *Vithal Rao* v. *Ram Rao* (30). I am unable to accept the view that the rule of preference regarding brothers is a special rule. It was pointed out by Mr. Justice Mitter, in *Guru Gobind Saha* v. *Anand Lal Ghose* (32), that there are numerous passages in the *Dayabhaga* in which a particular instance is put down to represent a general principle. This is true of the *Mitakshara* to a greater degree. Numerous authorities have laid down that the enumeration of heirs in the *Mitakshara* is only illustrative and not exhaustive. With reference to reasons for a rule of succession also, the same considerations must apply. As pointed out by Mr. Sircar in his "Mimansa Rules of Interpretation", in the case of the Smritis all the four rules of interpretation are applicable, namely, *Sruti*, *Linga*, *Vakya* and *Prakarana*. With reference to each one of these four principles, commentators have explained that "the suggestive power of words and ideas" should be largely resorted to. In my opinion the rule regarding the full and the half brother is an instance to which the *Prakarana* principle of interpretation is applicable. Sircar points out that the principle of *Prakarana* is in substance the principle of *Upalak-*

(32) 13 W. R. 49; 5 B. L. R. 15 (F. B.).

shana or *incidental indication*. When Vijnaneswara says that the brothers of the full blood are to be preferred to those of the half blood on the ground of *Matruriprakarshat*, he introduces a doctrine which by the theory of *Upalakshana* is applicable to all *sapindas* of the full and the half blood.

Apart from these considerations, we have to bear in mind that the guiding factor in regulating succession in the Benares School is consanguinity. As Sir Michael Westropp pointed out in *Lallubhai Bapubhai* v. *Mankuvarbai* (33), this doctrine is based on the theory that nearness is to be determined by the larger community of corporal particles between the propositus and the heir. The Judicial Committee of the Privy Council has approved of this proposition in *Bai Kesserbai* v. *Hunsraj Morarji* (34). This principle has been re-affirmed by the Committee in the recent case of *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (35). If this is the basic principle of succession under the *Mitakshara* system, there can be no doubt that a person claiming both through a male and a female is to be preferred to one who claims through the male only. Mr. Justice Ranade says that the *pratyasatti* or propinquity theory of the *Mitakshara* has different meanings in different places. I am unable to agree in this view. This theory is availed of by Vijnaneswara whenever special considerations do not apply. The Smritis in most cases only collate the usages of the people. Vijnaneswara has not been content simply to catalogue them. He has attempted to find out the reason for each of the observances. It is not right to impute to him that his rules of succession are based on different views of propinquity. Wherever he invokes that principle, he is consistent and clear; but where he is obliged to depart from it because of the conscience of the people being against it, he tries to justify the departure by special reasons. I do not think that there is good ground for holding that the *Mitakshara* understands *pratyasatti* in different senses.

Moreover, there is greater mutuality of spiritual offerings between the propositus and a full blood *sapinda* than between him and a half blood *sapinda*. It is true that Vijnaneswara does not give great importance to spiritual offerings in fixing the position of the heir, but where this ground is not opposed to the theory of propinquity by blood, there is no reason for ignoring this consideration altogether. It may also be pointed out that the author of Saraswathi Vilasa who criticises in a very outspoken manner some of the conclusions of Vijnaneswara, speaks of this rule of preference between brothers of the full and half blood as a very good one. If we remember that this sentence follows a number of diverse comments upon the grounds assigned by the *Mitakshara*, it is clear that the Saraswathi Vilasa regarded this one as sound in principle and as having a general application.

Mr. Justice Mookerjee has given excellent reasons for holding that the author of the Madana Parijata correctly expounds the view of *Mitakshara* regarding full and half blood *sapindas*. The author says:—"In default of the paternal grandfather, paternal uncles succeed in the same way as brothers in default of the father. Even here the relative position of brothers of full and of half blood is the same: the sons of the paternal grandmother take the inheritance first and in their default the sons of the co-wives of the paternal grandmother." There is no force in Mr. Krishnaswami Aiyar's contention that the author did not intend to extend the application of the principle to other *sapindas* of the half blood.

Under the *Dayabhaga* system, all relations of the full blood are preferred to those of the half blood of equal degree. [See *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* and *Rammoney Dossee* v. *Gobind Chunder Lahoory* (36).] The Privy Council in *Sheo Soondary* v. *Pirthee Singh* (37) has approved of this proposition; Sir Lawrence Jenkins in *Vithal Rao* v. *Ram Rao* (30), it may be pointed out, rests his decision on the principle of *stare*

(33) 2 B. 388; 7 I. A. 112.

(34) 30 B. 431; 10 C. W. N. 802; 4 C. L. J. 9; 8 Bom. L. R. 446; 3 A. L. J. 484; 1 M. L. T. 211; 16 M. L. J. 446 (P. C.); 33 I. A. 176.

(35) 25 Ind. Cas. 290; 16 M. L. T. 447; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L J. 573 (P. C.).

(36) 1 C. 27; 24 W. R. 234.

(37) 4 I. A. 147.

decesis. Although it is almost inexplicable that the full blood should rank equally with the half blood in a province where the prevailing authority (the Vyavahara Mayuka) brings the half brother only after the son of the full brother, it was thought inexpedient to upset titles established under the authority of *Samat* v. *Amra* (38). No such consideration applies to Madras. The ground of preference over the half blood is in consonance with received notions of the people in this part of India, is founded on the well-known theory of propinquity of blood, and is a logical extension of the rule stated by the *Mitakshara* regarding brothers. In *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (39) the Judicial Committee seem to have assumed that those of the full blood will be preferred to those of the half blood. I have, therefore, no hesitation in holding that the 3rd defendant is not entitled to rank *pari passu* with the plaintiff and the 1st defendant as heir to the estate of the deceased last male owner, Ramasami Gounden.

The main question relates to the validity of Exhibit I. Mr. Krishnaswami Aiyar's first contention is that the language of the document imports a surrender by the widow of all her rights in her son's property, the retention by the surrenderee of one portion of it and a re-grant to the widow of the rest. This imaginative process has not been realised by the execution of the necessary documents in that behalf. I am not unmindful of the obvious answer that the Smriti writers had not the Transfer of Property Act in their minds and that if a transaction bears on the face of it the impress that it was a result of considerations germane to Hindu Law, the fact that these considerations have not been carried out by appropriate documents will not prevent the operation of the rule of Hindu Law, although a party seeking possession on the strenght of the transaction may find his title not established. At the same time, it has to be remembered that parties are as familiar with the Hindu Law as they are with the Transfer of Property Act, and unless apt language has been employed suggesting a surrender and a re-grant, Courts should be slow to spell them out from stray recitals in documents. In the present case, the document is by the widow to the nearest reversioner. There is none from the latter to the former. It is true that in Exhibit I, there is a recital that the widow is to enjoy the remaining properties as if she were its absolute owner. I do not think that the language is consistent only with a re-grant to the widow. It is a statement which she herself makes. The observations of Mr. Justice Sankaran Nair in *Rangappa Naik* v. *Kamti Naick* (3) relate to a document executed by the reversioner to the widow, where an implication of re-grant would properly arise. They have no bearing on the present case; I, therefore, hold that it has not been proved in this case that the widow surrendered her estate and that there was a re-grant of a portion to her.

The next contention is that the partial surrender by Exhibit I is valid. I think it necessary to state the principles on which a surrender is based under the Hindu Law, before dealing with the specific question. The only text is that of the *Dayabhaga*:—"Therefore those persons who are exhibited in a passage above cited as the next heirs on failure of prior claimants, shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it, upon the death of the widow in whom the succession had vested. At such time the succession of daughters and the rest is proper, since they confer greater benefits on the deceased than other claimants." (*Dayabhaga*, Chapter XI, section 1, palacitum 59.) Mr. Justice Mookerjee points out in *Debi Prosad Chowdhury* v. *Golap Bhagat* (28) that the above text is "comprehensive enough to include not merely the case of the death of the widow, but all cases where her right ceases." Now the aim of the text is to enable female heirs to divest themselves of the temporal responsibility of managing an estate during their lives, and by surrendering possession and management, to accelerate the succession of the immediate reversioner. That is intended to give relief to her and not to enable her to enter into bargains with expectant heirs. It, therefore, stands to reason that if this object is to be achieved, the whole of the estate should be surrendered. The

(38) 6 B. 394.

(39) 19 M. 405; 23 I. A. 83; 6 M. L. J. 113; 7 Sar. P. C. J. 45.

rule should not be so worked as to place in the hands of the widow a weapon by which she can attain temporal advantages to herself, under the guise of seeking spiritual salvation, and to those whom she favours, at the expense of the heir on whom succession will devolve on her death. It is said that the principle of "surrender" has been grafted from, and is in consonance with, other systems of law and with common sense. Courts should not encourage a mongrel rule of law which, while violating the fundamental conceptions of the system of jurisprudence which it is intended to serve, has not the merit of introducing any well-recognised principle of equity and good conscience from the system from which the rule is borrowed. Fortunately the decided cases up till now do not compel us to extend the doctrine of surrender in this way.

There is the express decision of the Judicial Committee in *Behari Lal* v. *Madho Lal Ahir Gayawal* (10) that the surrender must be of the whole of the property if it is to confer title on the next reversioner. Mr. Krishnaswami Aiyar's ingenious suggestion that their Lordships only meant to lay down that the widow should not retain any interest for herself in the property surrendered, cannot be accepted. It is true that in *Pulin Chandra Mandal* v. *Bolai Mandal* (9) the authority of *Behari Lal* v. *Madho Lal Ahir Gayawal* (10) was extended in the direction suggested by the learned Vakil. That decision has been overruled by a Full Bench of the Calcutta High Court in *Debi Prosad Chowdhury* v. *Golap Bhagat* (28). In *Marudamuthu Nadan* v. *Srinivasa Pillai* (40), after a full examination of the authorites, it was laid down that partial surrenders are invalid. I do not think there is anything in *Rangappa Naik* v. *Kamti Naik* (3) which supports the contrary conclusion. There is no ground for the suggestion that the pronouncement of any of the learned Judges in that case supports a partial surrender by the widow; nor is *Bajrangi Singh* v. *Manorkarnika Bakhsh Singh* (7) an authority for that position. Both principle and authority are against the contention that it is competent to a widow to convey a good title to the property by a partial surrender in favour of the next reversioner. The spirit and letter of the Hindu Law are against it, and I know of no principle of jurisprudence which can lend validity to such a transaction.

If I may say so with respect, the confusion has arisen by mixing up the question of alienation with that of surrender. The latter rests upon a text of Hindu Law and is based upon certain principles which law-givers in this country have recognised both in the case of males and females. The former is a rule of evidence which finds no express sanction in the Smritis. The texts which enjoin to what extent a female heir can alienate property are all collected by Mr. Mayne in paragraph 607. The Judicial Committee have interpreted these texts to mean that "for religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than she possesses for purely worldly purposes. To support an alienation for the last she must show necessity." In interpreting this term "necessity", the question of the extent of proof has often cropped up. It has been laid down that the best proof of necessity will be where the next reversioner consents to an alienation by the widow. He is the man most interested in the inheritance. If his assent has been obtained, there is a guarantee that the alienation is justifiable. This rule of evidenee has led to the consideration of the question regarding the nature of the consent. It is now well established that this consent must have been given *bona fide*. Such a restriction is necessary in order that the immediate reversioner who is old and who sees no prospect of his succeeding to the property, may not deal with the property with intent to prejudice the rights of those who will be actually entitled to it on the death of the widow. I do not think, notwithstanding the *obiter dicta* of some learned Judges to the contrary, that the assent of the nearest heir has been regarded by the Judicial Committee as anything but a rule of evidence. The decisions bearing on the subject are very fully summarised by the learned Chief Justice of Calcutta in *Debi Prosad Chowdhury* v. *Golap Bhagat*(28); if I may say so without presumption, I entirely agree with that lucid summing up and conclusion. The differences in opinion among learned Judges are mostly

(40) 21 M. 128; 8 M. L. J. 69.

traceable to the case in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7). That was a case of partial alienation. I do not think this point admits of much doubt. It was by a series of transactions dealing with portions of the estate from time to time that the properties were conveyed. It was not a case of surrender. Sir Andrew Scoble in delivering the judgment of the Committee extracts various passages from previous decisions of the Committee and of the High Courts regarding the "restrictions imposed by the Hindu Law upon the widow's power to alienate." The quotation from *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (8) stops at the exact point where their Lordships deal with the proof of necessity. The remaining portion is very material, as indicating the view of the Judicial Committee on this subject. They say: "But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given, the purpose for which the alienation is made must be proper." This position has been consistently maintained in all the later decisions. *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7) does not refer to another case before the Privy Council, *Sham Sundar Lal* v. *Achhan Kunwar* (41). In this latter case, their Lordships say that the consent must be such "as to raise the presumption that the transaction was a fair one or one justified by Hindu Law." The judgment in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7) proceeds to say that "the principle being thus admitted by the High Courts in India, the question of the quantum of consent necessary only remains;" the admitted principle being that an alienation by a limited owner may be justified on the ground of necessity. This pronouncement is no authority either for the position that partial surrenders are valid or for the contention that the assent of the reversioner is anything more than presumptive evidence of ustifiable alienation. I must now refer to *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (1), which was subsequent to the Calcutta Full Bench decision and which places the meaning of assent by a reversioner beyond controversy. Their Lordships say with reference to the assent of the nearest reversioners that "as against them, it is a fair inference from their conduct that they believed that the arrangement had been made in good faith, and under such circumstances of necessity as would give it validity according to Hindu Law, and as it has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as *affording evidence* that the alienation was under circumstances which rendered it lawful and valid, their Lordships in this case consider that the conduct of the appellants themselves during those years affords evidence upon which the respondents are entitled to rely." I must regard this dictum as setting the controversy on this point at rest. To put it at the highest, Courts *shall presume* (to use the language of the Evidence Act) from the consent of the reversioners that the alienation was justifiable. Although I am inclined to think that it is a presumption of fact and not one of law, still the extent to which the principle has been pushed leads to the inference that the Courts are bound to presume the validity of an alienation when the next reversioner consents to it, until it is rebutted by clear and cogent evidence. Holding this view, I must dissent from the decisions which lay down that such a consent furnishes irrebuttable proof of necessity. I have referred at some length to this question because Mr. Justice Sadasiva Aiyar holds "that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male and gives him full ownership right in the alienated property."

In the present case, the so-called surrender was to the next reversioner. So no question of the consent of the immediate reversioner at the date of the alienation arises, unless it can be argued that a man who takes a gift of property consents to the disposition in his favour. But as I pointed out above, the consent must be of a character to raise the presumption of necessity. It would do violence to legal conceptions to argue that

(41) 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417.

any presumption of such a nature can arise when a man accepts a deed of conveyance in his own favour. Mr. Krishnaswami Aiyar realised this and asked us to support the transaction on the ground that, as it was assented to by the plaintiff who was entitled to the property in case the immediate reversioner died, his conduct precluded him from contesting the validity of the transfer evidenced by Exhibit I.

This takes me to the consideration of the last question argued in this case. That facts relating to this aspect of the case are these. After the transfer of the properties under Exhibit I to the then next reversioner, Ramasami Gounden, and after his death, the two sons of his undivided brother, Nachiappa Gounden, of whom the 1st defendant alone is now alive, sold to the plaintiff on the 7th December 1896 by Exhibit II some of the properties covered by Exhibit I. On the same date the same persons mortgaged to the plaintiff by Exhibit III other properties included in the surrender deed. Marakammal was alive at this time. Both Exhibits II and III refer to the deed of gift she executed to Ramasami Gounden. The question for determination is, whether the conduct of the plaintiff in taking the sale-deed and the deed of mortgage prevents him from seeking to recover the properties covered by these two documents.

On this question I have had the advantage of a consultation with the learned Chief Justice since the case was argued. I agree in the conclusion at which he has arrived. The 3rd defendant in this case must be deemed to be a stranger. The sale to him by the 1st defendant was to pay off the mortgage-money due to the plaintiff. It is most likely that the 3rd defendant was induced to take the conveyance because he found that the plaintiff, who with the 1st defendant were the nearest reversioners had advanced moneys on the mortgage. It is open to argument that the 3rd defendant had the same means of knowledge as the plaintiff had, and consequently the plaintiff cannot be said to have been estopped. I would have, therefore, preferred to have sent down an issue to the lower Court on the question. But seeing that both the learned Chief Justice and Mr. Justice Kumaraswami Sastri are inclined to hold that the evidence on record is sufficient to decide the point, I do not like to dissent from that conclusion. I, therefore, agree in the order proposed by the learned Chief Justice.

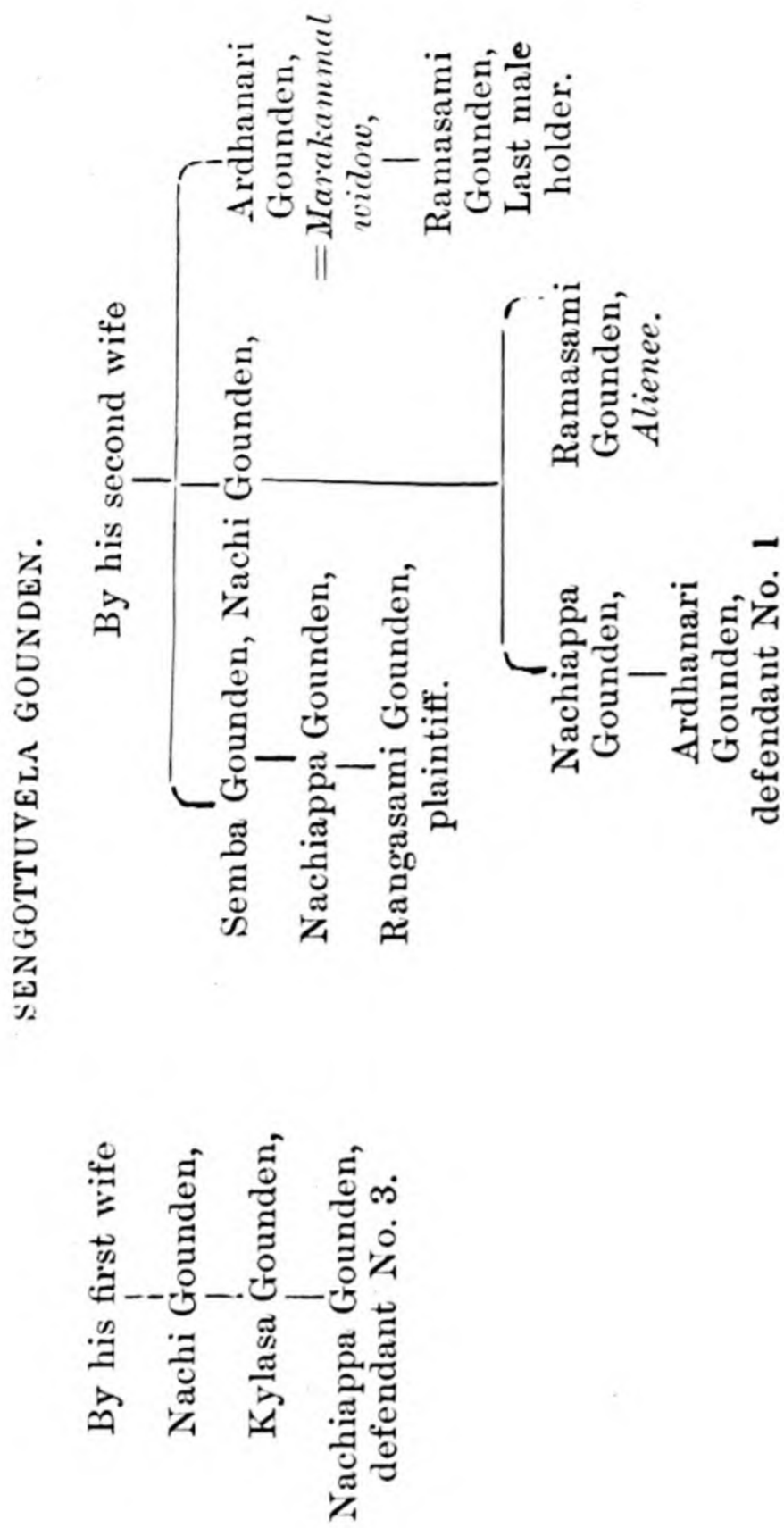
KUMARASWAMI SASTRI, J.—The 2nd defendant is the appellant. The plaintiff, as one of the reversionary heirs to the estate of the deceased Marakammal, sued for a declaration that the deed of gift, dated the 24th November 1893, executed by Marakammal in favour of Ramasami Gounden, her husband's brother's son, is invalid and not binding on him and for partition and delivery to him of a half share of the estate.

Various defences were raised, but for the purpose of this appeal it is only necessary to consider those relating to the validity of the deed of gift and to the claim of the 3rd defendant to a share along with the plaintiff and the 1st defendant. It is sought to support the alienation on the grounds (1) that it amounted to a surrender of the estate by the widow and to a re-grant which vested in the widow and the alienee absolute title in the property each held, (2) that it was a family settlement *bona fide* entered into between the widow and the next reversioner, (3) that the consent of the next presumptive reversioner validated the alienation and (4) that plaintiff cannot dispute its validity as he consented to the alienation, acquiesced in it and waived all objections by purchasing two of the items and taking a mortgage of the third. It is also argued that the distinction between *sapindas* of the whole and those of the half blood does not extend beyond the case of brothers and the sons of brothers.

The District Judge held that the deed of gift was invalid as against the plaintiff and that the 3rd defendant was excluded by the plaintiff and 1st defendant. An appeal was preferred to the High Court. Mr. Justice Miller was for holding that the alienation was invalid and that the 3rd defendant was excluded by the plaintiff and the 1st defendant. Mr. Justice Sadasiva Aiyar, while agreeing with Mr. Justice Miller as to the 3rd defendant being excluded, was for upholding the alienation.

The following table sets out the relation-

ship between the parties so far as it is material :—



Marakammal succeeded as heir to her son Ramasami Gounden, who died issueless in the year 1890. The next reversioner was Ramasami Gounden, her husband's brother's son, and she executed in his favour the deed of gift, Exhibit I, which is now sought to be declared to be invalid. It is dated the 24th November 1893 and the material part runs as follows :—" As you have performed the funeral rites to my husband, the deceased Ardhanari Gounden, and my son, the deceased Ramasami Gounden, as you have the right to inherit as surviving heir all my properties after my death, as you have spent on my behalf and on behalf of my son your own (moneys) and after borrowing moneys required for conducting Original Suit No. 5 of 1883 on the file of the District Court of Salem, conducted by my son, the deceased Ramasami Gounden, as plaintiff, and all other civil and criminal proceedings in connection therewith in other Courts, as I am advanced in age and unable to supervise and manage the *mitta* and other lands and to collect the amounts due on the hypothecation debt bonds, and as you have consented to my possession and enjoyment with all rights and interests of all the properties, other than those mentioned below, which belong to me under the *razinama* decree in Original Suit No. 5 of 1883 on the file of the District Court of Salem and which I am enjoying and of which I make a gift to you, and as you have promised to support me during my life-time at your expense and to have the marriage of my unmarried daughter performed according to our custom and to perform also *seeru* and *serappu* for this and to another daughter who has been married, I have made a gift of the undermentioned properties valued at about Rs. 10,000 to you who is the elder brother's son of my husband, deceased Ardhanari Gounden, and delivered possession to you. Therefore you shall in comfort possess and enjoy the undermentioned properties from generation to generation and with powers to give away by gift, sale, etc. I have no manner of right or interest over the said gift properties."

I do not think that this document can be construed to be in effect one whereby the widow surrendered the whole of her estate to the reversioner and got back a portion with absolute powers of disposal. Far from the surrender of the whole estate the document recites that the widow was to have absolute powers over the properties not given to the reversioner. It merely evidences an arrangement whereby the reversioner in consideration of getting certain items of property consents to the widow enjoying the rest of the properties absolutely. There is no evidence of any arrangement whereby the widow agreed to surrender the entire estate to the reversioner and subsequent to the surrender get back a portion of the estate by a conveyance from the reversioner, and I do not think that any such arrangement can be inferred merely because the document recites that the donee agreed to the donor enjoying the remaining property with absolute rights. Nor is there any evidence that it was in pursuance of

any *family arrangement* necessary and beneficial to the estate, so as to make it binding on reversioners who do not claim under the reversioner who was alienee.

It is argued by the appellant's Vakil that even though there might not have been an absolute surrender of the entire estate, there was a surrender of that portion which was covered by the deed, Exhibit I, and that all that the law requires is that the widow should not retain an interest in the portion given to the reversioner. Reference has been made to *Kanu Ram Deb* v. *Kashi Chandra Sharma Chowdhury* (42) and *Pulin Chandra Mandal* v. *Bolai Mandal* (9). In considering this aspect of the case, I think it is necessary to keep in mind the distinction between a surrender of the estate by the widow to the next reversioner, whereby the widow accelerates the succession by withdrawing her interest in the property, she treating herself as civilly dead so as to open up the inheritance in favour of the next reversionary heir; and (2) in an alienation of a part of the estate which is made with the consent of the next reversionary heir. So far as I can see there is, except in Bengal, very little authority for treating the reversioner's power to validate an alienation as derived from the ordinary power to accelerate the succession.

So far as the doctrine of surrender is concerned, there is no express authority to be found for it either in the Smritis or in the *Mitakshara*. The text of Katyana, accepted by all the commentators as authoritative, expressly states that the widow is to enjoy the estate of her husband with moderation until her death and that after her the husband's heirs should take it. An anticipation of interest involved by the theory of relinquishment or a defeasance of ulterior interests by intermediate or premature acts on the part of the widow is hardly contemplated by the Smritis. As pointed out by Sircar, the rule probably originated from the doctrine that the retirement from the world or the extinction of one's desire for property is according to Hindu Law civil death and causes in the same way as natural death the extinction of her rights in property and has the effect of accelerating the inheritance. The theory of acceleration of the estate by surrender by the widow has been evolved by the Calcutta High Court from the *Dayabhaga* of Jumutavahana, and a long series of decisions established the rule that it was open to the widow to surrender her widow's estate to the next presumptive reversioner, so as to vest the full estate in him as effectually as if he had succeeded to the estate on her death. The doctrine of acceleration by surrender, though it finds no express support from the Smritis, has been placed beyond all doubt by the decision of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal* (10), but it is clear that their Lordships expressly made it a condition precedent that her own life-interest had to be withdrawn so that "*the whole estate should be vested at once in the grantee.*" In *Marudamuthu Nadan* v. *Srinivasa Pillai*(40) the Full Bench of the Madras High Court held that the alienation, to be operative as a surrender, should be absolute and complete and that the whole limited estate should be withdrawn. In *Rangappa Naik* v. *Kamti Naik* (3) their Lordships were of opinion that a transfer, to be valid as a surrender, should be one whereby the whole estate of the widow was extinguished. It is argued that the decision of the Privy Council in *Bajrangi Singh* v. *Mankornika Bakhsh Singh* (7) has extended the doctrine of accelera tion by surrender even to surrenders of part of the estate, provided that the surrender is absolute as to the part surrendered, but reading the judgment I am unable to find any passage where the express direction of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal* (10), that the surrender to be valid should be of the whole estate, is questioned or modified. On the contrary their Lordships of the Privy Council cite the judgment of Justice Subramania Iyer in *Marudamuthu Nadan* v. *Srinivasa Pillai* (40), where he refers to the effect of the decision in *Behari Lal* v. *Madho Lal Ahir Gayawal* (10), as requiring that the surrender should be absolute and complete and that the whole estate should be withdrawn, with approval and observe at the end of the judgment that their Lordships would be unwilling to extend the widow's powers of alienation beyond its present limits. Their Lordships in *Behari Lal's* case (10) observe that "the necessity of the removal of the obstacle of

(42) 2 Ind. Cas. 660; 14 C. W. N. 226.

the life-estate is a practical check on the frequency of such conveyances", and it would require very strong authority to hold that the salutary check has been subsequently removed by the Privy Council. In *Kangappa Naik* v. *Kamti Naik* (3) his Lordship, the Chief Justice, was of opinion that the reservation as to the surrender being of the entire estate, which is expressly laid down by the Privy Council in *Behari Lal's* case (10), was not affected by the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7). Mr. Justice Sankaran Nair was also of the same opinion (see his observations at page 380). A similar view was also taken by the Full Bench of the Calcutta High Court in *Debi Prosad Chowdhury* v. *Golap Bhagat* (28). I am of opinion that the rule requiring the surrender of the entire widow's estate to be necessary to validate an alienation on the ground of surrender, which was clearly laid down by the Privy Council in *Behari Lal's* case (10) and by the Full Bench of the Madras High Court in *Marudamuthu Nadan* v. *Srinivasa Pillai* (40), is not affected by the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7).

It is argued by the appellant's Vakil that apart from the question of surrender, the alienation is valid as it was with the consent of the next reversioner. The contention is that the alienation would have been valid if it had been made to a stranger with the consent of the next reversioner and that there is no reason why it should not be equally valid if made to the next reversioner himself, who must be deemed to have consented to an alienation in his favour. This contention raises the question as to the effect of the consent of the next reversioner. Does consent *per se* validate an alienation which could not otherwise be supported, or is it only evidence of the propriety of the alienation? This question has been fully discussed and considered by a Full Bench of the Calcutta High Court in *Debi Prosad Chowdhury* v. *Golap Bhagat* (28) and I have no hesitation in agreeing with the conclusions arrived at, that consent is only evidence of the necessity or propriety and that the alienation by the widow with the consent of the reversioner would not as against reversioners other than those that consent, confer an indefeasible title to the alienee, apart from any question of necessity or propriety, unless such an alienation can be supported on the doctrine of surrender with the limitation laid down in *Behari Lal's* case (10) or estoppel.

The effect of assent by the reversioners has been discussed by their Lordships of the Privy Council in several cases and it has been treated as evidence of necessity, and not as something that of itself validates an invalid alienation. I need only refer to *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (8); *Raj Lukhee Dabee* v. *Gokool Jhunder Chowdhry* (26); *Sham Sundar Lal* v; *Achhan Kunwar* (41) and *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (1). Nothing can be clearer than the following observations in *Raj Lukhee Debee's* case (26): "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of *presumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration and deserving of considerable weight in the estimation of all the evidence of transaction." In their latest pronouncement on the subject in *Bjioy Gopal Mukerji's* case (1) their Lordships observe: "It has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman, as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

If consent *per se* validated an alienation, it is difficult to see why their Lordships of the Privy Council should have, in a series of decisions, treated it as evidence of propriety. There can be no question of propriety or necessity when all that is

required is the concurrence of the widow and the next reversioner to give a complete title to the alienee.

The Smritis and the commentators thereon do not, in my opinion, sanction the view that the widow and the next reversioner can do what they like with the estate. The text of Katyayana is that she should live under the protection of her elders and enjoy with moderation the property which she got from her husband, and that after her death her husband's heirs should take the property. Brihaspati observes that "she has not got property therein to the extent of gift, mortgage or sale", except for spiritual or religious purposes. What such purposes are appears from the following text of Brihaspati. "With presents offered to his (her husband) manes and by pious liberality, let her honour the paternal uncles of her husband, his spiritual parents and daughter's sons, the children of his sisters, his maternal uncles and also old and unprotected persons guests and females." The position of her husband's kindred is thus defined by Narada: "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself as well as her maintenance they have full power." The texts lay down the purposes for which alienations are justified and the power of the kinsmen, who are placed in the position of her guardians, can only be for carrying on the directions in the Smritis as to the proper and appropriate way in which she is to enjoy the estate. Vijnaneswara is silent as to the powers of disposal by a widow with the consent of the husband's kindred, but Jimutavahana says that she is empowered to giyep resents to her husband's *sapindas*, but not to her own relations if any of her husband's relations are in existence and adds, "with their consent, however, she may also bestow gifts on the kindred of her own father and mother. In the disposal of property by gift or otherwise she is subject to the control of her husband's family."

It is clear that the Smritis never contemplated alienations by a widow except for necessary or spiritual or charitable purposes, and gave her absolute powers in some cases and powers subject to the advice and guidance of her husband's kinsmen in others. There is nothing to justify the conclusion that the mere assent of one who would be the heir if the widow died at the particular moment, would entitle the widow to make alienations at her pleasure or squander the estate on purposes which the Smritis would have emphatically condemned.

I might in passing refer to the distinction sought to be drawn between cases of consent by the next reversioner to alienation for consideration and consent to gifts by the widow. In *Bakhtawar* v. *Bhagwana* (43), *Abdulla* v. *Ram Lal* (44) and *Umrao Kunwari* v. *Sheo Mangal Singh* (45) it was held that the decision of the Privy Council in *Bajrangi Singh's* case (7) did not apply to gifts. A contrary view was taken by the Madras High Court in *Kuppier* alias *Venkatasubbier* v. *Kotta Chinnaramier* (16) and *Kattamoody Raghupathy* v. *Kattamoody Kannamma* (4), where it was held that there was no difference in principle between gifts and transfers for consideration.

If their Lordships of the Privy Council laid down the rule that consent of the reversioner validates an alienation which is otherwise invalid, it is difficult to see what difference it would make if the alienation was for or without consideration. If consent *per se* validates an alienation, it must be because of the efficacy of the assent and it is difficult to see what difference it would make in principle, if the widow received consideration which she squandered on purposes which cannot, by any stretch of imagination, be said to be necessary or proper It may be that a gift is made to a deserving person or for an object that is praiseworthy. It may be one that has been recommended by the text-writers as a gift which the widow might well make owing to its being conducive to the spiritual welfare of herself or her husband or the material prosperity of his kinsmen. If it were necessary to do so, I would hold that there is no difference between gifts and other transfers, but I do not think the question raised has any direct bearing on

(43) 5 Ind. Cas. 270; 32 A. 176; 7 A. L. J. 12'.
(44) 12 Ind. Cas 601; 34 A. 129; 8 A. L. J. 1318.
(45) 24 Ind. Cas. 435.

the facts of the present case as the deed Exhibit I, though it is called a deed of gift, was really a transfer in consideration of moneys advanced and help rendered in connection with litigation concerning the estate which came to the widow, and also in respect of expenses to be borne in connection with the marriage expenses of the sister of the deceased male holder.

Considered as a rule of evidence, the doctrine of validation by assent is founded on the doctrine that a person may well be presumed not to act against his interest and that where a person who would be entitled to avoid a transaction, unless certain conditions are satisfied, assents to it to his prejudice, the safe inference to draw is that the conditions existed. The effect of the decisions of the Privy Council referred to by me above no doubt gives assent a high evidentiary value but they do not make it conclusive proof. As observed by their Lordships of the Privy Council, it is not a presumption of law in the sense of "*presumptio juris et de jure*", but its effect is to afford strong corroborative evidence where evidence of necessity is given and to supply the place of such evidence where it is not forthcoming.

I do not think that the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakksh Singh* (7) can be read as overruling all the previous decisions wherein assent was only treated as evidence of necessity. or as laying down the new principle that the widow and the next reversioner or reversioners can do what they like with the estate. Having regard to the series of decisions that limit the widow's powers of disposal and those which put the reversioner's right as a mere *spes successions*, it is difficult to hold that the widow and the next reversioner represent the entire inheritance and could deal with it as effectively as if the inheritance devolved on the next male heir. As pointed out by the Chief Justice in *Debi Prosad Chowdhury* v. *Golap Bhagat* (28) their Lordships of the Privy Council while referring to the doctrines of validity by assent and by surrender, formulated no new principles but only applied doctrines established by prior decision to a novel set of facts. With all deference to the learned Judges, I dissent from the view taken in *Kuppier* alias *Venkatasubbier* v. *Kota Chinnaramier* (46) and *Mallik Saheb Abdul Saheb Gandigiwad* v. *Mallikarjunappa* (19) as to the effect of the decision of the Privy Council in *Bajrangi Singh's* case (7). I am of opinion that *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (17): *Pilu* v. *Babaji* (47); *Ramakrishna* v. *Tripurabai* (18) and *Debi Prosad Chowdhry* v. *Golap Bhagat* (28) are correctly decided and that the following propositions are deducible from the authorities:—

(1) That an alienation to be valid as to surrender must be of the widow's whole life-estate so as to vest the inheritance at once in the alienee.

(2) That where the alienations is only of a part of the estate, the consent of the next presumptive reversioner is evidence of the necessity or propriety of the alienation and that in the absence of any evidence to the contrary, the Court *shall presume* that the alienation was proper.

(3) That the consent of a reversioner will, if given *bona fide* and for consideration, estop and bind the reversioner so consenting and those claiming through him apart from any question of necessity or propriety.

(4) That whether it is a case of surrender or partial alienation, the consent must be *bona fide* and not a device for the purpose of enlarging the widow's estate.

(5) That assent has a double aspect, not merely raising a presumption, but also raising an estoppel against the person assenting, even though he might not have received ny consideration or benefit.

The next point for consideration is whether the alienation by the widow tested by the above rules is binding on the plaintiff. The appellant's Vakil rests his case on estoppel, acquiescence and waiver. There is no dispute as to the facts. After the death of Ramasami Gounden (the alienee from the widow under Exhibit I), the 1st defendant, who was the son of the donee's undivided brother, Nachiappa Gounden, and 1st defendant's brother (now dead) sold to the plaintiff two of the items of property conveyed by the widow under Exhibit I and mortgaged another item to him for Rs. 8,000.

(46) 10 Ind. Cas. 421; 22 M. L. J. 488; 9 M. L. T. 356.

(47) 4 Ind. Cas. 584; 34 B. 165; 11 Bom. L. R. 1291.

The deed of sale in plaintiff's favour, Exhibit II, recites that the two items were obtained by Ramasami Gounden under the deed of gift and it is not disputed that the deed referred to is Exhibit I. The deed of mortgage which was executed on the same date of the deed of sale (7th December 1896) was for Rs. 8,000, and the only item mortgaged was the *mitta* (item 1 of the plaint). The mortgage recites that the *mitta* hypothecated was "the *mitta* which Ramasami Gounden obtained under a deed of gift from Marakammal." The schedule to the mortgage-deed also describes the property similarly. The property was sold subsequently by the 1st defendant to the 3rd defendant and it appears from the deed of sale that money had been borrowed from the vendee to discharge the mortgage in plaintiff's favour and that the sale was *inter alia* to discharge the debt so incurred.

When the plaintiff purchased two items of property and got a mortgage of another item (which was the most valuable) for Rs. 8,000, Ramasami Gounden, the donee under Exhibit I, was dead and the plaintiff was one of the next reversioners. The deed of gift, Exhibit I, executed by Marakammal in favour of Ramasami Gounden was not void but was only voidable at plaintiff's option, as ruled by their Lordships of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (15). He was, no doubt, not bound to institute a suit to set it aside, nor was he bound by any overt act to express consent or dissent, but he was certainly bound not to do any act which would reasonably induce third parties to believe that he elected not to avoid the transaction but to affirm it. It is difficult to believe that the plaintiff was not aware of his legal rights and of his rights to dispute the validity of the alienation by the widow. It appears from Exhibit I that Marakammal was 52 years old in 1893 so that she was at the date of Exhibits II and III about 55 years old. The plaintiff's age, as appears from his deposition, was 40 in 1909 so that he was 27 years old in 1896 when he purchased two items and lent money on the third. It is, no doubt, true that the alienation by the widow will be good during her life-time, but it is hardly likely that the next reversioner who was a young man of 27 would have lent Rs. 8,000, when the widow on whose death he would succeed was an old woman of 55 years, merely on the strength of the life-interest. When a reversioner under such circumstances lends a considerable sum on one of the most important items of property alienated by the widow, I think a reasonable and prudent man might infer that he assented to the alienation of that item by the widow. It has, no doubt, been held in *Sham Sundar Lal* v. *Achhan Kunwar* (41) that the consent must be shown to have been given with a knowledge of the effect of what one is doing and an intelligent intention to consent to such effect. As regards acquiescence and ratification it has been held in *La Banque Jacques Cartier* v. *La Banque D'Epargne De La Cite Et Du District De Montreal* (48) that they must be founded on full knowledge of the facts and must be in relation to a transaction which is valid in itself and not illegal and to which effect may be given as against the party by his acquiescence in, and adoption of, the transaction. The principles as to estoppel are to be found in section 41 of the Transfer of Property Act and section 115 of the Evidence Act. The law is clear, but the difficulty arises in its application to a particular set of facts. When a person lends a large sum of money to another on the security of property treating him as absolutely entitled to the property while, as a matter of fact, his title was only a limited one avoidable at the option of the mortgagee on the widow's death, it is difficult to see on what principle he can turn round and dispute the title of a purchaser who has lent money to pay him off and who to recoup himself has purchased the property.

It is argued that the principles of Hindu Law as to ratification and assent only apply to ratification by the next presumptive reversioner and that same principles cannot be applied where the alienation is by the widow to the next reversioner and that next presumptive reversioner consents. I am unable to see any reason for the distinction. As I have already pointed out, the Hindu Law does not make any distinction between the next and the more remote reversioners

(48) (1888) 13 App. Cas. 111; 57 L. J. P. C. 42.

or display any preponderating preference for the next heir over another more remote. The texts speak of the husband's kinsmen and the words "paternal uncles" in the text of Brihaspati, where the paternal uncles of her husband are spoken of, has been interpreted to mean the *sapindas* of her husband. Narada speaks of the husband's kin being the guardians. The rule laid down in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7), that the assent by the next reversioners is enough, is only a practical working rule and cannot be construed to mean that the assent given by remoter reversioners has no legal effect, even though the immediate reversioner is the alienee and his assent or evidence of necessity is of no use.

It is not necessary that the assent or ratification should be before or at the date of the alienation, *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (7); nor is assent required to be in any particular form. Assent might be inferred by attestation, *Kuppier* alias *Venkatasubbier* v. *Kota Chinnaramier* (46); *Narayana Aiyar* v. *Rama Aiyar* (21); *Chunder Dutt Misser* v. *Bhagwat Narain Thakur* (23): *Ismail Jolaha* v. *Jagannath* (22), though as pointed out by their Lordships of the Privy Council in *Raj Lukhee Dubee's* case (26), mere attestation without more does not necessarily import concurrence. It may also be inferred by recitals in other documents or by a course of conduct which leads to the reasonable inference that a person elects to ratify a voidable transaction, *Kuppier* alias *Venkatasubbier* v. *Kota Chinnaramier* (46); *Mallik Saheb Abdul Saheb Gandigiwad* v. *Mallikarjunappa* (19); *Modhu Sudan Singh* v. *Rooke* (14).

So far as the two items of property purchased by plaintiff are concerned, they were not very valuable and were sold along with other items of property admittedly belonging to the vendor. I do not think that under these circumstances it can be taken as proved beyond doubt that the plaintiff intended to give up his rights as regards all the items of property transferred by the widow under Exhibit I. So far as the mortgage of the *mitta* under Exhibit III is concerned, I am of opinion that the facts set out by me show that plaintiff must have assented to the alienation. Though Exhibit I purports to be a deed of gift, the recitals show that the alienee had spent his own moneys for a litigation concerning the estate got by the widow (to re-pay which the widow could have borrowed moneys or sold properties so as to bind the reversioners) and agreed to defray the marriage expenses of her daughter, who was the sister of the last male-owner. Assent by the reversioner is strong evidence of the truth of the recitals and shows that it was either necessary or proper. So far as the plaintiff is concerned, I am of opinion that he cannot question Exhibit I in so far as it conveys the *mitta* item (1) to Ramasami Gounden, both on the ground of estoppel and on the ground of consent or ratification.

The last question is about the exclusion of the reversioners of the half blood by those of the full blood. It will be seen from the genealogical table that Sengottuvela Gounden had two wives and that while the plaintiff, the 1st defendant and the last male owner are descendants of Sengottuvela Gounden by the second wife, the third defendant claims descent through the first wife. It is argued for the appellant that the rule of Hindu Law as to the exclusion of half blood by those for the full blood extends only to brothers and their sons and that there is no reason to apply the doctrine to ascendants. The balance of authority is in favour of the view that the distinction between whole blood and half blood extends to *sapinda* relations other than the brother and his sons. In *Subba Singh* v. *Sarafraz Kunwar* (29) and *Sham Singh* v. *Kishun Sahai* (31) their Lordships dissented from the view taken in *Samat* v. *Amra* (38) and *Vithal Rao* v. *Rama Rao* (30) by the Bombay High Court. Justices Miller and Sadasiva Aiyar, though they differed on other points, agreed in accepting the view taken by the Calcutta and Allahabad High Courts.

The chief argument adduced by the appellant's Vakil is that while the *Mitakshara* makes mention of the difference between whole and half blood in dealing with the case of brothers and their sons, no such distinction is drawn when other heirs are spoken of. It is also argued that the reasons given by the *Mitakshara* for fixing the position of what are called the compact

heirs are not always consistent and that consequently there is no reason to treat the grounds of inclusion or exclusion as applicable to the other heirs. These arguments lose much of their force when it is remembered that the *Mitakshara* bases the whole scheme of succession on the well-known text of Manu (Chapter IX, Sloka 187) which has been translated by Colebrooke as "to the nearest *sapinda* the inheritance next belongs." Literally translated the line reads as follows: "He who is unremote from *sapinda* his property becomes his." The *Mitakshara* treats *sapinda* relationship as arising from connection with parts of one body, curtailed by the technical limitation that it includes only paternal agnatic relations within the seventh degree. It treats as axiomatic Slokas 186 and 187 of Chapter IX of Manu which run as follows:—"To three must libations of water be made, to three must *pinda* or oblations of food be presented. The fourth is the giver of these offerings; the fifth has no concern with them. Whoever is unremote from (among) *sapinda* his property becomes his. After him the *Sakulya* is the heir, then the preceptor or pupil." In trying to reconcile this principle with the fact that the mother (probably by long usage) was placed before the father while the maternal relations were postponed to the paternal, Vijnaneswara put forward reasons which other commentators did not accept but there can be little doubt that however illogical the grounds might be when applied to particular relations, the basic principle accepted by him was that the inheritance goes to the nearest *sapinda*. In treating of the mother's rights to succeed in preference to the father he observes as follows:—"Besides the father is a common parent to other sons but the mother is not so and since her propinquity is consequently the greatest, it is fit that she should take the estate conformably with the text. To the nearest *sapinda* the inheritance next belongs." In treating of brothers he gives the preference to brothers of the whole blood, his reason being that those of the half blood are remote through the difference of the mother and that, therefore, those of the whole blood should take the inheritance in the first instance conformably to the text of Manu. "To the nearest *sapinda* the inheritance belongs." In dealing with brothers' sons he states: "On failure of brothers also their sons share the heritage in the order of the respective fathers," and Balambhatta explains this to mean in their order as descended from brothers of the whole or half blood.

So far as I can see, there is no reason for limiting the exclusion of the agnates of half blood by those of the full blood to brothers and their sons, if propinquity is to be the basis on which succession is to be regulated and the text of Manu, "To the nearest *sapinda* the inheritance next belongs," is to be treated as of universal application. The *Mitakshara*, which is a running commentary on the institutes of Yajnavalkya, is known for its brevity, and the repetition of arguments or grounds of exclusion when there is no difference in principle is hardly to be expected. Nor is it exhaustive on matters of succession. The view taken by the Calcutta and Allahabad Hight Courts has the sanction of Visweswara Bhatta, the well-known author of the Madanaparijata, who states that the paternal uncles and other ascendants succeed "on the analogy of brother's sons mentioned in the verse of Yajnavalkya regarding other heirs and that the distinction between the whole blood and the half blood applies to all ascendants. Upalakshana and Lakshana are well-known technical terms in Mimansa and it cannot be said that commentators like Vijnaneswara had not the rules of the Mimansa in mind. Upalakshana is the rule of construction whereby a word is taken to mean, not only a thing denoted by it, but also as meaning and including other things of the same nature. Lakshana is extending the meaning of a word to things connected by analogy. Applying these principles of interpretation and bearing in mind the rule of Manu as to succession by propinquity, there can be little doubt that Vijnaneswara gave the reason for preferring whole to half brothers by way of illustration of a general principle and hardly intended to cut down a rule of general application. I am of opinion that preference based on connection by whole blood applies not only to brothers and their sons but to uncles and their sons and grandsons.

In the result I allow the appeal as regards the *mitta* item 1 of the property and modify the decree of the lower Court by dismissing

plaintiff's suit as regards this item. The parties will pay and receive proportionate costs throughout.

Appeal allowed in part; Decree modified.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 131 OF 1913.
November 20, 1914.
Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.
NIAMAT ALI—DEFENDANT—APPELLANT
versus
ALI RAZA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 92, *applicability of- Dispute between parties as to who is entitled to be* mutwalli, *suit relating to.*

Suits relating to disputes between parties as to who is entitled to be *mutwalli* on the ground of family relationship are not brought under section 92 of the Civil Procedure Code.

First appeal from the decision of the District Judge, Farrukhabad, dated the 19th February 1913.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *A. Haidar)*, for the Appellant.

The Hon'ble Mr. *Abdul Raoof* (with him Mr. *Gulzari Lal)*, for the Respondents.

JUDGMENT.-In this suit, which purports to have been brought under the provisions of section 92 of the Code of Civil Procedure, the plaintiffs claimed that the defendant should be removed from the *mutawalliship* of certain property, which was specified in lists A and B appended to the plaint, that the defendant should be called upon to furnish accounts and that a new trustee or trustees from the family of the original appropriator (one Wali Ullah) should be appointed. In the plaint are set forth the history of the *waqf*, about which there appears to be no doubt. One Maulvi Wali Ullah started an Arabic school of literature and Muhammadan jurisprudence in the city of Farrukhabad about the year 1808. He dedicated certain shops, which at present produce about Rs. 22 per mensem, for the expenses. For a long time a man of the name of Syed Fazl Ali was *de facto mutwalli*. He made a further *waqf* of property worth about Rs. 7,500. He continued to be at least *de facto mutwalli* during the remainder of his life and named his son, Inam Ali, to be *mutwalli* after his death. Inam Ali succeeded Fazl Ali and died on the 5th of February 1908. Fazl Ali, when making his dedication, provided that the descendants of Inam Ali should be the *mutwallis* of the entire endowment. After the death of Syed Inam Ali, who apparently died without issue, his brother Karamat Ali assumed the *mutwalliship*. Then followed some litigation, Karamat Ali brought a suit asking for a declaration that he was the lawful *mutwalli* of all the property. The Court of first instance decided in his favour. The principal plaintiff in the present suit, Syed Ali Raza, was a party. Syed Ali Raza appealed and on the case coming before this Court the suit was withdrawn with liberty to bring a fresh suit. From the judgment it would seem that the Court had indicated that the evidence adduced by Karamat Ali was not sufficient to justify it in making an affirmative declaration in his favour. No fresh suit was apparently brought owing to the death of Karamat Ali. On the death of Karamat Ali, which took place on the 23rd of August 1911, the present defendant, Niamat Ali became *mutwalli* under the guardianship of his mother, *Musammat* Tasliman. This was in accordance with a provision in the Will of Karamat Ali. The present suit was then instituted on the 20th of February 1912. It must be noted here that there is no allegation in the plaint that there has been any misappropriation of trust funds or any breach of trust. It is not alleged that any scheme was required. The prayer is simply for the removal of the defendant from the office of *mutwalli* and that some new trustee or trustees from the family of the original appropriator should be appointed.

The Court below has made a decree removing the defendant from being trustee and has appointed the plaintiff, Syed Ali Raza, *mutwalli*. It has even given the costs of the suit against the defendant. Section 92 of the Code of Civil Procedure provides for a suit for certain reliefs in the Court of the District Judge in a case of an alleged "breach" of a trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust. Suits relating to disputes between parties

as to who is entitled to be *mutwalli* on the ground of family relationship are not brought under this section. We have already pointed out that no breach of trust was alleged nor proved, nor was it shown in any way that the intervention of the Court was necessary. Assuming that Karamat Ali was legally entitled to be the *mutwalli*, an office which he undoubtedly *de facto* enjoyed, he was entitled to appoint his successor. It seems to us that the suit was entirely misconceived and ought not to have been entertained by the learned Judge. It is argued that there was no *mutwalli* and that the *waqf* property was derelict, and that accordingly the intervention of the Court was absolutely necessary. This is clearly not so. Karamat Ali was *de facto mutwalli*, and it was never decided that he was not also *de jure* so. As a matter of fact it clearly appears that the defendant did assume the office and apparently the trust property was being properly managed. It is said that the defendant Niamat Ali is a minor. It is possible that he was a minor according to the Indian Majority Act, but it is by no means certain that he was a minor according to the Muhammadan Law, that is to say, that he had not reached the years of puberty and discretion. In the Will of Karamat Ali, which was made before the present dispute arose, he is described as being a boy of 16 years of age. On the general merits of the case it seems to us that the present suit has very little. The defendant is the grandson of Fazl Ali, who made the last endowment the most substantial portion of the *waqf*. Fazl Ali had for many years been at least *de facto mutwalli* of the endowment created by Wali Ullah, and the presumption would be that he was also *de jure mutwalli*. According to the spirit of Muhammadan Law Niamat Ali, his grandson, would have the best right to be *mutwalli*. We need hardly say that if there is a breach of trust in the future, it will be open upon proper proof to get the *mutwalli* removed and a new trustee appointed.

We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 164 OF 1911.

September 10, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

THURI KOTHANDARAMA REDDIAR —PLAINTIFF—APPELLANT

versus

THESU REDDIAR *alias* VEERASAMI REDDIAR—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 23—Agreement to pay money for procuring adoption, validity of—Public policy.

An agreement to pay a bribe to procure the adoption of a boy is one against public policy and is therefore, void.

Devarayan Chetty v. *Muthuraman Chetty*, 18 Ind. Cas. 515; (1913) M. W. N. 200; 37 M. 393; 24 M. L. J. 310, followed.

Appeal against the decree of the District Court of Chingleput, in Original Suit No. 19 of 1910.

Mr. *T. R. Ramachandra Aiyar* (with him Messrs. *T. Narasimha Aiyangar* and *N. Visvanatha Aiyar*), forthe Appellant.

Messrs. *R. Sadagopachariar* and *A. Krishnasami Aiyar*, for the Respondent.

JUDGMENT.

SANKARAN NAIR, J.—The plaintiff brought the suit as the assignee of a promissory note executed by the defendant in favour of one Venkatarama Reddi. The Judge has dismissed it on the ground that the consideration is illegal and the plaintiff is not a "holder in due course." The plaintiff appeals.

Venkatarama Reddi's daughter, Venkatalakshmi Ammal, was authorised by her husband to adopt a son. The defendant is her husband's brother's son. Venkatarama Reddi was not willing that his daughter should adopt the defendant. What then happened, according to him, may be described in his own words:—"The 1st defendant went away and came back in 10 days and asked one to intercede with Venkatalakshmi. I said I would do so. He went away and came back in another 15 days. I advised Venkatalakshmi to adopt in case the defendant and his brother brought litigation. On the several occasions the 1st defendant told me he would give me the Rs. 10,000 Venkatalakshmi had agreed to give me, if the adoption took place. It is a public matter that my daughter had promised to give me Rs. 10,000. I had also told the 1st defend-

ant. I do not know why my daughter was not willing to adopt the 1st defendant. My daughter had promised to give me Rs. 10,000 out of the income of the estate. Dasi Reddi came a third time seven or eight days later. I told my daughter that defendant had agreed to pay me Rs. 10,000 as she had agreed to and that it would be well she should adopt him. When he came the third time I told him I had arranged with my daughter and asked him to take her and complete the document." "The consideration for the suit promissory note was the adoption of the defendant. I agreed to bring about the adoption as the defendant promised to give me Rs. 10,000. If the defendant had not promised to give me Rs. 10,000, there would have been no adoption and I should not have spoken about it to my daughter."

The promissory note was executed for the payment of this sum of Rs. 10,000. The evidence shows that the amount was agreed to be paid as a bribe to Venkatrama Reddi to bring about the adoption. The appellant's Pleader argues that the defendant's evidence shows that the widow herself asked the defendant to execute the bond, as otherwise on account of her father's opposition she might be unable to carry out the adoption. This makes no difference, as there is no suggestion that the payment was made for the widow's benefit. In my opinion this agreement to pay a bribe is one against public policy and cannot be enforced. The appellant's Pleader argues that this case stands on the same footing as an alienation in favour of the widow and is similar to the class of cases dealt with in *Ramasami Aiyan* v. *Venkata Ramaiyan* (1) and *Visalakshmi Ammal* v. *Sivaraman* (2), and he argues that the decision in *Shri Sitaram Pandit* v. *Shri Harihar Pandit* (3), in so far as it is opposed to these decisions. should not be followed. Arrangements made for the benefit of an adopting widow stand on a very different footing. She is not bound in law to make any adoption. In the absence of any adoption she would be entitled to the possession of her husband's property during her life-time and absolutely to the usufruct thereof. Any arrangement, therefore, by which she retains any portions of that interest, which she parts with by an act purely voluntary on her part, might not be against public policy or against Hindu Law. It has also to be remembered that there are various texts of Hindu Law which place a widow's interest even higher than that of a son. See Mayne on Hindu Law, paragraphs 245 and 529. I am, therefore, of opinion that these cases have no bearing.

I am also of opinion for the reasons given by the District Judge that there was no consideration for the assignment. Venkatarama Reddi said in cross-examination that the arrangement was that the plaintiff was to get Rs. 1,000 in case of success in the suit and the balance was to be paid over to him. I am not prepared to accept his subsequent denial of his statement in re-examination. He is, therefore, not entitled to sue.

This appeal is dismissed with costs.

SPENCER. J.—I entirely agree. The case of *Devarayan Chetty* v. *Muthuraman Chetty* (4) is in point. In my opinion it was rightly decided in that case that the giving to a third party pecuniary interest in a marriage taking place or, in other words, "trafficking in marriage" is opposed to public policy and is not a legal consideration for a contract. This is in agreement with the English Law relating to marriage brocage contracts. Reading *Kalavagunta Venkata Kristnayya* v. *Kalavagunta Lakshmi Narayana* (5) and *Murugappa Chetti* v. *Nagappa Chetti* (6), I consider that no distinction can be made between contracts to make payment in consideration of marriage and similar contracts in consideration of adoption. In *Murugappa Chetti* v. *Nagappa Chetti* (6) it was held that though the adoption might be valid, the agreement for payment of money was a separate transaction and illegal. This is a transaction of a very different nature from fair and reasonable dispositions in favour of the adopting widow referred to in *Visalakshi Ammal* v. *Sivaraman* (2).

Appeal dismissed.

(1) 2 M 9 ; 6 I. A. 196; 5 C. L. R. 347; 3 Shome L. R. 39; 3 Ind. Jur. 472; 4 Sar. P. C. J. 42; 3 Suth. P. C. J. 663.

(2) 27 M. 577; 14 M. L. J. 310.

(3) 8 Ind. Cas. 625; 35 B. 169; 12 Bom. L. R. 910.

(4) 18 Ind. Cas. 515; 24 M. L. J. 310; (1913) M. W. N. 200; 37 M. 393.

(5) 3 Ind. Cas. 554; 32 M. 185; 18 M. L. J. 403; 4 M. L. T. 1 (F. B.).

(6) 29 M. 161; 16 M. L. J. 22.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 837 OF 1913.

June 17, 1914.

Present:—Mr. Justice Chamier.

CHAULI—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL BOARD OF MUZAFFARNAGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

U.P. Municipalities Act (I of 1900), ss. 2, 91—Powers of Municipal Board to close drain.

Section 2 of the U. P. Municipalities Act cannot be read in such a way as to prevent the Municipal Board from exercising for all time the powers conferred by section 91 of the Act in respect of drains which are a nuisance or injurious to health.

Therefore, even where a person has obtained a decree against his nieghbour declaring his right to pass water along a drain, the Municipal Board is entitled to close the drain if it is injurious to public health.

Second appeal from the decree of the Subordinate Judge of Meerut.

FACTS.—The plaintiff's house is adjacent to that of the defendant No. 2 in the city of Muzaffarnagar.

The dirty water of the plaintiff's house had been flowing in a drain passing through the compound of the defendant's house for over fifty years. In a former suit between the parties regarding the flow of this water, plaintiff's right was recognised by Civil Courts in 1886.

Recently the defendant moved the Health Officer and the Municipal Board to change the course of the plaintiff's drain into some other direction. The Municipal Board ordered the plaintiff to close the drain. Hence the suit by plaintiff for declaration and injunction against the defendant and the Municipal Board. The lower Appellate Court held that the Municipal Board had the power to order the closing of the drain and the diverting of the flow of water in some other direction. Hence this second appeal by the plaintiff.

Mr. *Nihal Chand*, for the Appellant.

Messrs. *Abdul Raoof* and *A. Ryves*, for the Respondents.

JUDGMENT.—This case appears to me to be on all fours with the case of *Abdul Aziz* v. *Chairman of the Municipal Board of Pilibhit* (1), by the decision in which I am bound. According to that case the suit ought to have been dismissed

(1) A. W. N. (1905) 79; 2 A. L. J. 222.

altogether. The Munsif has added a proviso to his decree to which the Municipal Board has taken no objection. The suggestion that the Board was not entitled to close the drain because the plaintiff had obtained a decree declaring his right to pass water along a drain through the defendant's house and that this right is saved by section 2 of the Municipalities Act, cannot be accepted. It is impossible to read section 2 in such a way as to prevent the Municipal Board from exercising for all time the powers conferred by section 91 of the Act in respect of drains which are a nuisance or are injurious to health.

The contention raised in the second ground of appeal has no weight. It must be presumed that the Board acted honestly in exercising the powers conferred on it, and it does not signify whether the Board was moved to act by the second defendant or by any one else.

In the fourth ground of appeal it is said that the plaintiff-appellant may be put to considerable expense. That is a matter which does not arise in the present case, nor can I express any opinion on the question whether the Board is bound to give compensation to him or not. In my opinion the decision of the lower Appellate Court is correct. The appeal, therefore, fails and is dismissed with two separate sets of costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2277 AND 2702 OF 1911.

August 11, 1914.

Present:—Mr. Justice Mullick and Mr. Justice Walmsley.

GIRISH CHANDRA CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS (IN BOTH)

versus

IN NO. 2277 OF 1911

KUNJA BEHARI KOWAR—PLAINTIFF—RESPONDENT

IN NO. 2702 OF 1911

RAM TARAN BHATTACHARJYA—PLAINTIFF—RESPONDENT.

Easement—Enjoyment for 20 years—Limitation Act

GIRISH CHANDRA CHOWDHURY *v.* KUNJA BEHARI KOWAR.

(*IX of* 1908), *s.* 26—Kobala *admitting right of easement —Evidence Act* (*I of* 1872), *s.* 13—*Appeal—Misjoinder of causes of action, plea of, whether allowed to be raised.*

Where an easement is enjoyed peaceably and o penly as of right without interruption for a period of 20 years, the requirements of section 26 of the Limitation Act are fully complied with, and the right becomes absolute.

A *kobala* admitting the right of the plaintiff to an easement is relevant and as such admissible under section 13 of the Evidence Act.

The plea of misjoinder of causes of action cannot be allowed to be urged for the first time in the High Court.

Second appeals from a decision of the Officiating Sub-Judge of Birbhum, dated 18th May 1911, affirming that of the Munsif, Second Court at Bolpur, dated 7th March 1910.

Babu *Kalidas Sircar*, for the Appellants.

Babu *Sajani Kant Sinha*, for the Respondent.

JUDGMENT.

MULLICK, J.—The plaintiffs in these suits pray for a right of irrigation to their lands from a tank belonging to the defendants. It appears that in *Fasli* 1315 *Sambat* the defendants having blocked the alleged channel and the plaintiffs having removed the obstruction, defendant No.1 lodged a complaint before the Magistrate, in consequence of which the plaintiff in Suit No. 580 and the son of the plaintiff in Suit No. 481 were criminally prosecuted for mischief and a fine of Rs. 20 each was imposed on them. In the case before us, the plaintiffs add a prayer for damages to the extent of the above fines and Re. 1 for cutting or opening the channel. The learned Subordinate Judge has found the right of easement established and has also given the plaintiffs the damages claimed.

On appeal several grounds have been taken before us which we will now examine in detail. The *first* point taken is that the user of the plaintiffs was not within two years of the suit. We find that this point was not taken before the Subordinate Judge and that it is not mentioned in the memorandum of appeal before us. We do not think that we can entertain it at this stage. The *next* point is that a certain *kobala*, which has been admitted on behalf of the plaintiff, was improperly admitted. We cannot agree that the evidence was improperly admitted. Section 13 of the Indian Evidence Act is in favour of the plaintiffs on this point; moreover, it does not appear from the judgment of the Court of Appeal below that the point was urged in argument. The *third* point is that certain persons over whose lands the irrigation channel passes have not been added as parties. In our opinion, these persons need not have been added. The *fourth* point is that there has been a misjoinder of causes of action. This point was not taken before the learned Subordinate Judge and we do not think we can allow it to be argued before us here. There remains a principal issue in the case, namely, whether an easement has been acquired as of right within the meaning of section 26 of the Limitation Act. It is admitted that there is no case of grant. But the substance of the appellant's attack on the judgment of the Court below is that there is no specific finding that the easement was enjoyed peaceably and openly as of right without interruption for 20 years. Reading the Judgment of the learned Subordinate Judge, which is one of concurrence with that of the Munsif, it is clear to us that what the Court below intends to find is that section 26 of the Limitation Act has been fully complied with. The learned Subordinate Judge states that the plaintiffs have acquired a right of irrigation from time immemorial. The learned Munsif on the beginning of his judgment, sets out the allegations of the plaintiffs, which are that there had been an enjoyment of the easement peaceably and openly as of right without interruption for 20 years. Although on his finding the learned Munsif does not use the words 'as of right', he comes to a general conclusion that the allegations of the plaintiffs have been made out. Reading the judgment as a whole, we are satisfied that he finds that the requirements of the law have been complied with. There remains, finally, the question of damages. It appears that the convictions of the plaintiff in Suit No. 580 and of his son in Suit No. 481 are still in full force. Upon the authorities, it does not seem competent for the plaintiffs to claim damages for malicious prosecution so long as these convictions stand and it is not seriously contended that the damages claimed are other than damages for malicious prosecution. In this view of the case, we think that the decree of the Court below as regards damages must be set aside. The appeals succeed in part. Each party paying his own costs throughout.

WALMSLEY, J.—I agree.

Appeals partly allowed.

SHEO HARAKH *v.* RAM CHANDER

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION NO. 84 OF 1914.

November 17, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

SHEO HARAKH—PLAINTIFF—APPELLANT

versus

RAMCHANDER—DEFENDANT—RESPONDENT.

Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), ss. 21 (4), 22—Appeals lying to District Judge ordered to be preferred to Subordinate Judge—Subordinate Judge, power of, to hear such appeals.

Where appeals lying to a District Judge under sub-section 2 of section 21 of the Bengal, N.-W. P. and Assam Civil Courts Act are directed under sub-section (4) to be preferred to the Court of a Subordinate Judge, the intention is that the appeals preferred accordingly should be heard and disposed of by the Subordinate Judge without any order of transfer of such appeals to his Court under section 22 of the Act.

Civil revision against the order of the Subordinate Judge of Mirzapur, dated the 21st November 1913.

FACTS.—The plaintiff took a lease of some land from the respondent, Ram Chander, and paid rent in advance and obtained a receipt for Rs. 124. Another co-sharer of Ram Chander brought a suit for arrears of rent against plaintiff, obtained a decree and realized Rs. 75-6-0 from plaintiff. Plaintiff, therefore, brought a suit to recover that amount on the ground that he had paid it to Ram Chander already, had as he represented himself to be the owner. The first Court decreed the suit, but the Sessions and Subordinate Judge, who heard the appeal, dismissed the suit. Plaintiff applied in revision to the High Court.

Mr. *S. D. Sinha*, for the Applicant:—The Subordinate Judge had no jurisdiction to hear the appeal unless it was transferred to him for hearing by the District Judge. Under section 21, Bengal N.-W. P. and Assam Civil Courts Act, appeals from the decrees of Munsifs lie to the District Judge. A notification issued by the Local Government under sub-section (4) merely enables the Subordinate Judge to receive such appeals. The word used in the sub-section is "preferred." The Subordinate Judge, therefore, can have no authority to "hear" the appeals unless there is an order under section 22 of the same Act. So long as the District Judge does not take action under section 22, the appeal is practically pending in his Court and the Subordinate Judge cannot hear it.

Mr. *Uma Shanker Bajpai* (for Mr. *Nawal Kishore*), for the Respondent:—The Legislature could never have intended that the power conferred on the Local Government under sub-section (4) should simply enable it to order by the notification that appeals should only be received by the Subordinate Judges and not be heard by them. The inconvenience sought to be avoided by the said notification would still continue, if it were further necessary for the District Judge to issue an order under section 22. When an appeal is preferred in a Court, it is pending in that Court and that Court has the power to hear it. I rely on *Sohan Lal* v. *Baldeo Pershad* (1). This ruling would apply to my case as the wording of section 18, sub-sectin (3), Oudh Civil Courts Act, is similar to section 21, sub-section (4), of the Bengal, N.-W. P and Assam Civil Courts Act and the above ruling was made under the former Act.

JUDGMENT.

CHAMIER, J.—This application for revision raises a curious question upon which, so far as we are aware, there has not been any decision of this Court. The plaintiff in this case filed a suit in the Court of the Munsif of Mirzapur, who in July 1913 decreed the claim. The defendant preferred an appeal against the Munsif's decree to the Court of the Subordinate Judge of Mirzapur. The Subordinate Judge proceeded to hear the appeal and in November 1913 allowed the appeal and dismissed the plaintiff's suit. This is an application for revision of the order of the Subordinate Judge, on the ground that the Subordinate Judge, in the absence of an order of the District Judge transferring the appeal to him for disposal, had no jurisdiction to hear it. Under section 21 of the Bengal, N.-W. P. and Assam Civil Courts Act appeals from decrees of Munsifs lie to the District Judge, but under sub-section (4), of that section the High Court may, with the previous sanction of the Local Government, direct by notification in the Official Gazette that appeals lying to the District Judge under sub-section (2) from all or any of the decrees or orders of any Munsif shall be preferred to the Court of such Subordinate Judge as may be mentioned in the notification, and the appeals shall thereupon be preferred accordingly. It appears that on April 25th, 1913, the High Court with the sanction of the Local Government directed by notification in the

(1) 7 O. C. 321.

Official Gazette that appeals from the decrees of the Munsif of Mirzapur should be preferred to the Subordinate Judge of that district. On behalf of the applicant it is contended that that notification merely enabled the Subordinate Judge to receive such appeals, but did not give him any authority to hear them in the absence of an order under section 22 of the same Act. Section 22 is the section which empowers a District Judge to transfer to any Subordinate Judge under his administrative control any appeals pending before him from decrees or orders of the Munsif. According to the argument presented on behalf of the applicant, an appeal which has been preferred under a notification issued under sub-section (4) of section 21 of the Act is pending before the District Judge and, therefore, may be transferred by him to any Subordinate Judge under section 22 of the Act. Speaking for myself I cannot accept this contention. It appears to me that after an appeal has been preferred to the Court of the Subordinate Judge it is pending in that Court, and I find much greater difficulty in holding that section 22 enables the District Judge to transfer such an appeal as an appeal pending before himself than in holding that the Legislature intended that an appeal preferred to a Subordinate Judge under such notification should not be disposed of by him. An exactly similar question arose in Oudh in 1903. In the Oudh Civil Courts Act (XIII of 1879) there is a provision similar to section 21, sub-section (4), of the Bengal, N.-W. P. and Assam Civil Courts Act. Under section 18, sub-section (3), of the Oudh Act, the Judicial Commissioner may, from time to time with the previous sanction of the Local Government, direct by notification in the Official Gazette that appeals from all or any of the decrees or orders of any Munsif shall be preferred to such Subordinate Judge as may be mentioned in the notificatian, and the appeals shall thereupon be preferred accordingly. It will be noticed that there is a slight difference between the language of the Oudh section and the language of section 21 of the Bengal, N.-W. P. and Assam Civil Courts Act, and it has long been the practice in Oudh to insert in the notification under section 18, sub-section (3), the name of the Subordinate Judge to whom the appeals are to be preferred. Whether this was necessary or not may be open to doubt, but the difference between the language of the two sections does not affect the question which we have to decide in this case. In the case of *Sohan Lal* v. *Baldeo Pershad*(1) the late Mr. Scott and I held that a Subordinate Judge, to whom appeals are preferred under a notification issued under section 18, sub-section (3), of the Oudh Act, has jurisdiction to dispose of them. I am of the same opinion still. Hundreds if not thousands of appeals have been disposed of by Subordinate Judges in Oudh since the year 1879 upto the year 1903, on the assumption that they had jurisdiction to dispose of them and since 1903, on the strength of the ruling to which I have referred. I have no doubt that the appeal in the present case was rightly disposed of by the Subordinate Judge and I would dismiss this application with costs.

PIGGOTT, J.—I concur both in the order proposed by my learned colleague and generally in the reasoning on which it is based. The only substantial argument in support of this application seems to be that there is nothing in section 21 of the Bengal, N.-W. P. and Assam Civil Courts Act which expressly lays it down that a Subordinate Judge, to whom an appeal has been preferred under sub-section 4 of that section, is to hear and to dispose of the same. To this it seems to me almost sufficient to reply that neither does the Act in question contain any provision that a District Judge, to whom an appeal from a decree or order of a Munsif lies under sub-section (2) of section 21, shall proceed to hear and dispose of the same. I turn to the Code of Civil Procedure to ascertain what a Court has to do to which an appeal has been preferred, and I find under rule 9 of Order XLI that certain endorsements are to be made on the memorandum of appeal and the appeal is to be registered. Then power is conferred on the Appellate Court to dismiss the appeal, if it thinks proper to do so, without sending notice to the Court from whose decree the appeal was preferred and without serving notice on the respondent. After this follow the rules laying down the procedure to be followed when a day is fixed to hear the appeal and notice of the same is issued to the respondent. It is presumed throughout that the Court to which an appeal has

been preferred shall do each and all of these things. The question before us in the present case, narrowed down to its ultimate limits, is, what should the Subordinate Judge of Mirzapur have done when this appeal was preferred to him? What he has actually done is to follow the procedure laid down in Order XLI of the Code of Civil Procedure and eventually to dispose of the appeal. The applicant's contention is that he should either have submitted the memorandum of appeal to the District Judge of Allahabad for an order of transfer, or have referred the matter to the said District Judge for the same purpose. There is certainly nothing in Act XII of 1887 which authorises a Subordinate Judge to do anything of this sort, and I concur without hesitation in the opinion expressed by my learned colleague that it would be a severe straining of the language used to say that this appeal, when it has been preferred to the Court of the Subordinate Judge of Mirzapur, was *ipso facto* pending before the District Judge of Allahabad. It seems to me altogether simpler to hold that the Legislature in drawing up the Civil Courts Act presumed that a Court to which an appeal was lawfully preferred would, in the absence of any order of transfer from a superior Court, proceed to hear and dispose of the same.

BY THE COURT.—The application is dismissed with costs.

Application dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 289 OF 1912.

November 23, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

K. MUTHUKARUPPA PILLAI—APPELLANT

versus.

SELLATHAMMAL *alias* KANAKAMMAL AND ANOTHER—DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Hindu Law — Stridhanam — Saudayika — *Property given to daughter by father before marriage —Control of husband over such property.*

A husband has no right of control over the *Saudayika* property or gifts given to his wife by her affectionate kindred before or after her marriage.

Debi Mangal Prasad Singh v. *Mahadeo Prasad Singh*, 14 Ind. Cas. 1000; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C.L.J. 344; 22 M.L.J. 462; 34 A. 234 (P.C.); 39 I. A. 121; *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 1 B. L. R. (P C.) 1; 10 W.R. (P.C.) 17; 12 M.I.A. 397; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 Eng. Rep. 389; *Judoo Nath Sircar* v. *Bussunt Coomar Roy Chowdhry*, 19 W. R. 264; *Bihu* v. *Raghunath*, 30 B. 229; 7 Bom. L. R. 936, *Dantaluri Rayapparaz* v. *Malapudi Rayudu*, 2 M. H. C. R. 360, followed.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 27 of 1912.

Messrs. *S. Srinivasa Aiyangar* and *K. Bashyam Aiyangar*, for the Appellant.

Messrs. *T. Rangachariar*, *C. Pattabhirama Aiyangar* and *N. C. Vijayaraghava Chariar*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—The property in dispute was given to the 1st defendant by her father in 1898 before she was married to the plaintiff. She sold the property to the 3rd defendant in 1912. The plaintiff sues for a declaration that the sale is invalid. The Subordinate Judge dismissed the suit.

There can be no question that if this property is *Saudayika*, the 1st defendant was entitled to deal with it at her pleasure. The main argument, therefore, was directed to showing that the term *Saudayika* does not include gifts prior to marriage. The nature of *Stridhanam* and its classification with reference to inheritance have given rise to conflicting views, in the Benares School. Courts may be spared a great deal of discussion if the view of the *Mitakshara* is fully accepted. Vijnaneswara comments on Yajnavalkya's text in Chapter 2, section 11, paragraph 2. He says: "That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented by the maternal uncles and the rest, at the time of wedding, before the nuptial fire; and a gift on a second marriage or gratuity on account of supersession, as will be subsequently explained in the text, 'To a woman whose husband marries a second wife, let him give, &c.,' (and, as indicated) by the word *adya* (and the text), property obtained by inheritance,

purchase, partition, acceptance, finding: all this is *Stridhanam* according to Manu and the rest." From this we might exclude those enumerated in the concluding portion of the paragraph as the Judicial Committee, though only dealing with a case of property obtained by partition, seem inclined to hold that *Stridhanam* in its narrow sense should be limited to what is mentioned in the previous portion of the paragraph. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (1). If we regard this restricted class as *Stridhanam* at the absolute disposal of a woman, we can steer clear of many difficulties. There is an exception as regards gifts from strangers not given at the nuptial fire or during the marriage procession, and acquisitions made by means of mechanical arts by a married woman. They are subject to the control of the husband, because the spirit of the Hindu Law is against a married woman receiving gifts from strangers except at the time of marriage or from making acquisitions during coverture, as she is expected to give her time and attention solely to the welfare of her husband and children and to the management of household affairs. I see nothing in the *Mitakshara* or in the writings of those whose authority is binding in Southern India against accepting this rule as a workable basis. But Courts have taken into account the sub-divisions of *Stridhanam* both in relation to inheritance and the power of disposition; I shall, therefore, proceed on the same lines and consider whether the property in dispute is subject to any control by the husband.

An examination of the various commentaries shows that *Stridhanam* is divisible into *Yautaka* and *Ayautaka*. *Yautaka* is that which is given at the nuptial fire. That interpretation is in accordance with the etymological significance of the term. In that term, moreover, are included all gifts made during the marriage ceremonies. *Ayautaka* is gift made before or after marriage. *Saudayika* includes both *Yautaka* and *Ayautaka* not received from strangers. It is defined to be gifts from affectionate kindred. This property can be dealt with by a married woman in any way she likes. Whether immoveable property received from the husband should be excluded from this species of disposable property is doubtful. The better view is against such restriction.

Among the Rishis only Katyayana, Vyasa and Vishnu use the expression *Saudayika*. The definition by Rishi Katyayana is the basis of discussion by the commentators of the various Schools of Hindu Law. According to him, the term certainly includes all gifts by the relations of the bride at, before, or after the marriage. Mr. Ghose's translation of the text is, "By a married woman or by a maiden whatever is received from the husband's father's family, from the brothers, or from the parents is called *Saudayika*." Mr. Srivinasa Aiyangar contended that as the author of the Smriti Chandrika restricts it to gifts made between the time of betrothal of a bride and the time of her entering the house of her husband, the property in dispute is not *Saudayika*. The author of the Smrithi Chandrika after discussing the text of the Rishis states his conclusion in Chapter IX, section 2, placitum 7, thus: "Both the foregoing passages tend to show that *Saudayika* is the wealth called '*Yautaka*,' or the like received by a woman from her own parents or persons connected with them, in the house of either her father or her husband, from the time of her betrothal to the completion of the ceremony to be performed on the occasion of her entering her lord's house." I agree with the learned Vakil that it is not the literal meaning of an original text alone that has to be looked at in the administration of Hindu Law. As pointed out by the Judicial Committee in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(2), although the commentators may have been wrong in their interpretation of an original text, their opinion should be enforced as having the sanction of usage for it. I do not think there is any force in Mr. Ghose's criticism of this dictum. Those who are conversant with the commentary of Vijnaneswara will readily recognise the force of the observation of the Judicial Committee. Yajnavalkaya's view is often not traceable in the

(1) 14 Ind. Cas. 1000; 39 I. A. 121; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 34 A. 234 (P. C.).

(2) 12 M. I. A. 397; 1 B. L. R. 1 (P. C.); 10 W. R. (P. C.) 17; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 Eng. Rep. 389.

elaborate discussion carried on by Vijnaneswara and in the conclusions at which he arrives. The fact is that commentators felt that any attempt to prescribe rules of inheritance on their own initiative will not find acceptance among the people. They had to justify their position by a reference to the sayings of the Rishis. This led them not unfrequently to depart from the literal meaning of the texts commented upon. They found a body of usage which was not in strict accordance with the Smritis. They had to recognise the force of such usage; but they preferred to say that the usage was within the meaning of the text. The commentaries indicate an attempt to reconcile the text law with the actual usage of the people. The development of Hindu Law is attributable to this progressive instinct. I am, therefore, willing to accept that the interpretation of Katyayana's text by the author of Smrithi Chandrika may be regarded as showing that in his days there was a tendency to restrict the use of the term *Saudayika*. Apparently, there was an attempt at this period to put fetters upon the power of disposition possessed by women over their *Stridhanam*. It has to be noted that the passage I have quoted from the Smriti Chandrika does not express the positive opinion of the author. The conclusion is stated hesitatingly. Moreover, later writers have expounded Katyayana differently. The Smriti Chandrika was written in the thirteenth century. The Madhavya in the fourteenth century and the Saraswati Vilasa in the sixteenth century, both of which are recognised authorities in Southern India, do not accept the views of the author of the Smriti Chandrika. This shows that the set-back in favour of giving the husband larger powers of interference over his wife's property was only temporary. The text itself is clear and its interpretation in works both contemporaneous with and after the Smriti Chandrika has been uniform. [See Madana Parijata (13th century), page 530, Part 2, Setlur's Hindu Law Books on Inheritance; Vivada Ratnakara (14th century) Chapter VIII, page 189, *ibid*; Vivada Chintamani (15th century), page 255, *ibid;* Dayatattva (16th century) Chapter XI, para. 3, page 499, *ibid*; Viramitrodaya (17th century), Chapter V, Part I, para. 5, page 442, *ibid.*] I am therefore, of opinion that the view of the author of Smriti Chandrika is not binding on us.

It has been argued that as Vijnaneswara gives no indication of his opinion regarding the right of disposition possessed by women over *Saudayika*, he must be taken to be against their having absolute dominion over it. On the contrary, the fact that he accepts Katyayana without any comment shows that he found no reason for differing from the sage. The *Futwas* of Pundits have been consistently in favour of giving woman absolute power of disposal over *Saudayika* of the kind mentioned in Katyayana's text. (Vyvasta Darpana, pages 687 to 692; Vyvasta Chandrika, Book V, Chapter II, section 2.) All the modern text-writers are in favour of that view. Dr. Gurudass Banerjee in his learned treatise on Marriage and Stridhanam subjects the texts and commentaries to a very critical examination and comes to the conclusion that 'Saudayika is at the absolute disposal of the donee.

There are not many cases dealing with this question. Most of the decided cases relate to succession. There is, however, a direct pronouncement on the point in Selwyn's S. A. D. Reports, Vol. VI, page 77. In *Judoo Nath Sirkar* v. *Bussunt Coomar Roy Chowdhry* (3) to which our attention was drawn by Mr. T. Rangachariar, it was held by Mr. Justice Mitter that legacy taken under the Will of her father by a woman before her marriage was *Saudayika*. There is no reason why this principle should not be extended to gifts *inter vivos*. In *Bhau* v. *Raghunath* (4) the property in dispute was a *vritti* inherited from the husband; and it was held that it was not *Saudayika*. Sir Lawrence Jenkins quotes the text of Katyayana and says that *Saudayika* as defined by the sage is at the absolute disposal of a woman. In *Dantuluri Rayapparaz* v. *Malapudi Rayudu* (5) the actual decision related to the power of a relation to compel a woman to carry out a promise to make a gift of her property. The learned Judges held "that the taking of the woman's property by the plaintiff, her kinsmen, is wholly

(3) 19 W. R. 264.
(4) 30 B. 229; 7 Bom. L. R. 936
(5) 2 M. H. C. R. 360.

repugnantat to the Hindu Law." They also expressed a doubt whether a woman had independent power of disposal during coverture over her *Stridhanam*. The texts bearing upon the subject were not examined and the pronouncement proceeds upon the general theory of the dependence of women in India. With all respect, the learned Judges have not realised that the power of disposition over property given to women under the Hindu Law is greatly in advance of the views held regarding it by other civilised communities. The Hindu Law deals with the dependence of women more as a right inhering in them for protection and as a duty resting upon men than as a disqualification for dealing with property.

Mr. Bhashyam Iyengar contended that the terms of the deed of gift showed that the property was given only conditionally and consequently it was not *Saudayika*. He referred to a passage in Viramitrodaya to the effect that conditional and collusive gifts are not *Stridhanam*. No other commentator has been quoted in support of this contention. I feel no doubt that the conditional gift therein referred to is one where a right of reversion is reserved to the donor. It may also include cases of nominal transfer made on the understanding that it should go back to the donor after the contemplated fraud had been accomplished. Nor is there any force in the contention that a gift exceeding 2,000 *fanams* in value is not to be regarded as *Stridhanam*. As pointed by Mr. T. Rangachariar, this may relate to property yielding an annual income of 2,000 *fanams*. It was only intended as a direction to the donor. It may have been due to the belief that women may not be able to manage extensive properties. These considerations can have no weight in these days. The text must be regarded as obsolete.

The appeal, therefore, fails and must be dismissed with costs.

WALLIS, OFFG. C. J.—I agree that the appeal must be dismissed with costs, and will only observe that considerable gifts by a father to his daughter prior to betrothal would seem not to have been of frequent occurrence in early times, as we do not find them separately dealt with in any of the texts or commentaries that have been cited before us. In this state of things, I do not think that the statement in the Smriti Chandrika is of the same authority as an express statement that gifts made by a father to his daughter before betrothal are not *Saudayika*. The author may not have had such gifts in mind when he wrote this passage and even if he had, his opinion is expressed only tentatively and cannot, in my opinion, outweigh the authority of the other texts which have been cited. Lastly, if we may look to the reason of the thing, there is no reason why such gifts should be less at the disposal of the wife than gifts made at the time of marriage.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2522 OF 1911.

May 13, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Beachcroft.

SURJA BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TARAP MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession by one co-owner against another—Presumption—Acts of hostile character—Exclusive possession.

To establish as amongst co-owners of joint property that there has been adverse possession of one against the others by reason of a particular act to which a hostile character is attributed, it must be conclusively shown that such act is wholly inconsistent with, and is not by any possibility attributable to, his character as joint owner.

A case of adverse possession by a co-owner cannot be established by mere paper assertions not brought home to the knowledge of the other co-owners, when there has been no actual exclusion of the latter from use and enjoyment for the period of limitation.

The entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all.

Appeal against decree of the Sub-Judge, Jessore, dated 22nd July 1911, reversing that of the Munsif, first Court, at Bongaon, dated 3rd June 1910.

Moulvi *Wahid Hossain*, for the Appellants.

Babus *Baidya Nath Dutt* and *Mohini Nath Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs for recovery of joint possession of 13/54ths share of the disputed land on declara-

tion of title thereto. The property belonged originally to three brothers, Nasir Mondal, Kader Mondal and Jiabuddy Mondal. Nasir left two daughters, Kader two sons and Jiabuddy a son and a daughter. The plaintiffs are the daughter of Jiabuddy and the three sons of the second daughter of Nasir. The defendants are the representatives of the other members of the family as also transferees from them. The Court of first instance found that the title alleged by the plaintiffs had been established and gave them a decree for joint possession. Upon appeal the Subordinate Judge has held that the title of the plaintiffs must be deemed to have been extinguished by adverse possession for more than 12 years on the part of their co-sharers. The decision of the Court of first instance upon the question of the title of the plaintiffs by inheritance does not appear to have been challenged before the Subordinate Judge, and the only question for decision at this stage is, whether such title by inheritance has been extinguished by adverse possession on the part of their co-proprietors.

In proof of the adverse possession alleged by the defendants, reliance is placed mainly upon two transactions, namely, a litigation of 1878 and a conveyance of 1886. It appears that the landlord had brought the property to sale, purchased it himself and settled it with one Moonshi Mondal. In 1878 the son of Jiabuddy, one of the sons of Kader and one of the daughters of Nasir jointly instituted a suit to recover the property from Moonhsi Mondal on the allegation that the sale was invalid and that the landlord had no authority to settle the land with him. It has been contended that the institution of this suit by three of the six representatives of the original owners shows exclusively that they claimed at the time under a title hostile to that of their co-sharers. We are of opinion that this contention is not well-founded. To establish as amongst the co-owners of joint property that there has been adverse possession of one against the others by reason of a particular act to which a hostile character is attributed, it must be conclusively shown that such act is wholly inconsistent with, and is not by any possibility attributable to, his character as joint owner. The act upon which reliance is placed before us is undoubtedly not of this description. It is no more consistent with the theory that the then plaintiffs were claiming adversely to their co-owners than with the theory that each of the plaintiffs represented his branch of the family. The Court of first instance thus rightly held that the institution of the suit of 1878 by these three persons did not necessarily constitute a hostile act on their part as against their co-owners.

The other transaction upon which reliance is placed is the conveyance executed on the 29th November 1886 by one of the two daughters of Nasir and one of the two sons of Kader in favour of the son of Jiabuddy. In this document the transferors professed to be owners each of one-third of the disputed land. This, no doubt, was an assertion of a hostile title as against the co-sharers of each of the transferors. But this does not indicate that the transferee also claimed an exclusive title to a third share of the land as against his sister, the first plaintiff in this suit. The Subordinate Judge has overlooked this fundamental distinction, and has failed to differentiate the case of the first plaintiff from that of the other three plaintiffs. This conveyance, though possibly indicative of an assertion of hostile title by one of the daughters of Nasir against her sister or the children of her sister if the latter were at the time in existence, does not show an adverse claim by the son of Jiabuddy against his sister. In so far therefore as the second, third and fourth plaintiffs are concerned, the Court has to investigate whether the transaction and its true character were brought to their notice, for, as was laid down by their Lordships of the Judicial Committee in *Anandrao Ganpatrao* v. *Vasantrao Madhavrao* (1), a case of adverse possession by a co-owner cannot be established by mere paper assertions not brought home to the knowledge of the other co-owners, when there has been no actual exclusion of the latter from use and enjoyment for the period of limitation. This raises at once the question of the true character of this document. It has not been disputed that the ostensible transferee was not the real transferee; consequently the Court must determine whether the transaction was

(1) 9 Bom. L. R. 595; 5 C. L. J. 338; 11 C. W. N. 478; 2 M. L. T. 151; 17 M. L. J. 184 (P. C.).

wholly fictitious, and whether even if intended to be genuine, the co-owners could discover the real transferee in whose favour the assertion of hostile title was made. This aspect of the matter has not been considered by the Subordinate Judge, and his judgment must be deemed essentially imperfect.

Apart from these two transactions, there remains the important question of the true nature of the possession of Ajgar Mondal after the conveyance of 1886. The Subordinate Judge has not found explicity whether he was in exclusive occupation, in assertion of a hostile title to the knowledge of his co-owners. As was pointed out by this Court in the case of *Jogendra Nath Roy* v *Baladeb Das* (2), the fundamental rule is that the entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is in itself rightful, and does not imply hostility as would the possession of a mere stranger, in other words, the law considers every possession lawful the commencement and continuance of which is not proved to be wrongful, and this upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary is established. In the case before us the Court of first instance found that the co-owners of Ajgar, who were his relations, namely, his sister and nephews, visited him occasionally and received presents of fruits and other produce of the land. The Subordinate Judge has not dealt with this part of the case properly. He has not negatived the finding that these co-owners did come to the house of Ajgar at times, but he has refused to believe that Ajgar gave the plaintiffs their share of the produce. It may be pointed out that the Subordinate Judge here misunderstood the case of the plaintiffs. They did not assert that they regularly received from Ajgar a definite share of the produce as representing the extent of their interest in the land. Their case was that they were on friendly terms with Ajgar, visited him from time to time, and received from him part of the produce of the land by way of present. This story, if found true, would negative the theory that the possession of Ajgar was hostile to that of his co-sharers or that he had asserted a hostile title as against them to their knowledge. The Court of first instance correctly laid down the law when it stated that the defendants had to show that Ajgar had asserted his exclusive right openly and to the knowledge of the plaintiffs or that the plaintiffs were denied their title at any time before 12 years. The Subordinate Judge has not found that the plaintiffs asserted a title to this property and that Ajgar denied that they had such title. He has not found that they asked for a share of the produce and that their claim was refused. We are of opinion that the judgment of the Subordinate Judge is substantially defective and that his decree cannot be maintained.

The result is that the appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that he may re-hear the appeal.

Costs will abide the result.

Appeal allowed; Case remanded.

(2) 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 305 OF 1913.

September 11, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair.

SELLAPPA KOUNDAN—PLAINTIFF—APPELLANT

versus

GURUMOORTI *alias* KALI GOUNDAN AND ANOTHER—DEFENDANTS Nos. 1 AND 2—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Compromise petition—Reciting release of co-parcener's right in family property, admissibility of, without registration.

A compromise petition evidencing either an actually effected release of a co-parcener's right in a family property or merely an agreement to give a release, is admissible in evidence without registration.

Bindesri Naik v. *Ganga Saran Sahu*, 20 A. 171 (P. C.); 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273, *Natesan Chetty* v. *Vengu Nachiar*, 3 Ind. Cas. 701; 33 M. 102; 6 M. L. L. T. 313; 20 M. L. J. 20; *Ravula Parti Chelamana* v. *Ravula Parti Rama Row*, 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 876; (1911) 2 M. W. N. 265, referred to.

Appeal from the decree of the District Court of Trichinopoly, in Appeal Suit No. 439 of 1911, preferred against that of the Court of the District Munsif of Namakal, in Original Suit No. 108 of 1910.

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *C. Krishnamachari*, for Mr. *R. Rangasami Iyengar*, for the Respondents.

JAGRANI MISRANI *v.* BISHESHAR DUBE.

JUDGMENT.—The compromise is in our opinion admissible in evidence under the decision of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu* (1). In that case their Lordships decided that petitions by the creditor accepted as correct by the debtor and presented to the Courts would have been admissible without registration in proof of a variation of a registered contract. These documents were described by their Lordships as pleadings filed by the parties and the compromise petition in the present case occupies a corresponding position. In *Natesan Chetty* v. *Vengu Nachiar* (2) to which one of us was a party and with which we both agree, this view was taken of the decision in *Bindesri Naik* v. *Ganga Saran Sahu* (1) and we do not find that it has been expressly dissented from in *Ravula Parti Chelamana* v. *Ravula Parti Rama Row* (3), though in that case the learned Judges seem to put a different interpretation on the language of the Privy Council. Taking this view, it follows that if the compromise, properly construed, evidences an actually effected release by the 3rd defendant of his rights in the family property, it is admissible in evidence and if, as is argued, it evidences only an agreement to give a release, then also it does not require registration.

We reverse the decree of the District Judge and remand the case to him; he will receive the document, Exhibit A3, in evidence and dispose of the appeal according to law. Costs will abide the event.

Decree reversed; Case remanded.

(1) 20 A. 171 (P. C.); 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273.

(2) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(3) 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 876; (1911) 2 M. W. N. 265.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1140 OF 1912.

November 9, 1914.

Present:—Justice Sir P. C. Banerjee, KT.

JAGRANI MISRANI—PLAINTIFF—APPELLANT

versus

BISHESHAR DUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (III of 1877), s. 17—Compromise petition filed in mutation case—Stamp—Registration.

A petition presented to a Revenue Court in a mutation case and stating that the parties had compromised their dispute and praying that mutation may be sanctioned in accordance with the compromise, does not require to be stamped or registered as a transfer of interest in immoveable property.

Second appeal from a decree of the District Judge of Gorakhpur.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Jang Bahadur Lal*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen relates to an estate which was recorded in the name of one Chandrika Dube and after his death in the name of his widow, *Musammat* Anurani. Upon the death of *Musammat* Anurani in the year 1900, the *patwari* submitted a death report stating that her daughter, *Musammat* Jagrani, the present plaintiff, was her heir and that her name ought to be entered in the revenue papers. An objection was preferred by Mulai, the son of one of the brothers of Chandrika Dube. The dispute was compromised by Jagrani and Mulai (who was the father of the defendants-respondents) on the 12th of February 1901. By this compromise Jagrani withdrew her claim and consented to the entry of the name of Mulai in the place of Anurani. It may be mentioned that Mulai's contention in the Revenue Court was that the family was joint and that he alone was entitled to the property in question. The Revenue Court passed an order directing the name of Mulai to be entered in accordance with the compromise. The plaintiff brought the present suit for recovery of possession of the property of which Mulai was, and after him the defendants have been in possession since the year 1901. She denied having entered into the compromise, asserted that she knew nothing as to the terms of it and that a fraud had been practised on her, and alleged that her father was separate and she was entitled to his property upon the death of her mother. The defendants on the other hand relied on the compromise, repeated their assertion as to the family having been joint and stated that the plaintiff was unchaste and was not entitled to inherit her father's property. The Court of first instance found that the family was separate, but it was of opinion that the compromise was made by the plaintiff with full knowledge of it, that it was binding on her, that there was consideration for it and that the defendants had discharged debts due by Chandrika Dube and Anurani. That Court dismissed the suit

ALWAR CHETTY *v.* CHIDAMBARA MUDALI.

The decree of the Court of first instance was affirmed in appeal by the learned Judge. He was of opinion that the compromise was admissible in evidence; he was further of opinion that the compromise was binding on the plaintiff.

Upon the first point, I think the decision of the learned Judge is right. The petition presented in the mutation case only informed the Court of the compromise which the parties had effected. That petition did not require to be stamped or registered as a transfer of interest in immoveable property. The case is similar in some respects to that of *Kokla* v. *Pearey Lal* (1).

On the second point, *viz.*, whether the plaintiff was fully cognisant of the terms of the compromise and of its effect upon her interests, the finding of the learned Judge is not very satisfactory. What the learned Judge says is this: "The Revenue Court, however, was satisfied that she agreed. Her father-in-law and his brother undoubtedly sanctioned her action and she signed the paper." Whether the learned Judge in making the above remarks only meant to refer to what had taken place in the Revenue Court or to find that with the advice of her father-in-law and his brother the plaintiff had entered into the compromise with full knowledge of what she was doing and what its effect would be upon her interests, is not very clear. The learned Judge does not in distinct terms find against the plaintiff on this point on the strength of the evidence adduced in the case. It will, therfore, be more satisfactory to have a clear finding from him on this point. Furthermore, if Chandrika Dube was separate the plaintiff would ordinarily be his heir after the death of her mother. If she agreed to give up her interest there must have been some consideration for the relinquishment of her rights. The Court of first instance found that there was consideration for such relinquishment. This finding of the Court of first instance was disputed in appeal in the Court below, but the learned Judge came to no finding in regard to it and he deemed it unnecessary to discuss the point. In my opinion for a satisfactory decision of this case, it is necessary to have findings from the Court below on the following issues. which I refer to that Court under Order XLI, rule 25, of the Code of Civil Procedure :—

(1) Did the plaintiff enter into the compromise of the 12th of February 1901 with full knowledge of its contents and of its effect upon her interests after obtaining proper advice in regard thereto?

(2) Was there any, and if so what, consideration for the said compromise?

(3) Was the property in suit the separate property of Chandrika Dube or was it the property of a joint family of which he and Mulai were members?

(4). Did the plaintiff become unchaste before the death of her mother?

The Court will try the above issues on the evidence already upon the record. On receipt of its findings the usual ten days will he allowed for filing objections.

On receipt of the findings his Lordship delivered the following

JUDGMENT.—Upon the first issue referred to the Court below its finding is that *Musammat* Jagrani, the plaintiff, entered into the compromise with full knowledge of its contents and of its effect upon her interests after obtaining proper advice in regard thereto. On the second issue it finds that there was consideration for the compromise, though it was not as adequate as it should have been. Upon these findings, which are findings of fact, the plaintiff's appeal must fail. I accordingly dismiss it with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 61 OF 1906.

August 7, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

P. ALWAR CHETTY—PLAINTIFF—APPELLANT

versus

P. CHIDAMBARA MUDALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Administrator General's Act (II of 1874), ss. 17 to 20—Probate and Administration Act (V of 1881), s. 90—Succession Act (X of 1865), s. 179—Hindu Wills Act (XXI of 1870), s. 2—Hindu dying intestate—Letters of Administration to estate of deceased taken out by Administrator-General—Son

(1) 21 Ind. Cas. 29; 11 A. L. J. 765; 35 A. 502.

ALWAR CHETTY *v.* CHIDAMBARA MUDALI.

of deceased minor on that date—Sale of one item of property by son on attaining majority—Subsequent sale by Administrator-General of same item of property, validity of.

If an Administrator-General takes out Letters of Administration to the estate, moveable or immoveable, of a Hindu dying intestate, the whole estate of the deceased vests in the Administrator-General and he can dispose of it without the sanction of the Court, in such manner as may appear to him proper.

An administration cannot be treated as closed until every act necessary for its completion has been done.

Where, therefore, the Administrator-General in order to realize the commission due to him sold an item of immoveable property forming part of the estate of the deceased while that same item had been previously sold by the son of the deceased on attaining majority:

Held, that the sale by the latter was a nullity, as that property still vested in the Administrator-General, and not in the son.

Appeal from the judgment and decree of Sir Charles Arnold White, Kt., Chief Justice, dated the 5th September 1906, in Original Suit No. 144 of 1905 of the High Court.

Mr. *C. K. Mahadeva Aiyar*, for the Appellant.

Messrs. *C. Venkatasubbaramiah, V. Visvanatha Sastri* and *Short & Bewes & Co.*, for the Respondents.

JUDGMENT.

SPENCER, J.—This is an appeal from a judgment of the learned Chief Justice sitting as a single Judge on the original side of the High Court.

Upon the death of one Rajamanicka Mudali, the father of the 1st defendant, the Administrator-General was directed by an order of Mr. Justice Boddam upon a petition presented to him on the original side to take out Letters of Administration to the estate of the deceased. Accordingly, Letters of Administration, which are Exhibit Y, were granted to the Administrator-General on the 28th March 1899. The 1st defendant is said to have attained his majority on November 19th, 1904. On the same day he mortgaged a house belonging to the estate of his deceased father in favour of the 3rd defendant; and on the 26th April 1905 he sold the same house to the plaintiff for Rs. 2,500. Subsequently in July 1905 the Administrator-General at the 1st defendant's request sold this house to the 2nd defendant for Rs. 2,300 in order to recover the commission due to him for the administration of the estate, and a sale-deed was executed on the 1st August 1905 to that defendant. The plaintiff brought this suit for a declaration that the sale by the Administrator-General to the 2nd defendant was invalid; but this contention was found against him and the suit was dismissed. He now appeals.

The appellant's Pleader in his arguments has raised the following questions:—(1) Was the sale by the Administrator-General, after the 1st defendant attained majority and without the orders of the Court, a good and valid sale? (2) Did the property vest in the Administrator-General by virtue of the Letters of Administration? and (3) Did the property vest in any other members of the family?

The last point may be briefly disposed of by pointing out that if the property passed by survivorship to any person other than 1st defendant, the plaintiff who claims to derive title from 1st defendant will be out of Court.

The answer to the first question must depend on the answer to be given to another question which is, what powers does the Administrator-General possess when dealing with the estates of Hindus administered by him under Act II of 1874?

Section 17 of this Act empowers a Court to pass such an order as Exhibit K purports to be, directing the Administrator-General to apply for Letters of Administration of the effects of any persons, including Hindus, who die leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court in the Presidency Towns. Section 18 provides that, in cases where danger is apprehended of such property being wasted before the legal successor can be ascertained, the Court may authorise the Administrator-General to collect and take possession of such property and hold it according to the orders and directions of the Court, and thereupon the Administrator-General shall be entitled to collect and take possession of such property and if necessary, to maintain a suit for the recovery thereof. This section is not a section under which Letters of Administration are granted, because it expressly refers to the contingency of Letters being afterwards granted. The section under which Letters of Administration are granted is section 20, and this section contains no words to the effect that the Administrator-

General must act "under the orders and directions of the Court." In the absence of any words to the contrary, it may be presumed that after receiving the Letters of Administration he should exercise his ordinary powers as Administrator-General. In the case of *In the goods of Hari Das Dutt* (1) it was held by Harington, J, that an Administrator-General holding an estate under section 18 of the Administrator-General's Act pending the grant of Letters of Administration would not be in any better position than a private Administrator. In *Lalchand Ramdayal* v. *Gumtibai, Ghella Pema* v. *Gumtibai* (2) there is an observation at page 153 that an Administrator-General who has obtained a fiat for Letters of Administration would have no higher authority over, or estate in, the deceased's property than any ordinary Administrator would have over, or in, the property of a deceased Hindu, whatever that authority or estate might be. The Act itself does not define the powers of the Administrator-General. But under the Charter of 1866 this High Court was invested with power to grant Letters of Administration in such manner and form as was at that time in use, or might hereafter be in use, in the Diocese of London and to do all other things whatsoever needful and necessary on that behalf. (See Morley's Digest, Vol. II, page 619.)

This leads us to the second question, whether the estate vested in the Administrator-General by virtue of the grant of the Letters of Administration. The learned Chief Justice has held that it did, notwithstanding the fact that no vesting section is to be found in the Administrator-General's Act. Section 179 of the Indian Succession Act and section 4 of the Probate and Administration Act expressly provide that the executor or administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. Before these sections can be applied, it must be considered whether the Administrator-General's Act is a self-contained Act, or whether it must be read subject to the provisions of either of these two Acts, so far as they can be applied to the circumstances of the particular case. By section 2 of the Hindu Wills Act (XXI of 1870), section 179 of the Indian Succession Act was applied to the Wills of Hindus in the towns of Bombay and Madras and was again repealed by section 154 of the Probate and Administration Act. The result of this is that, so far as the Wills of Hindus are concerned, section 179 which vests the estate of a deceased Hindu in his Administrator does not apply, although certain other sections of the Indian Succession Act do apply to Wills of Hindus; but the present case, being a case of intestacy, will not be governed by the Hindu Wills Act (XXI of 1870). Again, if the Administrator-General's Act has to be read subject to the provisions of the Probate and Administration Act, section 4 which vests the property in the Administrator will apply; and also section 90, which restricts the power of an Administrator to dispose of property by way of sale or mortgage without the previous permission of the Court, must be applied. In the Succession Act there is no restriction such as is contained in section 90 of the Probate and Administration Act, and, therefore, if the cases of Hindus dying intestate ought to be governed by the Succession Act, there can be no doubt that the estate of the deceased is vested in the Administrator and that he has full powers to dispose of it in such manner as may appear to him proper. With reference to the Charter which gives powers similar to those in use in the Diocese of London, it may be observed that the office of the Administrator-General in this country corresponds to that of the Public Trustee in England, and the powers of a Public Trustee, when dealing with small estates of a capital value not exceeding £1,000, include such powers as arise from the fact that after he declares in writing signed and sealed by him that he takes over the administration of the estate, the estate excepting copyhold and stock vests in him as if it were transferred to him by a vesting order under the Trustee Act. The learned Chief Justice has observed in this connection that according to the practice of the English Court of Probate, the Administrator would have power to deal with everything that is covered by the grant without obtaining the special sanction of the Court. Although the Administrator-General's Act does not, in express words, state that all the properties over which the Administrator-General has

(1) 11 C W. N. 193.
(2) 8 B. H, C. R. 140 (O. C.).

obtained Letters of Administration vest in him, section 33 contemplates the fact that estates may be vested in the Administrator-General by virtue of Letters of Administration. In the absence of any words of limitation in this Act, we feel no doubt that the learned Chief Justice was right in holding that the estate of Rajamanicka Mudali vested in the Administrator-General. It has further been argued that in any case the Administrator-General had no authority to dispose of immoveables. Although in *Kadumbinee Dossee* v. *Koylash Kaminee Dossee* (3) it was considered that Letters of Administration applied only to moveables, section 23 (*a*) has been introduced subsequently by Act IX of 1881 and makes it clear that there is no distinction to be made in India between real property and personalty, by declaring that Letters of Administration shall have effect over all the property and estate, moveable or immoveable, of the deceased throughout the Presidency.

A further difficulty has arisen in this case owing to the provisions of section 90 of the Probate and Administration Act having been embodied in the Letters of Administration (Exhibit Y) granted to the Administrator-General and printed on the reverse of the same. It appears from inquiries that we have caused to be made that it is the practice on the original side to print section 90 of the Probate and Administration Act on the last page of all Letters of Administration whenever they are granted under that Act.

Whether this section, which restricts the power of the Administrator to mortage, or transfer by sale, the property of which he takes control, was added to the grant in this particular case by design or accident cannot now be ascertained. But in either case section 149 of the Probate and Administration Act destroys the effect of this addition. This section declares that "nothing contained in this Act shall affect the rights, duties and privileges of the Administrator-General, Bengal, Madras or Bombay." Section 52 of the Administrator-General's Act permits Administrators-General of Bombay and Madras to retain a commission of 5 per cent. upon the amount or value of the assets which they collect and distribute in the due course of administration.

The administration cannot be treated as closed until every act necessary for its completion has been done; and such was not the case here as may be seen from Exhibit T, dated 18th August 1905.

It, therefore, appears that the Administrator-General had not, in the present case, been divested of his powers at the time when the sale to the 2nd defendant was made, and, therefore, that he was acting within the scope of his authority in conducting the sale. In this view of the case, the plaintiff's appeal fails and must be dismissed. The 2nd and 4th respondents: costs (one set) will be borne by the estate. Appellant will bear his own costs. The 3rd defendant, who took a mortgage of the suit house from the 1st defendant, supports the plaintiff in this appeal and pleads that even if the legal estate was not divested by the first sale, yet the beneficial interest has already passed to him to the knowledge of the Administrator-General and that he is entitled to retain it in spite of the second sale.

In regard to this contention we are of opinion that 3rd defendant's case must stand or fall with the decision of the question of the property being vested in the Administrator-General at the time when 1st defendant entered into transaction with plaintiff and 3rd defendant.

The 3rd defendant will bear his own costs of this appeal.

SANKARAN NAIR, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 395 OF 1912.

November 9, 1914.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

NARAIN DUTT—PETITIONER—APPELLANT

versus

SUPERINTENDENT OF DEHRA DUN—OPPOSITE PARTY—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 9, 25(2)—Objec of s. 9—Objection under s. 9 not taken—Power o District Judge—Sufficient reason.

The object of making an owner claim under section 9 of the Land Acquisition Act in respect of land notified under the Act to be acquired, is to enable

(3) 2 C. 431.

the Land Aquisition Officer to make a fair, reasonable and proper award based upon a proper inquiry after the proper means have been placed before him for holding such inquiry.

The bare fact that previous negotiations for sale had taken place between the claimant and the Government, is not a sufficient reason for not putting forward a claim under section 9 of the Act.

Section 25 (2) of the Act gives the Judge the right to decide as to the sufficiency or otherwise of the reasons for a man's non-appearance and not putting forward his claim under section 9 of the Act, and where no sufficient reason is given the Judge ought not to interfere with the award of the Collector.

First appeal from a decree of the District Judge of Saharanpur.

Mr. *A. H. C. Hamilton* (with him Dr. *Sunder Lal*), for the Appellant.

Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings taken under the Land Acquisition Act. Notice was issued in pursuance of section 9 of the Act to the present appellant and he made no claim as directed under that section. The Collector made an award and the appellant applied for reference to the District Court. In the District Court an objection was taken that as he had made no claim under section 9, the Court was not empowered to award any compensation greater in amount than that mentioned in the Collector's award. The learned District Judge held that because there had been previous negotiations between the Government on the one part and the appellant on the other in which the Government had offered to purchase the land for Rs. 50,000, whereas the appellant had offered to sell for, or rather had refused to sell for, anything less than Rs. 80,000, therefore there was sufficient reason for the appellant not having put forward his claim under section 9 of the Act. He, therefore, proceeded to hear the reference. On behalf of the Government no objection has been taken to the amount awarded by the District Judge, but it is sought to support their case and to defeat the appeal by urging that no reason, much less a substantial reason, has been shown for the appellant having failed to make a claim under section 9 of the Act. In our opinion the appellant showed no reason, much less a sufficient reason, for not making the claim. The Judge says in his award that the appellant might well have thought that he had made it sufficiently clear to Government what he wanted. It is perfectly true that the appellant offered to sell his property to Government for Rs. 80,000 which is the value he places upon it. When, however, action was taken and notice issued to him under the Act, those negotiations had fallen through and come to an end. If the appellant had made his claim he would have asked for Rs. 80,000, the value he places on the property, *plus* 15 per cent. for compulsory acquisition. So it is quite clear that there was no reason whatsoever for his not having made his claim under the Act. The object of making an owner claim under section 9 of the Act is set out in the case of *Secretary of State for India in Council* v. *Bishun Dutt* (1). It is to enable the Land Acquisition Officer to make a fair, reasonable and proper award based upon a proper inquiry after the proper means have been placed before him for holding such inquiry. No inquiry as to the value of the land is stated to have been made beforehand and if the appellant wished to retain his right of reference to the District Court, he ought in justice to the Government to have come forward and placed before the Collector, in pursuance of the notice issued, all available means to enable that Officer to arrive at a correct and proper award. The bare fact that previous negotiations for sale had taken place was no reason whatsoever for not putting forward his claim under section 9 of the Act. It certainly was not sufficient reason. In our opinion section 25, clause 2, gives the Judge the right to decide as to the sufficiency or otherwise of the reasons for a man's non-appearance and not putting forward his claim under section 9. In the present case no reason, in our opinion, was given for this non-appearance.

In this view the District Judge ought not really to have allowed in his award to the appellant any sum greater than that awarded by the Collector. But as the Government has taken no objection to the amount awarded by the District Judge either in the form of a cross-appeal or cross-objections, it is not for us to interfere with the amount so awarded. The result is that the appeal must fail and is dismissed with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 423; 33 A. 376; 8 A. L. J. 115.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 254 OF 1905.

November 12, 1906.

Present:—Mr. Justice Miller.

RAMAKRISHNAM PILLAI—DEFENDANT—PETITIONER

versus

ROBERT FISCHER—PLAINTIFF—RESPONDENT.

Landlord and tenant—Nanjai *holding*—Ryot's *right to use a portion of holding as seed-bed*—*Damages for non-cultivation*—Zemindar *must prove wrong use*—*Burden of proof.*

Prima facie the utilization of a reasonable portion of a *nanjai* holding for *nathankal*, *i. e.*, for growing seedlings for subsequent transplantation, is a proper use of the land and to make out a claim for damages for non-cultivation of the *nathankal* plots, the *zemindar* must show that the plots were wrongly used as such or that the *ryot* might and ought to have grown a crop to maturity on the same plots after removing the seedlings.

Petition, under section 25 of Act IX of 1887, against the decree of the Subordinate Judge of Madura (East), in Small Cause Suit No. 494 of 1904.

Mr. *K. Ramachandra Aiyar*, for the Petitioner.

The Hon'ble Sir *V. C. Desikachariar*, for Mr. *T. Rangachariar*, for the Respondent.

JUDGMENT.—This case is similar to Civil Revision Petition No. 253 of 1905 with the addition that there is here a question whether the utilization of a portion of the land for *nathankal*, *i. e.*, for growing seedlings for subsequent transplantation, is or is not a proper cultivation of the land in due season. The Subordinate Judge says the landlord is not bound to provide plots for seedlings. That may be so, but that is not the question. The question is rather whether the tenant is entitled to grow seedlings for his own transplanting and if he does so whether he can be made to pay *varam* for the *nathankal* plot of land, if he is unable after transplanting the seedlings to grow on the same plot a crop to maturity.

I have not been shown any case in which the point has been decided or any evidence in the suits under consideration bearing on this question; the allegation that remission is not granted for *nathankal* is beside the point.

Prima facie the utilization as seed-bed of a reasonable portion of a *nanjai* holding is a proper use of the land and *prima facie* the *ryot* will get all he can out of his holding; it lies, therefore, on the *zemindar* to show that the *nathankal* plots were wrongly used as such or that the *ryot* might and ought to have grown a crop to maturity on the same plots after removing the seedlings.

In the absence of such evidence I must hold that the *zemindar* has not made out a claim for damages for non-cultivation of the *nathankal* plots.

The decree must be modified by reducing the amount awarded to the plaintiff accordingly.

Costs will be paid and received in proportion to success and failure in both Courts.

Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 882 OF 1912.

May 8, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

NABI BAKHSH—PLAINTIFF—APPELALNT

versus

Musammat MEHR BIBI—DEFENDANT—RESPONDENT.

Custom—*Adoption by widow of her co-wife's son, effect of*—*Gift by sonless proprietor of land to several persons in equal shares*—*Suit by collaterals on death of donees without issue.*

An adoption by a widow of her co-wife's son does not have the effect of making him her heir to the prejudice of her father's agnatic heirs.

Where a sonless proprietor made a gift of his landed property in equal shares to his daughter, her son and the son of his other pre-deceased daughter and on the death of the 1st daughter's son his share passed to the daughter, on a suit by the collaterals on her death for recovery of lands gifted to her and her son:

Held, that the donor did not create a joint tenancy with remainder to the survivor and that, therefore, the suit was not barred by reason of one of the donees being alive.

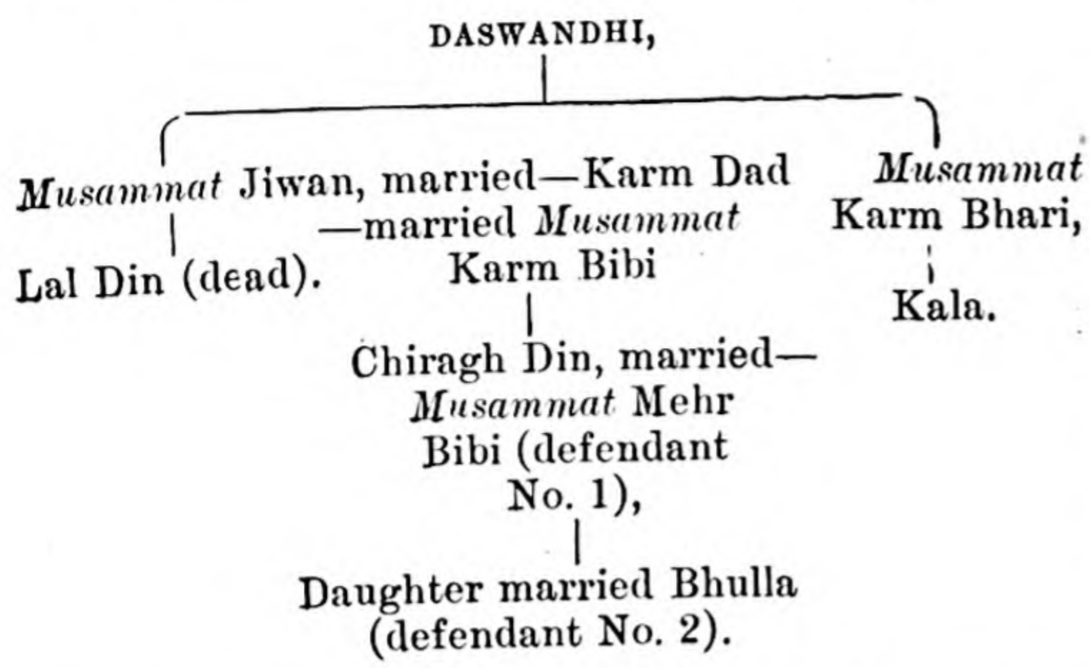
Second appeal from the decree of the Divisional Judge, Sialkot, dated the 11th May 1912, reversing that of the District Judge, Sialkot, dated the 23rd December 1910, decreeing the plaintiff's claim.

Messrs. *Devi Dayal* and *Ahmad Hassan*, for the Appellant.

Mr. *G. C. Narang*, for the Respondent.

JUDGMENT.—The full pedigree-table is given in the judgment of the learned Divisional Judge, but the following

sufficiently explains the relationship of the parties for the purpose of this appeal :—



Karm Dad, the husband of *Musammat* Jiwan, had a second wife, *Musammat* Karm Bibi, by whom he had a son, Chiragh Din. The latter died in 1895, leaving a widow, *Musammat* Mehr Bibi (defendant No. 1), and a daughter married to Bhulla (defendant No. 2). About the year 1865 Daswandhi made a gift of the whole of his property, in equal third shares, to (1) his daughter, *Musammat* Jiwan, (2) Lal Din (the son of *Musammat* Jiwan), and (3) Kala (the son of his daughter, *Musammat* Karm Bhari, who had died prior to the date of the gift). These gifts were unsuccessfully challenged by Daswandhi's collaterals, their suit being dismissed on the ground that they were too remotely related to the donor to contest his action. Daswandhi died in 1870, and Lal Din in 1877. The latter left no issue and the third share gifted to him passed on his death to his mother, *Musammat* Jiwan.

Upon the death of *Musammat* Jiwan the collaterals of Daswandhi brought the present suit in which they claim to recover the lands gifted to *Musammat* Jiwan and Lal Din from *Musammat* Mehr Bibi, who is in present possession. The ground upon which the claim is based is that the gift to *Musammat* Jiwan and her son enured only for the benefit of the donees and their lineal descendants, and that as neither Lal Din nor *Musammat* Jiwan had left any such issue surviving, the property reverted, under the well-recognised and general rule of customary law, to the agnatic heirs of the donors.

The defendants impleaded were *Musammat* Mehr Bibi (the widow of Chiragh) and Bhulla, the husband of her deceased daughter, and their defence to the suit was two-fold. In the first place, they pleaded that *Musammat* Jiwan had in her life-time adopted Chiragh Din (the son of her husband by her co-wife) and that consequently Chiragh Din's widow, *Musammat* Mehr Bibi, was entitled to hold possession for her life, and in the second place, that Bhulla was also one of Daswandhi's collaterals and that in his presence plaintiffs had no right to sue for possession.

These were the only pleas urged by defendants, and the District Judge decided both in favour of plaintiffs. Bhulla accepted this decision and preferred no appeal to the Divisional Judge, but *Musammat* Mehr Bibi did appeal and urged that plaintiffs' claim to Lal Din's share was time-barred, that *Musammat* Jiwan and Lal Din had paid off certain mortgage charges and that consequently plaintiffs could not recover the land without paying defendant, who was the representative of *Musammat* Jiwan and Lal Din, the said amount, and that Chiragh Din had been proved to be the adopted son of *Musammat* Jiwan.

There was obviously no force in any of these contentions. *Musammat* Jiwan, as the mother of Lal Din, would in the natural course of things be allowed by the collateral heirs of Daswandhi to enjoy for her life the property given to her son, and her possession of it was clearly permissive and in no sense adverse to plaintiffs. Nor again would any adoption by her of Chiragh Din (a total stranger to the family of Daswandhi) have had the effect of making him her heir to the prejudice of her father's agnatic heirs.

As a matter of fact, the District Judge has found, and quite rightly, that there is no evidence whatever to support the allegation that *Musammat* Jiwan adopted the son of her co-wife, but even if she had done so, it is clear that her action could not possibly have affected plaintiffs' rights to succeed by reversion on failure of her lineal descendants.

The plea that *Musammat* Mehr Bibi was entitled to be reimbursed for moneys paid by *Musammat* Jiwan to redeem certain mortgages is a mere after-thought and

utterly untenable in any event. Chiragh Din and his widow are not the heirs of *Musammat* Jiwan, and apart from the objection that there is no proof that *Musammat* Jiwan spent any money in redeeming mortgages on the land in suit, *Musammat* Mehr Bibi would have no right to claim compensation for any such expenditure, had it been established.

So far as *Musammat* Mehr Bibi's own pleadings and grounds of appeal were concerned, there can be no doubt that her defence to the claim must have failed and the decree of the District Judge has been upheld. But the Divisional Judge set up an entirely new case for her, and himself evolved a line of defence which has never suggested itself to either defendants or their legal advisers. He has *assumed*, in the absence of any evidence and purely on what he regards as probabilities, that Daswandhi, when he made the gift to the three donees in 1865, "intended to give them a joint tenancy, with remainder to the survivor or her issue in the event of the descendants of either becoming extinct." Having assumed this fact, and having given Daswandhi the credit for creating an estate of a highly technical nature, an estate probably unknown to the personal law of Daswandhi [*Jogeswar Narain Das* v. *Ram Chandra Dutt* (1)] and most assuredly unknown to Daswandhi himself, the learned Judge, in defiance of the pleadings and the facts upon the record, proceeds to import into the case a highly technical rule of English conveyancing and to hold that Kala, the sole surviving donee under Daswandhi's gifts, is in law the rightful heir, by survivorship, to *Musammat* Jiwan, and that as long as he lives, plaintiffs can have no *locus standi* to sue for possession of any part of the property originally given by Daswandhi. Upon this extraordinary ground the learned Judge has dismissed plaintiffs' suit and has brushed aside, as a matter of no possible moment, the very important fact that Kala has never asserted any right to the property in suit. He has, further, completely ignored the actual pleadings of the parties and has dismissed the suit by applying to it a technical rule of English conveyancing (and that, too, erroneously), without giving the plaintiffs an opportunity of showing that Daswandhi, an uneducated Punjab agriculturist, could not possibly have had that rule in his mind when he made the gifts, in distinct shares, to the three donees. Had plaintiffs had this opportunity, they could have pointed to the fact that when Lal Din died, Kala did not take a half share with *Musammat* Jiwan in the deceased's property, whereas if the Divisional Judge's view is correct, Kala and *Musammat* Jiwan must have succeeded jointly to Lal Din's property.

We must further take exception to the remarks of the Divisional Judge when he says that the gift to *Musammat* Jiwan stands as it did when the collaterals originally sued to have it set aside, and that it cannot be impugned now any more than it could be then. Plantiffs do not now impugn the gift. Their contention is that the donees (*Musammat* Jiwan and Lal Din) have since that litigation died without issue and that under the ordinary rule of customary law, the property reverts to them as the ultimate heirs of the donors. It is idle, therefore, for the learned Judge to observe that what was done and decided in the former case cannot now be undone. Plaintiffs do not ask for anything to be undone. They accept the previous decision but allege that facts are now entirely different, and obviously their contention is correct.

In the circumstances it is to be regretted that the Divisional Judge went out of his way to assert that it was "deplorable that plaintiffs should be induced to file suits like this and waste money on them because their legal advisers do not grasp the elementary principles of law," and to stigmatise this as "a meddlesome suit." These observations were most unfair to plaintiffs and their legal advisers and were quite uncalled-for and unjustifiable.

In our opinion, plaintiffs were fully justified in preferring their present claim, and their suit must have succeeded had the learned Judge himself adjudicated upon it in the ordinary way and with reference to elementary principles of pleadings.

We accept the appeal and, setting aside the decree of the Divisional Judge, we restore that of the District Judge. Respondent must pay costs throughout.

Appeal accepted.

(1) 23 C. 670 (P. C.); 23 I. A. 37.

GOPALA KRISTNA YACHENDRULA VARU *v.* SECRETARY OF STATE.

MADRAS HIGH COURT.

CIVIL APPEAL No. 143 OF 1911.

October 9, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

Unde Rajaha Raja Sri Raja Velugoti Sri Raja GOPALA KRISTNA YACHENDRULA VARU BAHADUR, K. C. I. E.—DEFENDANT—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easements Act (V of 1882), s. 7, ills. (h), (i), *distinction between—Natural stream, test and essentials of—Owner of land below, right of, to dam back natural stream—Riparian owner, right of—Damming of natural stream to better cultivate, whether ordinary agricultural operation.*

Where a stream has a continuous flow at the beginning but subsequently diversifies itself over a vast area of land, it is a natural stream and the owner of the adjacent land below has no right to put a dam across it to the injury and damage of the upper land-owners.

Per *Wallis, Offg. C. J.*—As the erection of a bund to dam back the water of a natural stream is an infringement of a natural right, as declared in section 7, illustration (*h*) of the Easements Act, the water of such a stream passing in a defined channel should be allowed to flow without material alteration in its quantity or direction.

Per *Seshagiri Aiyar, J.*—The essential attributes of a natural stream are that it must have a fairly defined course; it must move; and its water must be capable of identification. It need not always be confined with banks, nor need it have a continuous flow or a width of particular dimensions.

The distinction between illustrations (*h*) and (*i*) of section 7 of the Easements Act is this: In the former case the water must flow in a natural stream, in the latter, although there may be no defined channel the water must have a regulated course. The one deals with the developments of a stream, while the other deals with its beginnings. At the beginning of a stream, it is not to be expected that water will flow within well-defined bounds.

It is open to a person to protect himself against extraordinary floods. The right of any other person is not in question in such a case, as each one has a right to use means to prevent a possible sudden danger.

Every riparian owner should so conduct operations on his property as not to affect injuriously those above and below him.

To put up a dam to enable one to better cultivate his fields is not an ordinary agricultural operation.

Appeal against the decree of the District Court of Guntur in Original Suit No. 25 of 1908.

Messrs. *T. R. Ramachandra Iyer* and Mr. *S. Subramania Iyer*, for the Appellant.

The *Government Pleader*, for the Respondents.

JUDGMENT.

WALLIS, OFFG. C. J.—The plaintiff is the Secretary of State, the first defendant the Rajah of Venkatagiri, and other defendants are *ryots* of the village of Vasapallipadu in the Guntur District. The suit is brought for the removal of a bund or dam placed by the defendant across what is alleged by the plaintiff to be a natural stream of salt water, known as the Nallavagu, which has the effect of throwing back the saline waters of the stream on to the lands of the Government village Allur and sending it into the irrigation tanks of the village to the injury of the wet crops raised with the tank water. The District Judge has given the plaintiff a decree and the 1st defendant appeals. The bund in question was put up first in 1896 and was removed by the orders of the Divisional Officer at the end of 1897. It was again put up in 1904 and after some correspondence this suit was instituted for its removal in 1908. The main defence put forward was that the Nallavagu was not a stream flowing in a defined course at this point. Witnesses were examined and cross-examined at very great length to prove this, and a very lengthy argument based on their evidence was addressed to us by the learned Vakil for the appellant who, on the other hand, passed very lightly over the documentary evidence for the twelve years preceding the filing of the suit. This is not surprising, because reference to the correspondence which passed and to the statements which were taken from both sides during that period shows that this contention was raised for the first time in the first defendant's written statement and that till then no one had ever doubted that it was a natural stream.

The upper reaches of the Nallavagu admittedly form a natural stream, though like other streams in this part of the country it only flows during the north-east monsoon, from October to December, and for a short time after heavy showers at other periods of the year. Some three or four miles higher up than the suit bund the stream bifurcates, one branch taking a north-easterly course and finding its way into the Buckingham Canal, which flows parallel with the coast, while the branch now in question admittedly flows in an easterly or south-easterly direction down

to a point above two miles distant from the place where the bund was erected and then, according to the defendants, ceases to flow in a defined channel and spreads over the surface of the country, whereas according to the plaintiff, it pursues its course to the site of the bund and before the bund was erected, flowed southward through the wet lands of the defendant's Vasapallipadu village and ultimately found its way into the Buckingham Canal further south.

Below the point C in the plan Exhibit 1A, where the defendants say the Nallavagu ceases to flow in a defined channel, the water is admittedly confined on the right bank and does not overflow to the south over the Vasapallipadu lands until it reaches the site of the bund. If it spread out at all it must, therefore, have been to the north and if there was nothing on the north to contain it, it must obviously have spread over the country until it was absorbed and very little water could have found its way to the bund site. On the other hand if, as appears to have been the case, the natural configuration of the country to the north was such that saline water admittedly flowing down the Vagu to the point C was subsequently directed to the bund site whence it flowed down through the defendants' lands, this would appear to be sufficient to satisfy the definition of a natural stream in the explanation to section 7 of the Easements Act, *viz.*, "a stream flowing by the operation of nature only and in a natural and known course." I confess that it appears to us very largely a case of *res ipsa loquitur*, seeing that admittedly the saline waters brought down by the Vagu found their way to the site of the bund and then before its erection flowed down into the wet lands of the defendants.

How long this state of things had existed is not perhaps very material. It may be that the other branch became silted up and that in consequence a larger volume of water passed down the branch in question than had formerly been the case. The fact that the northern branch is clearly marked in the survey map of 1862 while the other is not, makes this probable. There are near the point of bifurcation the remains of a bund which is said to have been erected about 1872 and to have fallen into ruins or been dismantled about 1879. This bund, no doubt, had the effect of sending most of the water down the north-east branch. According to the earliest statement of the Allur *ryots* in 1896 it was removed or allowed to fall into disrepair because the *ryots* on the north-east branch objected that it caused their lands to be flooded. This again is not improbable, as in the correspondence which passed prior to suit there is a letter of the 1st defendant, Exhibit I, in which it is stated that the erection of a similar bund would have that effect. Whatever the origin of the south-east branch of the Nallavagu it seems perfectly clear that in the rainy season it was flowing in a natural stream at the site of the suit bund in 1896, when the bund was first erected, and for many years previously. The statement, Exhibit N taken by P. W. No. 4 from the Vasapallipadu *ryots* on 14th August 1896 in answer to the complaint of the Allur *ryots*, shows that there was then no question of its not being a natural stream. They say they were present when the officer inspected the bund and the course taken by the Nallavagu, and describe the Nallavagu as following south of the bund through their wet lands forming marshes or grass-grown hollows. Exhibit L2 is the report of the officer and Exhibit L15 the plan submitted by him in which the course of the Vagu is clearly shown both above and below the bund. The subsequent petition of the Vasapallipadu *ryots*, Exhibit L5, dated 25th September 1896, denied that they had "newly erected a bund to the said Nallavagu." Similar statements by them are to be found in L10, dated the 6th January 1897. Exhibit L13, dated 6th August 1897, is an order for the removal of the bund. The bund was removed on 26th September 1897, Exhibit O. 2, dated 10th October 1897, is a complaint of the Allur *ryots* that the bund was being re-erected. The order for the removal of the bund was set aside as irregular on 9th December 1897, Exhibit J7, and nothing more is heard of it until Exhibit L16 dated 22nd September 1904, which is a complaint of its having been recently re-erected. Exhibit L17 is the Revenue Inspector's report and Exhibit L18 the plan he prepared at the time. Exhibit R of 14th November 1904 is the reply by the 1st defendant to the letter written to him by the Sub-Collector of Ongole complaining of the erection of the bund to divert the course of the Nallavagu. In his reply the 1st defendant refers to the

damage done "by the Nallavagu stream" to the wet lands of the Vasapallipadu village which are below the suit bund. Exhibit IA is a plan prepared shortly after on 20th November 1904 by the Assistant Engineer. The defence relies very much on this plan, because it shows the waters as spreading out at the point C about two miles above the bund, but this plan, which was made in the middle of the north-east monsoon, shows the state of things then existing consequent on the erection of the bund which, as the Executive Engineer says in his evidence, had the effect of throwing back the waters of the Vagu, raising their level to a considerable distance higher up the stream and making them overflow the dry lands on the north. The same observation applies to the evidence of Mr. Pogson, the architect and surveyor called by the defendants as their 1st witness. He visited the place during the rainy season immediate before the trial and observed the state of things caused by the bund during heavy rain, a state of things which would have been very different if the bund had not been there. In my opinion the admission made by the defendants in the correspondence, the plans prepared in 1896 and 1904, and the admitted facts of the case all show conclusively that the Nallavagu flowed in a natural stream at the place where the suit bund was erected, and I think this is also the effect of the oral evidence which I do not propose to examine in detail. If this be so, the erection of the suit bund was admittedly an infringement of the natural rights of the plaintiff as declared in section 7, illustration (*h*), of the Easements Act that the water of the natural stream passing through the lands of his Allur village in a defined natural channel should be allowed to flow within his limits without material alteration in quantity or direction.

Even if there was no natural stream flowing in a defined natural channel through the plaintiff's lands adjoining the site of the bund, which was erected just over the border line in the 1st defendant's lands, I do not think this would make any difference, because I think the bund would equally be an infringement of the plaintiff's natural rights as the owner of the upper land that water naturally rising in or falling on such land and not passing in defined channels should be allowed by the owner of adjacent lower land to run naturally thereto. The defendants say that, if there is no natural stream, they are not bound to allow the water to run down on to their land and quote *Mahamahopadhyaya Runga Chariar* v. *Municipal Council of Kumbakonam* (1). That decision proceeded on an alleged conflict between the natural right, recognised in illustration (*a*) to section 7, of every owner of land in a town to build on such land subject to any Municipal law for the time being in force, and the natural right defined in illustration (*i*) of every owner of upper land against the owner of adjacent lower land in respect of water naturally running in or falling on such land and not flowing in defined channels. Illustration (*a*) does not apply to the present case and the question decided in that case does not arise here, but the defendants rely on an observation of Subramania Iyer, J., at page 546 that the right mentioned in illustration (*i*) is "a right only in the sense that the passage of water from the higher to the lower close gives no right of action to the owner of the latter, that being but the result of the operation of the laws of nature." I don't think this passage should be taken apart from its context. As a general proposition it appears to be unsupported by authority and with great respect I am unable to accept it. To say, as the defendants do, that, while the plaintiff as owner of the upper land in the open country has a natural right that water naturally running in or falling on his land and not flowing in defined channels should be allowed by the owner of adjacent lower land to run naturally thereto, the latter has a right to erect just over the border of his land a barrier which has the effect of throwing the water back upon the land of the upper owner, appears to me to be in direct contradiction to the language of the section as well as to the law on which the section is founded. In *Menzies* v. *Earl of Breadalbane* (2) the Lord Chancellor cited

(1) 29 M. 539; 1 M. L. T. 333; 16 M. L. J. 582.

(2) (1828) 3 Bligh (N. S.) 414 at p. 420; 4 Eng. Rep. 1387; 32 R. R. 103.

with approval the following passage from the Digest (Dig. 39 t. 3. 1, 1), "*opus quod quis fecit ut aquam excluderet, quae exundante palude in agrum ejus refluere solet, si ea palus aqua pluvia ampliatur, eaque aqua replusa eo opere agris vicini noceat, aquae pluviae actione cogetur tollere*", that is to say, the action *equae pluviae* or of rain water will lie against a landowner for the removal of a work erected by him to keep water off his land which naturally overflows on to it from a marsh, when in time of heavy rain the water forced back by the work so constructed does damage to the lands of the adjoining owner. To the same effect are the decisions *Broder* v. *Saillard* (3) and *Hurdman* v. *North-Eastern Railway Co.* (4), which was approved in *Whalley* v. *Lancashire and Yorkshire Railway Co.* (5). The present seems to be one of the class of cases referred to by Brett, M. R., in that case at page 136, "where your property is subject to the defect that, unless you can prevent the injury which the ordinary course of nature will bring upon it by transferring it to your neighbour's property, your property must suffer as the natural consequence of its position." In such a case, as pointed out by the Master of the Rolls, an owner who to cure the defect to his own property were to turn the water on to his neighbour's land would be liable to an injunction and damages. I do not think that this can be said to be the case of an extraordinary peril coming on the defendant's lands, because the evidence is that for at least more than 30 years before suit, and possibly very much longer, these saline waters have found their way in times of heavy rain to the site of the suit bund and flowed on to the defendant's lands. No authority has been cited to us to show that the fact that natural water carries certain amount of saline matter in solution which renders it injurious to crops in any way, takes it out of the law governing the distribution of natural surface water, and I think that cases such as *Rex* v. *Pagham Levels Commissioner* (6) and *Nield* v. *London and North Railway Company* (7) have no application to the present case. The Government Pleader does not support the award of damages and the decree will be modified accordingly. Otherwise, in my opinion, the appeal fails and must be dismissed with costs. The defendants will be restrained from diverting or obstructing the course of the south-eastern branch of Nallavagu stream at the site of the suit bund or elsewhere so as to prevent the same from flowing in its natural course past the site of the said bund, and they will be directed to remove so much of the suit bund or any other work as may wholly or partially divert or interfere with the flow of the south-eastern branch of the Nallavagu stream in its natural course.

SESHAGIRI AIYAR, J.—The suit is by the Secretary of State for India for the removal of a bund erected by the 1st defendant, the Rajah of Venkatagiri, and his tenants across a stream known as the Nallavagu. Both parties admit that this stream originates in the Ongole Taluk and that up to A (I shall refer to plan I A, as it was filed for the defendants and as its accuracy as representing the state of affairs as it existed at the time of its preparation in 1904 was not questionod by the plaintiff), it has a defined course. The 1st defendant contends that from A it proceeds in a north-easterly direction as a well-defined stream, and that it is not a stream in its passage in the south-westerly direction from A. It is common ground that there is a bifurcation at this point. It was finally admitted by the defendants that from A to C in the south-easterly course, Nallavagu has all the requisites of a running stream; they allege that beyond C, it diffuses itself over a large area. It is not denied that despite this diffusion, the water of Nallavagu finds its way through depressions into a marsh and that ultimately its waters empty themselves into the Buckingham Canal. The defendants state that from A to C the distance is a mile and a quarter and from C to the Buckingham Canal, it is four miles. They say that this irregular flow of water from C caused considerable damage to their crops as it

(3) 2 Ch. D. 692; 45 L. J. Ch. 414; 24 W. R. 1011.

(4) 3 C. P. D. 168; 47 L. J. C. P. 368; 38 L. T. 339; 26 W. R. 489.

(5) 13 Q. B. D. 131; 53 L. J. Q. B, 285; 50 L. T. 472; W. R. 711; 48 J. P. 500.

(6) 8 B. & C. 355; 2 Man. & Ry. 468; 6 L. J. K, (o. s.) 338; 108 Eng. Rep. 1075; 32 R. R. 407.

(7) 10 Ex. 4; 44 L. J. Ex. 15; 23 W. R. 60.

was saline, and that in order to enable them to cultivate their fields to the best advantage they put up the dam complained of. They do not dispute that the effect of this dam is to throw a great quantity of water on the lands of the plaintiff during the flood seasons, but they demur to having caused any actual damage to the crops grown on plaintiff's lands. The District Judge came to the conclusion that the defendants were not entitled to raise a dam and directed its removal. He did not find any actual damage, and awarded nominal damages. The first defendant has appealed.

The first question for consideration is whether Nallavagu is a natural stream in its south-easterly course. The evidence is not very full and definite, but after giving my careful consideration to the arguments advanced by the learned Vakils for the appellant I have come to the conclusion that it is a natural stream. It was pointed out that in the surveys carried on by the plaintiff, the lands through which Nallavagu passes up to C are not entered as river-bed, whereas in its north-easterly direction this has been done. This may show that from A to C the outlet has been more recent than from A to B. For more than 30 years from 1878, this part of Nallavagu has been in existence and yet the survey officers have not recorded the numbers through which it passes as river-bed. I do not think that much importance should be attached to this omission. I see no reason to disbelieve the evidence of P. W. No. 4. He was a Revenue Inspector of Ongole in 1896. It was in that year that the defendants first put up a dam across the Nallavagu very near the site of the present one. He inspected the locality and submitted a report (Exhibit L2). He also submitted a sketch of the course of the stream (Exhibit L5). This plan was not made by a professional man and its very imperfections impress me with its truth and honesty. The legal significance which would attach to the Nallavagu, if it were regarded as a natural stream, was unknown to him. The report and the plan may be said practically to be *ante litem motam*, and I am preparted to act upon both. The plan traces a very defined course in 1896, and is confirmed by the report Exhibit L2. In the witness box he has given evidence in support of the existence of the course of the stream. P. W. No. 6, the *karnam* of Allur, one of the villages through which the stream passes, and who was one of the signatories to report Exhibit L in 1896, supports the Revenue Inspector. I see no reason to discredit this evidence. I have rejected from consideration the evidence of the other villagers, because they are interested. As against the evidence of P. W. No. 4 and P. W. No. 6 there is the evidence of D. W. No. 3, the Tahsildar under the defendant. He does not give any definite evidence and is not supported by any record which he has made. The other evidence for the defendants is that of persons who are interested in the result of the litigation. I do not place any reliance on it. My conclusion is that up to the year 1896, Nallavagu flowed in a south-easterly direction in a defined channel. It may be, as contended by the appellants, that the branching off in this direction was only about 1878. However, the existence of a ruined masonry bund at A is against this contention. It is amply proved that in or about the year 1872 a masonry dam was put up near the point of bifurcation either by or at the instance of the 1st defendant. Unless the stream had been flowing south, it was hardly likely that such a permanent construction to divert its course would have been thought of. I am inclined to think that this south-easterly course of the Nallavagu must have existed even prior to 1872. At any rate it is clear that from 1878 it had been flowing in this direction. In that year the evidence shows that the dam was either breached or washed away; about that time the branch in the north-westerly direction was becoming silted up. Consequently a large volume of water must find its way from A to C and downwards.

Even if I feel any doubt regarding this conclusion of mine, I am satisfied that on the facts admitted by the defendants, the Nallavagu in the south-easterly direction was a natural stream in the eye of the law. As stated by me already, it is conceded that from A to C in this direction it has all the requisites of a natural stream. It is from this point that a defined course is denied to it. It is said that it has no banks, that it does not pass within specified limits, and that it has not a marked

flow. These, it is argued by the learned Vakils for the appellant, are essential to constitute a stream. It is in evidence that from C the Nallavagu passes through *zamin* lands at first, thence through Government lands and finally spreads itself out over a large extent of *zamin* ands. It is to prevent this diffusion that the dam, according to the defendants, was erected. It is admitted by the witnesses whose lands will be submerged if the dam were removed that before the year 1896, the water of the Nallavagu found its way, though not within banks on either side, into a marsh nearly three miles lower down and ultimately emptied itself into the Buckingham Canal. See D. W. No. 2 at page 244, D. W. No. 3 at page 248, D. W. No. 4 at page 251, D. W. No. 6 at page 263, D. W. No. 14 at page 276 and D. W. No. 10 at page 265. This last witness is 70 years of age. He says: "A portion of the water of this southerly branch flows over the wet lands of Vasapallipadu and empties itself into the Buckingham Canal,—I have known this for the last 50 years." There is absolutely no reason why this witness should be disbelieved. The evidence above set forth establishes that up to point C for a mile and a quarter from the point of bifurcation there is a defined stream, from that point the water moves and is not stagnant, it spreads itself out over a large area, and ultimately finds its way into the Buckingham Canal. In accepting this evidence on the side of the defendants, it must be allowed that from point C up to the Buckingham Canal, the course is not well-defined, there are no visible bunds restricting the flow of the water. Do these facts take away from the character which the Nallavagu has up to C?

The question to be considered is, what are the attributes of a natural stream? Lord Tenderdon in *Rex* v. *Oxfordshire* (8) said that "water flowing in a channel between banks more or less defined" formed a water-course. It has since been decided that there need be no continuous flow of water. Angell in his book quotes from an American decision which says: "It is not essential to a water-course that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the waters entirely unmixed with earth or flowing with any fixed velocity: but the law does not and cannot fix the limits of variation in these particulars" (Angell on Water-Courses, page 4, VII Edition). The facts of this case are on all fours with *Gillet* v. *Johnson* (9); *Macomber* v. *Godfrey* (10) quoted by Angell in the footnote (1) at page 3. Farnham collects all the authorities bearing on the question and in Volume II, page 1564, points out that the term "water-course" has been extended to 'depressions in...a prairie country which drain large extents of territory of enormous quantities of surface water, although they have no well-defined channels or banks, but still are well-defined water-courses for surface water." The opinion of Kelly, C. B., in *Holker* v. *Porritt* (11) fully supports this view although in the Appellate Court [*Holker* v. *Porritt* (12)] the point was left open. *Whitehead* v. *Parks* (13) takes the same view. The passages in Volume 40 of the American Encyclopædia to which our attention was drawn by the learned Vakils for the appellant are somewhat contradictory in their character. It often happens that the various States of the United States adopt different interpretations of well-known terms. It is not safe to rely upon isolated passages to be found in this volume for the definition of water course. Farnham draws attention to these conflicting views and states the general trend of the American Law on the subject. I accept his statement as expressing the view which finds most favour with eminent Judges in that country. Reason and principle are in favour of the view suggested. A volume of water which has acquired a distinctive character as a stream up to a point does not lose it by the fact that in the rest of its course it is not well-defined. From an examination of the authorities the attributes of a natural stream may be thus summarised. It must have a fairly defined course. It must move. Its water must be capable of identification. It need not always be confined with banks. It need not have a continuous flow. Its width need not be of parti-

(8) 1 B. & Ad. 289 at p. 301; 8 L. J. (o. s.) K. B. 354; 109 Eng. Rep. 794.

(9) 30 Conn. 180.

(10) 108 Mass 219; 11 Am. Rep. 349.

(11) 8 Ex. 107; 42 L J. Ex. 85; 21 W. R. 414.

(12) L. R. 10 Ex. 59; 44 L. J. Ex. 52;33 L. T. 125 23 W. R. 400.

(13) 2 H. & N. 870; 27 L. J. Ex. 169; 115 R. R. 863.

cular dimensions. It is by these tests that a natural stream has to be judged. I am of opinion that in the case before us the Nallavagu satisfies all the positive requirements above mentioned and is a natural stream. The recent decision in *Villuri Adinarayana* v. *Polimera Ramudu* (14) practically agrees with this conclusion of mine.

It was argued by the learned Government Pleader that even apart from the question of the Nallavagu being a natural stream, the action of the defendants in putting up the dam so as to flood the plaintiff's lands with saline water is actionable. The language of illustration (*i*) to section 7 of the Easements Act is relied on, while illustration (*h*) deals with water in a running stream. Illustration (*i*) is limited to water rising or falling on the land of the upper owner. I have felt some doubts whether this illustration is not confined to cases where a spring has its origin in the upper land or serves as a bed for a waterfall. In Domat's Civil Law, the rule is stated in these words:—If waters have their course regulated from one ground to another, whether it be by the nature of the place, or by some regulation or by a title or by an ancient possession, the proprietors of the said ground cannot innovate anything as to the ancient course of the waters. Thus he who has the upper grounds cannot change the course of the waters, either by turning it some other way or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do anything that may hinder his grounds from receiving the waters which they ought to receive and that in the manner which has been regulated. Farnham in commenting upon this rule says that even in regard to surface water there must be a well-regulated flow, before interference with it becomes actionable. In the Digest the rule is stated slightly differently (See rule 110, Ware's Roman Water Law, page 57). But as pointed out by the Lord Chancellor in *Menzies* v. *Breadalbane* (2) there are conflicting views on this subject. The collection of authorities made by Mr. Ware shows it. Under these circumstances, I do not feel justified in presuming that the Indian Legislature intended illustration (*i*) to represent the views of Ulpian in Digest 39, t. 3, l, 1. The distinction between illustrations (*h*) and (*i*), in my opinion, amounts to this. In the former case the water must flow in a natural stream. In the latter although there may be no defined channel, the water must have a regulated course. The one deals with the developments of a stream while the other deals with its beginnings. At the beginning of a stream, it is not to be expected that water will flow within well-defined bounds. Even in such a state the upper owner is entitled to say that its natural course should not be obstructed provided the water moves on regularly. It is true that in *Hurdman* v. *North-Eastern Railway Company* (4) Cotton, L. J., held that a lower owner is not entitled to protect himself against the flow of rain water falling on the upper land, but the learned Lord Justice would, I think, exempt the carrying on of agricultural operations from this rule. I do not think that that case affects the question we have to decide. In that case, a wall was erected in the course of a building which had the effect of totally shutting out the drainage of the water for the field above. I shall, therefore, not rest my decision upon illustration (*i*). I think this case is governed by illustration (*h*). I prefer to decide this case on the footing that there is a stream. Mr. T. R. Ramachandra Iyer argues that the defendant was justified in putting up a dam on his own land to save his property from being inundated by the flow of the saline water. He draws a distinction between preventing a nuisance before it reaches a man's land and taking steps to free himself from it after it has entered his land. In the former case, the action will be justifiable though it may cause damage to the upper owner. In the latter case, care will have to be taken to see that the upper owner is not injured. I fail to see any real distinction between the two classes of cases. The cases which were quoted, to which I shall presently refer, relate to extraordinary floods. It has been held that it is open to a person to protect himself against such dangers in anticipation. The right of any other person is not in question in such cases. Each one has a right to use means to prevent a possible sudden danger. The decision of Bramwell, B., in *Nield* v. *The London and North-Western Railway Co.* (7) has been much relied on. It is stated in

(14) 17 Ind. Cas. 648; 12 M. L. T. 637; 24 M. L. J. 17; 37 M. 304.

that judgment that "the flood is a common enemy against which every man has a right to defend himself," and that "the law allows a kind of reasonable selfishness in such matters," but the sentences which immediately follow make a reservation in cases "where there is a natural outlet for natural water." This case, therefore, does not apply to conditions where the ordinary flow of water in a natural stream is concerned. It was argued that as the upper owner will be damaged by the dam only during the season of flood, this case is within the rule relating to extraordinary floods. The fact that a larger volume of water will year after year flow in a channel during well-known periods will not constitute the water an extraordinary flood. There are very few perennial streams in this country; and the extension of the doctrine of extraordinary floods to streams which during particular seasons let out a large quantity of water would render the position of the upper riparian owner entirely insecure. I think the principle of *Nield* v. *London and North-Western Railway Co.* (7) should be confined to cases where the anticipated danger is occasional, abnormal and unusual. *Menzies* v. *Breadalbane* (2), which Bramwell, B., quotes with approval in *Nield* v. *The London and North-Western Railway Co.* (7), lays down quite distinctly that a riparian proprietor should not erect mounds on his premises to protect himself from ordinary floods if the result of so doing will be to cause damage to the proprietor on the opposite bank. The Lord Chancellor points out in this case that under the Scottish Law, which follows the Roman Law in this respect, "though the river threatens to change its channel you cannot protect yourself to the prejudice of the opposite proprietor." As regards the law of England, he says there can be no doubt on the point. The various cases to which we have been referred in the course of the argument can be grouped under one or the other of these two cases. I shall very briefly notice them. *Rex* v. *Pagham Level Commissioners* (6) is followed in *Nield* v. *London and North-Western Railway Co.* (7).

The defence erected in that case was intended as a protection against inroads of the sea which, in the language of Lord Tenderden, L. J., was a common enemy. In *Attorney-General* v. *Earl of Londsdale* (15) Vice-Chancellor Malines says that the principle of protecting mischief against a common enemy has no application to natural streams. The case of *Rylands* v. *Fletcher* (16) and *Madras Railway Company* v. *Zamindar of Carvetinagaram* (17) belong to the same category. On the other hand in *Miner* v. *Gilmour* (18) Lord Kingsdown laid down that a riparian owner should so use his rights as not to interfere with those of other proprietors either above or below him. This has been accepted as the correct exposition of the law on the subject in *Orr Ewing* v. *Colquhoun* (19). In this case Lord Blackburn after an elaborate discussion of the question states the law to be: "the owner of the banks of a non-navigable river has an interest in having the water above him flow down to him and in having the water below him flow away from him, as it has been wont to do." *Whalley* v. *Lancashire and Yorkshire Railway Company* (5) lays down that although a man may not bring the water on his land, he has no right to protect his property by transferring the mischief from his own land to that of another. These principles have never been departed from in the subsequent cases in the English Courts. In this country where facilities for the drainage of water have not been yet provided to the same extent as in England, it is necessary to see that the owners of property on the banks of streams are not allowed to gain advantages to themselves at the expense of others; nowhere is there greater need for the strict enforcement of the doctrine that each riparian owner should so conduct operations on his property as not to affect injuriously those above and below him. We are governed in most cases by considerations of *mamul* and usage and it would lead to disturbances to allow any one of the owners to introduce innovations which would render his neighour's exercise of ordinary rights of property infructuous. Mr. Ramachandra Iyer said that by erecting a dam his client was not doing anything extraordinary;

(15) 7 Eq. 377; 38 L. J. Ch. 335; 20 L. T. 64; 17 W. R. 219.

(16) 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220.

(17) 1 I. A. 364; 14 B. L. R. 209; 22 W. R. 279.

(18) 12 Moore P. C. 131; 7 W. R. 328; 3 L. T. 98; 14 Eng. Rep. 861; 124 R. R. 3.

(19) 2 App. Cas. 839.

he was only engaged in agricultural operations. I think the learned Government Pleader is right in pointing out that the putting up of a dam to enable the defendants to better cultivate their fields is not an ordinary agricultural operation.

There are not very many Indian cases dealing with the question. *Gopal Reddi* v. *Chenna Reddi* (20) is only an illustration of the principle laid down in *Nield* v. *London and North-Western Railway Company* (7). Mr. Justice Shephard in following *Rex* v. *Pagham Level Commissioners* (6) has not adverted to the distinction which has been maintained in the later case in *Attornley-General* v. *Earl of Londsdale* (15). Subramania Iyer, J., in *Mahamahopadhyaya Ranga Chariar* v. *Municipal Council of Kumbakonam* (1) lays down that where there is a conflict of rights between two owners, that one who wants to exercise his ordinary rights should be protected although by that exercise he may injure his neighbour. The case itself related to the erection of buildings in an urban area. Text-writers and Courts have recognised that in such areas, it would be injurious to public welfare that a person should be prohibited from building because he will thereby cause danger to his neighbour. There is the sanction of Roman Law for this position. See Farnham, Volume III, page 2607 and 40 American Encyclopædia, page 643. Even in such a case, it is said that some provision by way of drain, should be made in order that the neighbour may not suffer by an overflow. I do not think the learned Judge intended to lay down that the principle regarding conflict of rights should be extended to agricultural areas in rural parts. If that was the intention, I must respectfully differ from such a proposition.

In *Sankarappa Naicker* v. *Pari Naicker* (21) Sankaran Nair and Oldfield, JJ., limited the application of this rule to urban areas. I entirely agree with that conclusion.

My conclusions are that the Nallavagu is a natural stream and that the defendant is not entitled to put up the dam complained of, as it would result in inflicting injury upon the plaintiff.

(20) 18 M. 158; 4 M. L. J. 244.
(21) 21 Ind. Cas. 62; 25 M L J 276; (1913) M. W. N. 640.

Having regard to the decisions in *Abdul Hakim* v. *Gonesh Dutt* (22); *Iman Ali* v. *Poresh Mundul* (23) the only declaration the plaintiff is entitled to is that the defendant should not put up a bund which will have the effect of submerging the plaintiff's lands. If he can adopt measures by which he can protect himself without causing an injury to the plaintiff's lands, he is entitled to do so.

Appeal dismissed; Decree modified.

(22) 12 C. 323.
(23) 8 C. 468; 10 C. L. R. 396.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 138 OF 1914.
December 14, 1914.
Present:—Mr. Justice Chamier and Mr. Justice Piggott.

KANHAI LAL AND ANOTHER—PLAINTIFFS—APPLICANTS
verrus
MUL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Rejection of amendment application—No irregularity—High Court, power of, to interfere—Jurisdiction.

When a Subordinate Judge, holding that the expression "future interest" used in a decree means interest from the date of decision and not from the date of the institution of the suit, disallows an application for the amendment of the decree, he commits no irregularity; and whether his decision is right or wrong, the High Court has no jurisdiction to interfere in revision.

Revision against the decree of the Officating Subordinate Judge of Shahjahanpur, dated the 26th of June 1914.

FACTS.—The applicants brought a suit on a mortgage and claimed Rs. 16,851-1-6 for principal and interest up to the date of the suit. They also asked for future interest. The Court decreed the claim with costs and six per cent. per annum future interest. The office prepared a decree awarding Rs. 16,851-1-6 and costs and declared the same to be due on the date on which the suit was decided. It also allowed interest on this amount from the date of decision to the date of realization. The plaintiffs put in an application for amendment of the decree contending that they were also allowed interest from the date of the suit. The

Subordinate Judge rejected the application. The plaintiffs applied in revision to the High Court.

Mr. *Gulzari Lal*, for the Respondents, raised a preliminary objection to the effect that no revision lay. The lower Court first passed a decree under Order XXXIV, rule 4. It decided by its judgment that future interest with the principal amount claimed and costs was decreed to the plaintiffs-applicants. The decree was framed by the lower Court in accordance with the judgment. An appeal lay against that decree if there was any grievance to the plaintiffs-applicants. The order under revision was simply an order construing the decree and the judgment, and deciding that the decree was in accordance with the judgment. The lower Court had the jurisdiction to decide the matter in any way and no revision could lie against such an order.

Mr. *Lalit Mohan Banerjee*, for the Applicants:—The lower Court was bound to prepare the decree under Order XXXIV, rule 4. Under the provisions of that rule, the lower Court was bound to award to the plaintiffs in the decree the interest from the date of the suit. The Court was bound to grant the interest from the date of the suit at the contractual rate. This was so held in *Musammat Rajwanta Kuar* v. *Sham Narain Singh* (1) and the lower Court was bound to interpret the decree in a way which would give effect to the provisions of law. Failure to do so was failure to exercise jurisdiction and if the lower Court refused to amend the decree and to interpret it according to law, it failed to exercise jurisdiction and its order was open to revision by the High Court.

He relied in *Raghunath Das* v. *Raj Kumar* (2).

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge of Shahjahanpore declining to amend a decree. The applicants suing on a mortgage claimed Rs. 16,851-1-6 on account of principal and interest up to the date of suit. They asked for future interest, that is, interest after the date of the institution of the suit. The Court "decreed the claim with costs, and six per cent. per annum future interest." The office prepared a decree which declared that Rs. 16,851-1-6 on account of principal and interest and Rs. 204 on account of costs, total Rs. 18,055-1-6, were due to the plaintiffs on January 9th, 1914, that is the date on which the suit was decided and allowed the plaintiffs' interest on the last-mentioned sum from that date till realization at the rate of six per cent. per annum. The plaintiffs by an application which appears to have been prepared on January 20th, 1914, but was not filed until April 21st, 1914, asked the Court to amend the decree, which they said was not in accordance with the judgment. They contended that the judgment allowed interest from the date of the suit up to the date of realization on the amount claimed. The Subordinate Judge says: "From the perusal of the judgment it appears that the Court did not allow interest from the institution up to the date of the decree and, therefore, the decree is all right," and the application was disallowed. Thus it appears the Subordinate Judge construed the expression "future interest" to mean interest from the date of decision, and not from the date of the institution of the suit. He may have been wrong and the Court when deciding the case may have intended to allow interest from the date of the institution of the suit; but it is impossible to say that the Subordinate Judge has acted irregularly. He had jurisdiction to decide wrongly as well as to decide rightly; and whether he was right or whether he was wrong, we are unable to entertain this application in revision. We, therefore, dismiss it with costs.

Application dismissed.

(1) 23 Ind. Cas. 88; 12 A. L. J. 283; 37 A. 220.
(2) 7 A. 876; A. W. N. (1885) 256.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 253 OF 1905.

November 12, 1906.

Present:—Mr. Justice Miller.

SEETHARAMA IYER—DEFENDANT—PETITIONER

versus

ROBERT FISCHER—PLAINTIFF—RESPONDENT.

Landlord and tenant—Varam *agreement*—*Condition*

TIKARAM v. GHASIRAM.

to cultivate land in due season, whether reasonable —Damages for non-observance of condition, measure of.

The condition in a *varam* agreement which obliges the *ryot* to cultivate the land in due season is not unreasonable, provided that it is not read as insuring the rent in all seasons. In case such condition is not observed, the measure of damages is the average yield of neighbouring land.

Petition, under section 25 of Act IX of 1887, against the decree of the Subordinate Judge of Madras (East), in Small Cause Suit No. 493 of 1914.

Mr. *K. Ramachandra Aiyar*, for the Petitioner.

The Hon'ble Sir *V. C. Deshikachariar*, for Mr. *T. Rangachariar*, for the Respondent.

JUDGMENT.—The condition in the *patta* tendered which obliges the *ryot* to cultivate the land in due season cannot be said to be unreasonable in a *varam* agreement, provided, of course, that it is not read as insuring the rent in all seasons.

Here I am bound by the finding that the defendant might have cultivated the land had he closen to do so.

The measure of damages applied by the Subordinate Judge, the average yield of neighbouring land, is in my opinion the right one.

The petition is dismissed with costs.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 468 OF 1912.

October 15, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

TIKARAM—DEFENDANT—APPELLANT

versus

Seth GHASIRAM—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), ss. 85, 115—Tenant can save one holding if unable to save another—Surrender by tenant, effect of, on his mortgagee —Partition—Order of Settlement Officer, whether necessary—One holding could be split up into several by consent of landlord and his tenants.

A holding can be split up by a landlord and his tenants with mutual consent and without the order of a Settlement Officer. If a partition made by two persons interested in two portions of a holding is accepted by the landlord, each becomes separate holding.

Section 85 of the Central Provinces Tenancy Act contemplates ejectment only from the holding in respect of which an arrear is due. In other words, it is open to a tenant to pay up the arrear on one holding and save it from forfeiture, though he be unable to pay what is due on another holding.

A surrender by a tenant will not prejudice the rights of his mortgagee when the mortgage is not voidable at the instance of the landlord.

Appeal against the decree of the District Judge, Narsinghpur, dated the 31st July 1912, reversing that of the Subordinate Judge, Narsinghpur, dated the 10th April 1912.

Mr. *G. P. Dick*, for the Appellant.

The Hon'ble Sir *B. K. Bose*, for Respondent.

JUDGMENT.—This is a case where, if the facts are properly appreciated, there is little difficulty in applying the law.

The defendant-appellant, Tikaram, admits the allegations made by the plaintiff in the first nine paragraphs of the plaint. I propose, therefore, to summarise the allegations made in those paragraphs.

The plaint states that Mohanlal and Baliram were the occupancy tenants of field No. 86, area $17\frac{3}{4}$ acres, rent Rs. 26-8-0. On 3rd August 1893, that is before the coming into force of the new Tenancy Act of 1898, a thirty years' *zurpeshgi* lease was given to the plaintiff, of a part of the holding, namely, of 14 *bighas*, with rent at rupees twenty-one. It is now admitted before me that the plaintiff has failed to prove the landlord's consent to the transfer, though such consent was alleged in the plaint. The then *malguzar* went on accepting from the plaintiff Rs. 21 as rent out of the total rent for the holding, Rs. 26-8-0. When the new Settlement came into force the rent of the holding was enhanced to Rs. 35. The old number 86 was now numbered as Nos. 108/2, 133/1, 133/2. The portion mortgaged to the plaintiff came henceforth to be numbered 133/1. There was no distribution of the rent Rs. 35 by the Settlement Officer.

In paragraph 7 of the plaint, the plaintiff says that with the consent of the *malguzar* rupees thirty was fixed as the rent for No. 133/1, the plot in the possession of the mortgagee, and the plaintiff has been paying this rent accordingly.

In paragraph 6 it is stated that the rent for this plot for *Sambats* 1964, 1965 and 1966 was duly paid by the plaintiff to Tikaram, *Musamwat* Gomti and *Musammat* Radha, the *malguzars* of the village.

The plaint then refers to a partition of the village as the result of which plot

No. 133/1 has fallen to the share of *Musammat* Radha and *Musammat* Gomti.

On the 24th June 1909 Tikaram brought a suit for the rent of Nos. 133/1, 133/2 and 108/2 for *Sambats* 1964 and 1965 and after giving credit for Rs. 30 a year, claimed Rs. 5 a year and obtained a decree against the tenants, which was followed up by their ejectment from all the plots. These proceedings are alleged to be collusive though the defendant-appellant, Tikaram, denies it.

The plaintiff questions also Tikaram, the *lambardar's* right to sue alone after the partition for rents due prior to the partition.

The plaintiff asks for a declaration that the decree obtained against the tenants is not binding on him and prays for possession of No. 133/1.

Musammat Radha and *Musammat* Gomti (defendants Nos. 2 and 3), to whose share plot No. 133/1 has been allotted at the partition of 1909, repudiate the action of the *Lambardar* Tikaram. The case has been contested throughout by Tikaram alone who has no longer any interest in the plot in suit.

The first Court dismissed the suit, holding that the mortgage was without the consent of the landlord and that Tikaram, as *lambardar*, had authority under the *Wajib-ul-arz* to institute and carry on the proceedings against the tenants. On appeal the District Judge held that Tikaram had a right to carry on the ejectment proceedings. On the authority of *Jena Bapu* v. *Ram Rao* (1) the lower Appellate Court found that the landlord must be deemed to have ratified the mortgage in favour of the plaintiff, though at its inception it was voidable for want of consent. The District Judge was of opinion that the plaintiff should have been called upon to pay the balance of the rent before a suit for rent against the tenant could be instituted. He has passed a decree for possession of No. 133/1 on condition that the plaintiff deposits the amount decreed in the rent suit. The defendant No. 1 has preferred this second appeal, but there is no appeal by the plaintiff.

The lower Appellate Court's finding that the landlord has ratified the mortgage has been questioned in the first ground of appeal. It has been found by the Court below that the rent for the plot in the mortgagee's possession has been always accepted from him with full knowledge of the transfer, and that the receipts are in the mortgagee's name. I may also point out that it was at the mortgagee's request that a separate rent of rupees thirty was fixed by the landlord for plot No. 133/1. The conclusion arrived at by the District Judge is fully supported by the authority of the ruling which he cites.

I am of opinion that when the landlord agreed to distribute the rent on each parcel separately, the parent holding was split up into two holdings. The mortgagee's object in making the request was to secure an independent liability for his plot unconnected with the liability of the other plots. This was an arrangement acceptable to the landlord, for at least thirty out of thirty-five rupees would be punctually paid by a well-to-do money-lender such as the plaintiff is. The mortgagee had a number of years yet to enjoy his plot under his mortgage and was practically in the position of vendee. If a partition, made by two persons interestrd in two portions of the holding, is accepted by the landlord, each becomes a separate holding. The receipts filed in the case do not suggest any intention on the part of the landlord to preserve intact the joint liability of all the plots. The appellant's learned Counsel has shown no authority for the proposition that without the order of a Settlement Officer no holding can be split up by the landlord and tenants with mutual consent. I hold that plot No. 133/1, rent Rs. 30, is a separate holding.

It is admitted that the rent for No. 133/1 was punctually paid not only for *Sambats* 1964 and 1965, the two years for which the suit was brought, but also for *Sambat* 1966. There was, therefore, no arrear in respect of this holding. Whether there should be a separate suit for arrear of rent in respect of each holding, as held in *Jagannath Prasad* v. *Tori* (2), I am clear that section 85 of the Tenancy Act contemplates ejectment only from the holding in respect of which an arrear is due. In other words it would be open to a tenant to pay up the arrear on one holding and save it from forfeiture, though he is unable to pay what is due on another holding.

(1) 15 C. P. L. R. 99.

(2) 29 A. 18; 3 A. L. J. 610, A. W. N. (1906) 253.

NATHA SINGH v. MANGAL.

In the suit brought by Tikaram, it was open to the tenants to have pleaded that no arrear was due in respect of No. 133/1. So long, however, as the decree stands it is binding on them. Can this be regarded as a case of forfeiture, when no forfeiture has been incurred as a matter of fact? Their consent to the decree places that decree on no higher footing than a voluntary surrender. The case of *Ram Saran Das* v. *Ram Pergash Das* (3) seems to support this view.

I have already held that the finding of the lower Appellate Court that there was a ratification of the mortgage before the institution of the rent suit, is one binding on me. We have, therefore, to consider the effect of a surrender by a tenant on the rights of his mortgagee holding a valid mortgage. Section 115 of the Transfer of Property Act, though not applicable to the case, codifies the doctrine of Common Law on the point. As held by Ismay, J. C., in *Bhuray* v. *Lala Vishwanath* (4), such a surrender will not prejudice a mortgagee when the mortgage is not voidable at the instance of the landlord. In such a case the tenancy has, in consideration of law, a continuauce.

I need not express any opinion as to whether Tikaram alone could maintain the rent suit and the subsequent ejectment proceeding.

In my opinion, the plaintiff was entitled to an unconditional decree for possession without payment of the rent due on the other plots, but no cross-objection has been filed by the plaintiff. The appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 32 C. 283.
(4) 2 N. L. R. 170.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 875 OF 1911.

May 14, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

NATHA SINGH—DEFENDANT—APPELLANT

versus

MANGAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Adoption—Sister's son—Bajwa Jats of Nikodar Tahsil, Jullundur District—Onus.

The adoption of a sister's son or a gift to such a person is not allowed by custom of the *Bajwa Jats* of Jullundur district, and the onus of proving the contrary is upon the person setting up the custom.

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 9th May 1911, affirming that of the Subordinate Judge, first Class, Jullundur, dated the 23rd December 1910, decreeing the claim.

Messrs. *Duni Chand* and *Badr-ud-Din Kureshi*, for the Appellant.

Mr. *Asquith*, for the Respondents.

JUDGMENT.—The parties are *Bajwa Jats* of Nikodar Tahsil, Jullundur District. Plaintiffs, who are the collaterals in the fourth degree of one Sawan deceased sue for possession of the land left by the deceased, on the allegation that the defendant, Natha Singh, the son of Sawan's sister, took possession thereof upon his uncle's decease and had mutation effected in his name. The defendant pleaded that the land in dispute had not descended from an ancestor common to the plaintiffs and Sawan; that Sawan had adopted defendant in his infancy and brought him up as a son; and that in addition Sawan shortly before his death had made a gift of his property to defendant.

The Subordinate Judge held that the property was ancestral; that plaintiffs were related to deceased in the fourth degree; that an adoption had in fact taken place, though in all probability only shortly before the execution of the deed of adoption which was dated the 17th March 1909; that the said adoption was invalid by custom; and finally that the alleged gift in favour of defendant had not been proved. He, accordingly, granted plaintiffs the decree prayed for.

The Divisional Judge on appeal agreed with the Subordinate Judge that the gift had not been proved and that the alleged adoption, even if it took place in fact, was contrary to custom and invalid. He, accordingly (without coming to any finding as to whether the property was ancestral or whether an adoption had in fact taken place), dismissed defendant's appeal.

A further appeal has been filed by the defendant in this Court, and the main contention urged on his behalf is that there is no proof that the land in question is

ancestral *qua* the plaintiffs and that as a result, the mere fact of his adoption would suffice to oust the plaintiffs who, in the event of the property being self-acquired, would have no *locus standi* to contest the validity of the adoption.

After hearing lengthy arguments, we are of opinion that plaintiffs have succeeded in showing that the land in suit originally descended from the common ancestor, Gola, who founded the village very many years ago. The statement made by the proprietors of the village in 1885 at the time of Settlement is conclusive upon this point. They then asserted that the village had been founded by their ancestor, Gola, and that the lands held by them had descended from him, though in the course of time various branches of the family had divided areas *inter se*. The presumption then is that this land, which was originally ancestral, has continued to bear the same character and it was for the defendant to prove that it had lost that character. He has not been able to show that it has ever passed out of the hands of the descendants of Gola, and in these circumstances we must hold that the first Court's finding is correct and that the land is ancestral.

Upon this finding it is hardly necessary for us, in face of the Full Bench ruling in *Ralla* v. *Budha* (1), to add that the onus of proving that *Bajwa Jats* of Jullundur District recognise the validity of the adoption of a sister's son lay very heavily upon the defendant. The instances cited by him are mostly irrelevant, and those that are in point date from a time long since past and it is impossible to obtain full details with regard to the circumstances surrounding them. In the case of Amru, for instance, he is said to have given three-fourths of his land to his daughter before the first Settlement, but we have no particulars as to whether there were any reversioners or whether they consented to the gift. The other instance relates to a case of a daughter's son and was decided so long ago as 1863. On the other hand, in addition to the Full Bench ruling cited, we have a comparatively recent decision (Civil Appeal No. 418 of 1894) by Division a Bench of this Court to the effect that the adoption of a sister's son, or a gift to such a person, is not allowed by custom of the Hindu *Jats* of the Jullundur District.

Upon these authorities we agree with the Courts below that the adoption, if it took place in fact, was contrary to custom and that defendant had no right to the land for which plaintiffs have brought the present suit. The appeal is consequently dismissed with costs.

Appeal dismissed.

(1) 50 P. R. 1893 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 381 OF 1913.
February 25, 1914.
Present:—Mr. Hallifax, A. J. C.
HUSEN—DEFENDANT—APPELLANT
versus
RAJARAM—PLAINTIFF—RESPONDENT.

Minor—Sale by de facto *guardian, validity of—Limitation Act (IX of* 1908), *Sch. I, Art.* 91—*Suit to set aside sale.*

An alienation of the property of a minor by a person who is that minor's guardian *de facto*, but not *de jure*, is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property.

Article 91 of the Limitation Act does not apply where the sale is void.

Appeal against the decree of the Divisional Judge, Nerbudda Division, dated the 11th March 1913, confirming that of the Subordinate Judge, Nimar, dated the 15th November 1912.

Dr. *H. S. Gour* and Mr. *S. R. Pandit*, for the Appellant.

Mr. *J. Mitra*, for the Respondent.

JUDGMENT.—The plaintiff, Rajaram, is the son of *Musammat* Lawangai, the younger of the two widows of his father, Nahad or Naharu. On the 25th of February 1905 his father's elder widow, *Musammat* Jamnai, acting on his behalf as his guardian, executed a sale-deed of his property in favour of the defendant, Husen Rangrez, for Rs. 2,000. At that time the age of Rajaram was between 13 and 17 years. One Kushal, son of Gulba, joined *Musammat* Jamnai in the execution of the deed of sale. He was apparently

cousin to the plaintiff, but it seems to have been admitted all through the case that he had no title to the property and was not a necessary party to the transfer. The two widows and Rajaram lived together, and the elder widow, *Musammat* Jamnai, seems to have managed the property and the family affairs. The suit out of which this appeal arises was filed by Rajaram on the 23rd of June 1911, that is to say, within six years and four months of the execution of the sale-deed by his step mother. His own mother, *Musammat* Lawangai, is still alive.

Rajaram alleged in his plaint that he was then about nineteen years of age and that the sale-deed of February 1905 was void, because it was for no consideration and because neither of the executants had any right to deal with his property. He prayed, therefore, that he might be restored to possession of his property, making an offer at the same time to refund to the defendant any part of the consideration stated in the deed of sale which might be found to have been received for necessary purposes and for his benefit. He added an alternative prayer for joint possession in case it should be found that Kushal was owner of a share at the time of the transfer. It has been found in both the Courts below that Rajaram was not twenty years old when he instituted this suit and that of the consideration stated in the sale-deed it has been proved that *Musammat* Jamnai took and applied Rs. 1,275 for necessary purposes and the benefit of the minor. He, therefore, was given a decree for possession of the property on payment of Rs. 1,275, and this sum is now stated to have been paid into Court on or before the date fixed.

In both the Courts below it has been held that it is unnecessary to decide whether the deed is void or voidable or what Article of the second Schedule of the Limitation Act applies to the suit, because of the finding that the suit has been brought within three years of the attainment of majority by the plaintiff. Both judgment and decree of the first Court, however, ordered the deed of sale to be "dismissed" on payment of the sum found to have been taken for necessary and proper purposes, so that it was there treated as voidable. In the lower Appellate Court it was held, on the authority of the ruling of their Lordships of the Privy Council in *Mata Din* v. *Sheikh Ahmad Ali* (1), that the Article of the Schedule of the Limitation Act governing the suit is neither 44 nor 91, but 144. This is going beyond their Lordships' judgment, as they refrained from deciding whether the sale in the case before them was void or merely voidable, that is to say, whether Article 91 did or did not apply to the case. In delivering the judgment, Lord Robson said: "There has been much argument. . . . as to whether . . a sale by a *de facto* guardian, if made for necessity, or for the payment of an ancestral debt, affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case. To begin with, the appellant has not succeeded in showing that the disputed sale of 1889, although made for the payment of an ancestral debt, was made of necessity, or was beneficial to the minor. On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned."

There is, however, a distinct indication of their Lordships' opinion on this point in the passage immediately preceding that just quoted, where they said: "It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and as such were entitled to sell his property, provided that the sale was in order to pay his debts and was, therefore, necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a *de facto* guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it." Later also their Lordships described the sale as "effected not by a guardian, but by a wholly unauthorised person." We have also the ruling of the Allahabad High

(1) 13 Ind. Cas. 976; 16 C. W. N. 333; 11 M. L. T. 115; (1912 M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49.

Court in *Nizam-ud-din Shah* v. *Anandi Prasad* (2) and that of the Calcutta High Court in *Moyna Bibi* v. *Banku Behari Biswas* (3) which are directly in point. I hold, therefore, that an alienation of the property of a minor by a person who is that minor's guardian *de facto* but not *de jure* is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property.

The cases cited as opposed to this view were the rulings of this Court in *Seetaram Sadasheo* v. *Nilu Patel* (4) and *Musammat Tanto* v. *Gajadhar* (5) and of the Allahabad High Court in *Ramausar Pandey* v. *Raghubar Jati* (6) and *Gajeshri Prasad* v. *Dharma Dat* (7). In the first two cases the alienation was by the mother of the minor who was his guardian *de jure* and also *de facto*. In the third, the plaintiff alleged that the person who had alienated his property during his minority as his mother and guardian was in fact neither, and the learned Judges found in a judgment of four lines that Article 142 of the Limitation Act applied. The fourth case was one of alienation by the elder brother of a Hindu minor and in order to enable the Court to decide the question of limitation, the suit was remanded for a finding whether the elder brother was the lawful guardian of the minor or had any other legal power to convey the property or not. The first two cases are, therefore, distinguishable, and the last two support the view I have taken.

The sale to the defendant being void, Article 91 of the Limitation Act does not apply, and under Article 144, which governs the suit, it is well within time. I may say that if it had been necessary for the purposes of this appeal to uphold the findings of the Courts below in respect of the plaintiff's age as a proper finding of fact, I should have had the greatest difficulty in doing so. The question is, however, immaterial in the view I have taken. The only other plea taken in appeal was in regard to a suggested ratification by the minor after attaining majority. There cannot, of course, be any ratification of a contract which is void *ab initio*. In any case ratification was not pleaded in the first Court, and the only evidence now suggested as tending to show that the minor did ratify the contract is the fact that on the 12th of June 1911 he took a lease from the defendant for one year of two of the six *malik-makbuza* fields in dispute. The area of the six fields is 52·72 acres, and of the two leased is 16·52 acres, and there is absolutely no evidence to show that when he executed the *kabulyat* the plaintiff had that full knowledge of the facts which is essential to ratification or estoppel. The remaining grounds taken in the petition of appeal were expressly abandoned. The appeal is, therefore, dismissed and the appellant must pay the respondent's costs.

Appeal dismissed.

(2) 18 A. 373; A. W. N. (1896) 99.
(3) 29 C. 473; 6 C. W. N. 667.
(4) 1 C. P. L. R. 75.
(5) 1 N. L. R. 129.
(6) 5 A. 490; A. W. N. (1883) 64.
(7) A. W. N. (1888) 152.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 932 OF 1914.

November 11, 1914.

Present:—Justice Sir P. C. Banerjee, KT.

GANGA PRASAD—JUDGMENT-DEBTOR—APPELLANT

versus

JWALA PRASAD—DECREE-HOLDER—RESPONDENT.

Execution--Application to revive execution proceedings—Limitation.

A decree for the demolition of a house was passed on 31st July 1907. On 15th of February 1909, an application was made for execution. On 26th of May 1909 the judgment-debtor put in an application asking for two weeks' time to demolish the house. The decree-holder consented to it. The Court in order to lighten its file by removal of one case from it ordered to strike off the application for execution. On 21st of July 1913 the decree-holder again made an application that steps should be taken to demolish the house:

Held, that the application of the 21st July 1913 was an application to revive the former application and the execution was not barred by time.

Second appeal from the decision of the Additional Judge of Farrukhabad, dated 9th May 1914.

Dr. *S. N. Sen*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—The only question in this

case is whether the application for execution filed by the decree-holder on the 21st July 1913 is time-barred. The decree-holder obtained a decree on the 31st of July 1907 for the demolition of a house. On the 15th of February 1909 an application for execution was made by him in which he prayed that the decree might be given effect to and the house demolished. The judgment-debtor put in an application on the 26th of May 1909 asking for two weeks' time to demolish the house; to this the decree-holder consented. The Court, however, apparently with a view to show that its file had been lightened by the removal of one case from it, passed an order striking off the application for execution. Meanwhile the brother of the judgment-debtor instituted a regular suit in respect of the house claiming it as his own. On the 18th of June 1909 the brother of the judgment-debtor applied to the Court to stay proceedings in the execution case, on the ground that he had instituted his suit. Upon this application the Court made an order to the effect that as the execution case had already been struck off the file no order of stay was necessary. After the decision of the suit brought by the judgment-debtor's brother, the decree-holder made his application on the 21st of July 1913 and prayed that steps should be taken for the demolition of the house. The judgment-debtor contended that execution was time-barred. Both the Courts below have overruled his objection and have held that the application now made by the decree-holder must be deemed to be one for the revival of the execution proceedings commenced on the 15th of February 1909. In my opinion this view is correct. In the year 1909 when the judgment-debtor took time for the purpose of demolishing the house, the Court must be deemed to have stayed proceedings when it granted the application for time. There was no occasion to reject the application for execution. The proper order of the Court ought to have been an order staying proceedings for the period for which time was taken. But as I have said above, it apparently wanted to show a clear file and, therefore, removed the case from the list of pending cases. The order passed on the 26th of May 1909 must be deemed to be an order staying proceedings until further orders and the present application can only be regarded as an application to revive and continue the proceedings which had thus been stayed. In this view no question of limitation arises and the appeal must fail. I dismiss it with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 64 OF 1912.

June 25, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

GOKAL SINGH—PLAINTIFF—APPELLANT

versus

KANHAYA LAL—DEFENDANT—RESPONDENT.

Suit to set aside decree passed against a person as minor on ground that he was not minor—Burden of proof.

Where a decree passed against a person as a minor is sought to be declared null and void on the ground that he was not minor but major at the date of the suit, the burden of proof lies on him to establish his allegation.

First appeal against the decree of the District Judge, Hoshangabad, dated the 19th April 1912.

Mr. *S. R. Pandit*, for the Appellant.

Mr. *Atmaram Bhagwant*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sues for a declaration that the decree in Suit No. 9 of 1909 in the Court of the District Judge, Hoshangabad, is null and void as against him. His allegations are that whereas at the date of the former suit he was twenty-two years of age, he was described in the plaint in that suit as a minor, and one Buddhu Singh, his brother, appointed his guardian *ad litem*. The plaintiff says that he had no notice of the former litigation, and only came to know of it when the property mortgaged was sold. The plaintiff's case is that he lives in the same house as Buddhu Singh, but is not joint in estate with him since the last seven years. The defendants pleaded that the plaintiff was a minor in 1909. It is unnecessary to notice the other pleas taken in the lower Court. The suit has been dismissed on the ground that the plaintiff has failed to prove that he had attained majority in 1909.

The argument for the appellant was two-fold. In the *first* place, he contends that he has proved the plaintiff's age in 1909 to be twenty-two. *Secondly*, he contends on the authority of *Cheyt Narain Singh* v. *Bunwaree Singh* (1) that it was for the defendant to establish that the plaintiff was a minor at the time of the former suit.

The plaintiff's two witnesses on the point of his age have been disbelieved by the lower Court. The defendants have adduced no evidence on this point. I agree with the learned District Judge that no reliance can be safely placed on the testimony of the plaintiff's two witnesses, and I need not repeat the reasons he has given in his judgment.

On the second point, I agree with the learned District Judge that the burden of proof lay on the plaintiff to establish the allegations made in his plaint. The case from the Weekly Reporter cited above is not in point. There the question was whether the plaintiff was a minor at the date of the suit. In this case we are concerned with the plaintiff's minority when a former suit against him was pending. Under Order XXXII, rule (3), the Court can only appoint a guardian for a defendant on being satisfied of the fact of his minority. From Exhibit P-3, a copy of the order-sheet in Suit No. 9 of 1909, I find that on the 17th April 1909 the Court held Gokal Singh (the present plaintiff) to be a minor and thereupon proceeded to appoint his elder brother Buddhu Singh as his guardian for the suit. On what materials the Court was satisfied of the plaintiff's minority, I am unable to find from the record. I think it is for the plaintiff to show that though the former Court was satisfied that he was a minor, he was really not so. The defendants may well rely on the order of the Court in the absence of satisfactory proof by the plaintiff showing that the order was erroneous. The case is somewhat analogous to a case where a defendant, against whom an *ex parte* decree has been passed, seeks to set aside that decree on the ground that the summons was not duly served on him. In such a case the burden will be on the defendant to prove non-service of summons, as held in *Torob Ali* v. *Chooramun Singh Chowdhry* (2). The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 23 W. R. 395.

(2) 24 W. R. 262.

MADRAS HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL NO. 41 OF 1913.

October 9, 1914.

Present:—Sir John Edward Power Willis, KT., Offg. Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

MUTHAMMAL—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF TINNEVELLY—DEFENDANT—RESPONDENT.

Res judicata—*Estoppel—Decision as well as grounds of decision bar subsequent suit—Civil Procedure Code (Act V of* 1908), *s.* 11—*Boundary Marks Act (XXVIII of* 1860), *s.* 24, 25, *order under, finality of.*

The plea of *res judicata* or estoppel is available, not only as regards the final conclusion of the Court or Officer, but also regarding all findings necessary for arriving at that conclusion whether they are given on formal issues raised in the case or are referable to the points which must have been the basis of the final determination.

A decision of the Boundary Settlement Officer that certain lands did not form part of a *zemindari*, if not contested by filing a suit under section 25 of the Boundary Marks Act and also the grounds of that decision, *viz.*, that the lands never had formed part of the *mitta*, are *res judicata* between the parties in any subsequent suit for those lands.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Sir Arnold White, Kt., Chief Justice, dated the 10th February 1913, in Appeal Suit No. 199 of 1910, reported as 19 Ind. Cas. 68; 13 M. L. T. 293; (1913) M. W. N. 307; 24 M. L. J. 405, preferred against the decree of the Subordinate Judge of Tinnevelly, in Original Suit No. 57 of 1908.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *S. Swaminathan*, for the Government Pleader, for the Respondent.

JUDGMENT.

WALLIS, OFFG. C. J.—In this case the plaintiff sued to recover certain lands which she alleged to form part of her *mitta* and to have been wrongfully taken possession of by Government, and in the alternative for a reduction of the *peishkush* charged on the *mitta* and a refund of the *peishkush* paid by

her for *Fasli* 1317 proportionate to the extent of the lands which had been taken from her. The boundaries of the *mitta* and the adjoining Government lands were delineated under the Boundary Marks Act XXVIII of 1860, in the year 1880, when the Boundary Settlement Officer found that the lands in question had never formed part of the area of the *mitta* and accordingly excluded them. The proprietor of the *mitta* did not contest this decision by filing a suit under section 25 of the Act as he might have done. In these circumstances the decision of the Boundary Settlement Officer, that the lands in question did not form part of the *zemindari*, is *res judicata* according to the decision of the Full Bench in *Kamaraju* v. *Secretary of State for India* (1) and I think that the ground of the decision, *viz.*, that they never had formed part of the *mitta*, is also *res judicata* as having formed the ground of decision. The Subordinate Judge was, therefore, right in dismissing the plaintiff's suit on this ground. In the view I take of the case, the question whether the Court is precluded by the terms of section 58 of the Madras Revenue Recovery Act, II of 1864, from entertaining the plaintiffs' claim for a return of proportionate *peishkush* for the *fasli* in question, as to which there was a difference of opinion between the learned Judges who heard the appeal, does not arise. The appeal fails and is dismissed with costs.

AYLING, J.—I agree.

SESHAGIRI AIYAR, J.—I entirely agree with my Lord. I only wish to say a few words with reference to the argument of Mr. Govindaraghava Aiyar that the decision of the Survey Officer in 1880 under section 24 of Act IV of 1897 is conclusive only as regards the actual decision arrived at in the case, namely, that the lands claimed belonged to the Government and not to the *mittadar*. I am unable to uphold this contention. Exhibit III, the petition to Mr. Baber, sets out the ground on which the claim was made. It says that prior to the sale of the *mitta* to the claimant's transferor, the *mitta* included the lands in dispute, and that at the sale in 1868, they passed to the purchaser. These were the questions which the Survey Officer had to decide. He did decide them, although he did not raise the points in the form of specific issues. Section 24 of the Boundary Marks Act says that such a decision is final, subject to its being contested in a Civil Court within a specified time. It is conceded in this case that no suit was filed within the time limited. The decision is, therefore, binding upon the parties, whether it is *res judicata* in the technical sense in which the term is used in the Civil Procedure Code or not. The general principles enunciated in section 11 of that Code are of universal application. The question under that section will be whether a matter was substantially in issue, and not whether it has been formally in issue. It was pointed out by the Judicial Committee of the Privy Council in *Krishna Behari Roy* v. *Bunwari Lal Roy* (2): "It has probably never been better laid down than in a case which was referred to in *Gregory* v. *Molesworth* (3), in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston." In *Narayanan Chetty* v. *Kannammai Achi* (4) the learned Judges say that an appellate judgment operates by way of estoppel as regards all findings which are necessary to make the decree effective. *Gokul* v. *Shrimal* (5) lays down the same proposition. Apart from the plea of *res judicata*, as a question of estoppel the same considerations must apply. In Bigelow on Estoppel, after a full examination of all the English and American authorities, it is stated: "A former judgment or verdict, on the other hand, is conclusive between the parties to contested causes (as has already been intimated) of all necessary inferences arising from it as well as of the matters actually in issue." See also pages 97 and 157. Sir George Mellish expresses the proposition thus in *Alison's* case, *In re Bank of*

(1) 11 M. 309.

(2) 2 I. A. 283 at p. 286; 25 W. R. 1; 1 C. 144; 8 Sar. P. C. J. 559; 3 Suth. P. C. J. 213.

(3) (1747) 3 Atk. 627; 26 Eng. Rep. 1160.

(4) 28 M. 338.

(5) 6 Bom. L. R. 288.

Hindustan, China and Japan (6): "It is clear, I apprehend, that the judgment of the Courts of Common Law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered." It seems clear from the authorities that the plea of *res judicata* or estoppel is available not only as regards the final conclusion of the Court or Officer, but also regarding all findings necessary for arriving at that conclusion, whether they are given on formal issues raised in the case or are referable to the points which must have been the basis of the final determination. In the present case, the principal subject of controversy was whether the Court sale of the *mitta* included the lands which the Government claimed to exclude. It was on the ground that it did not form a portion of the *mitta* that the Survey Officer decided that the property did not belong to the claimant but to the Government. That pronouncement estops the appellant from claiming that the lands in dispute passed to him by the auction-sale. As the *peishkush* was imposed only after the sale to him, it follows that the assessment on these lands was not taken into account in fixing the amount payable by the appellant.

Appeal dismissed.

(6) (1873) 9 Ch. App. 1 at p. 25; 43 L. J. Ch. 1; 29 L. T. 519; 22 W. R. 113.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 175 OF 1913.

March 26, 1914.

Present:—Mr. Stanyon, A. J. C.

RAGHU—PLAINTIFF—APPLICANT

versus

MADHGIA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Time requisite for obtaining copies, computation of—Due diligence—Application through agent—Agent's delay—Risk—Extension of time—Tender of copying fee on public holiday, whether proper.

The time requisite for obtaining copies must be measured from the date when an application for such copies is duly presented by, and the date on which such copies are duly tendered for delivery to, the applicant.

The time requisite for obtaining a copy is the time which it takes an applicant to obtain the copy using all due diligence. He must (1) present an application, accompanied by the prescribed fee, at a proper time and place to the appointed official; and (2) be prepared to take delivery of the copies at the time and place fixed for delivery. If he does not discharge both these duties he fails to exercise the due diligence required to obtain the copies. But he may do these acts personally or by an agent.

Where, however, he elects to work throught an agent, he cannot claim credit for any delay caused by taking that course. The time allowed for obtaining copies through an agent is the same as would have been allowed if the applicant had himself applied for and taken delivery of them, irrespective of the question whether the agent's delay was or was not beyond the control of the principal. A principal who elects to use an agent in working against strict rules of time does so at his own risk.

The computation of time for obtaining copies of judicial records is subject to strict rules and no discretionary extensions of such time are permissible.

A suit was dismissed on the 30th November 1912. On the 14th December 1912 the plaintiff posted an application for copies of judgment and decree, and on the same day despatched a money order to pay the cost thereof. The application reached the hands of the Clerk of the Court on the 16th December 1912, but the money order which reached the delivery Post Office on the 18th December could not be delivered to the Clerk of the Court before the 21st December, because the 18th, 19th and 20th December being public holidays, the copying office was closed during those days. The copies were ready and were posted to the applicant on the 20th January 1913:

Held, in computing the period of limitation for an appeal against the decree, that

(1) the application for copies was not presented until the 21st December 1912;

(2) the Post Office being an agent of the applicant, the time to which the applicant was entitled should be measured from the date when the Post Office delivered the application and the necessary money to the official appointed to receive the same, and the day on which the official appointed to deliver the copies made such delivery to the Post Office;

(3) all time occupied by the Post Office in conveying the application and fees to the copying office, and in carrying back the copies to the applicant, was outside that computation;

(4) the tender of fees transmitted by money order on a public holiday was not a tender at the proper time.

Civil revision against the decree of the District Judge, Bhandara, dated the 30th April 1913.

Mr. *A. M. Moodlyar*, for the Applicant.

JUDGMENT.—The facts of this case are not disputed. The plaintiff sued the defend-

RAGHU v. MADHGIA.

ants for Rs. 172-13-0 in the Court of the Munsif of Sakoli, and the suit was dismissed on the 30th November 1912. On the 14th December 1912 the plaintiff posted an application for copies of the judgment and decree, and on the same day despatched a money order to pay the costs thereof. The application reached the hands of the Clerk of Court on the 16th December 1912. The money order is said to have reached the delivery post office on the 18th December, but the 18th, 19th and 20th December being holidays during which the copying office was closed, payment of the money order was made to the Clerk of Court on the 21st December 1912. The copies were ready and were posted to the applicant on the 20th January 1913, and he filed an appeal from the Munsif's decree on the 31st January 1913 in the Court of the District Judge. That Court, allowing from the 21st December 1912 to the 20th January 1913 as time requisite for obtaining "copies," found the appeal to have been filed one day too late and dismissed it as time-barred. The plaintiff has, therefore, made the present application for revision.

I will assume for the sake of argument that the decision of this Court in *Duri* v. *Mohanlal* (1) does not stand in the way of my consideration of the present application on the merits thereof. Circular No. V—8 of this Court contains the rules regulating the grant of copies of Civil judicial records. Rule 3 thereof reads :—

"Every application shall be accompanied by an advance sufficient to cover the estimated cost of the copy applied for. In the case of an application sent by post the advance shall be remitted by money order. An application unaccompanied by an advance shall not be registered or acted on."

This rule follows the general principle laid down in section 6 of the Court Fees Act, 1870, and no application for copies can be taken to have been duly presented unless and until the prescribed advance which should be tendered with it has been received. Therefore, I concur with the learned District Judge in holding that the application for copies in this case was not presented until the 21st December 1912.

(1) 4 N. P. L. R. 184.

Two circumstances are, however, urged in support of the applicant's contention that due presentation should be taken to have been made on an earlier date. *Firstly*, it is said that the application and the money order having been despatched by the applicant on the same day, the 14th December 1912, the failure of the money order to reach the Clerk of Court on the 16th December, when the application was put into his hand, was a result beyond the control of the applicant and should not be debited to him. On this ground it is claimed that the money order should be deemed to have been delivered on the date when in ordinary course it should have been delivered, and due presentation of the application should be held to have been made on the 16th December 1912. *Secondly*, it is said that the money payable under the order was in fact tendered by the Post Office to the Clerk of Court on the 18th December 1912, but was not received owing to the Court and its offices being closed on that day—one of the three public holidays already mentioned. On this ground it is claimed that presentation of the application for copies became complete on the 18th December 1912.

I am of opinion that neither of these contentions can be accepted. A study of the case-law on the subject seems to me to show that the time requisite for obtaining copies must be measured from the date when an application for such copies is duly presented by, and the date on which such copies are duly tendered for delivery to, the applicant. The authorities I have considered are *Upasoo* v. *Gopala* (2); *Musammat Kaveri Bai* v. *Musammat Chandra Bhagabai* (3); *Punjaji* v. *Jagannath* (4); *Garud* v. *Hira Ram* (5); *Parashram* v. *Likhan* (6); *Krishna* v. *Balia* (7); *Paga* v. *Sadasheo* (8); *Bechi* v. *Ahsan-ullah Khan* (9); *Yamaji* v. *Antaji* (10); *Nobin Chunder Roy* v. *Brojendro*

(2) 4 C. P. L.R. 166.
(3) 4 C. P. L. R. 188.
(4) 6 C. P. L. R. 13.
(5) 14 C. P. L. R. 40.
(6) 10 Ind. Cas. 866; 7 N. L. R. 67.
(7) 14 Ind. Cas. 403; 8 N. L. R. 11.
(8) 17 Ind. Cas. 624; 8 N. L. R. 172.
(9) 12 A. 461; A. W. N. (1890) 149.
(10) 23 B. 442.

Coomar Roy (11), and my own unreported judgment in *Pandurang* v. *Balaji* (12), decided on the 7th November 1911. The view laid down in *Punjaji* v. *Jagannath* (4), that the time requisite for obtaining a copy is the time which it takes an applicant to obtain the copy using all due diligence, was approved in *Krishna* v. *Balia* (7): and I concur in it. In order to obtain copies of a Civil Court judgment and decree the applicant must perform two acts, namely—

(1) he must present an application accompanied by the prescribed fees at a proper time and place to the appointed official; and

(2) he must be prepared to take delivery of the copies at the time and place fixed for delivery.

Unless the applicant discharges both these duties, he fails to exercise the due diligence required to obtain the copies. But he may do these acts personally or by an agent duly empowered. Where, however, he elects to work through an agent, he cannot claim credit for any delay caused by taking that course. He cannot include, as time requisite for obtaining the copies, any period occupied in sending his application or instructions to the agent, or by the agent in proceeding to the copying office and presenting the application, or in the transmission of the copies by the agent to him. In other words, the time allowed for copies obtained through an agent will be the same as would have been allowed if the principal had himself applied for and taken delivery of them, namely, from the date when the application is duly presented to the date when the copies are duly tendered for delivery: and this will be so irrespective of the question whether or not the agent's delay was or was not beyond the control of the principal. A principal who elects to use an agent in working against strict rules of time does so at his risk. The computation of time is subject to strict rules, and must not be confused with cases where for sufficient cause an extension of time is allowable. There is no rule for discretionary extensions of time in computing the time requisite for obtaining copies of judicial records. This was pointed out in the Allahabad case above quoted.

One of the agents whom an applicant for such copies may employ is the Post Office: and the time which he will be entitled to in such a case will be measured from the date when the Post Office has delivered the application and the necessary money to the official appointed to receive the same, and the day on which the official appointed to deliver the copies makes such delivery to the Post Office. All time occupied by the Post Office in conveying the application and fees to the copying office, and in carrying back the copies to the applicant, is outside that computation. I took this view in *Pandurang* v. *Balaji* (12), and I see no reason to modify it in any way. Abnormal and unexpected failures of the Post Office, like such failures on the part of any other agent—failures for which the applicant is in no way responsible—may be sufficient ground for *extending* time in cases where time may be extended; but they cannot affect the *computation* of time.

In the present case the application was not duly presented until the advance-fees were paid in by the Post Office It is notorious that a money order takes a longer time than a plain unregistered letter to reach the addressee, and there is no ground for assuming that there was anything unusual in the money order not being paid on the 16th December 1912: while any tender of the fees transmitted by the money order on a public holiday was not a tender at the proper time for the purpose of payment under the rule above cited.

For these reasons I hold that the District Court rightly held the applicant's appeal to have been filed one day beyond time. The exercise of its discretion in not extending time is not open to consideration in revision. This application is, therefore, dismissed without notice to the other side.

Application dismissed.

(11) 12 C. L. R., 541.
(12) S. A. No. 75-B of 1911.

SOUTH INDIAN INDUSTRIALS *v.* MINDI RAMAJOGI.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 254 OF 1911.

September 17, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

THE SOUTH INDIAN INDUSTRIALS, LTD., FORMERLY KNOWN AS THE ARBUTHNOT'S INDUSTRIALS—PLAINTIFFS—APPELLANTS

versus

MINDI RAMAJOGI AND OTHERS—DEFENDANTS NOS. 1 AND 3 TO 5—RESPONDENTS.

Contract Act (IX of 1872), ss. 230, 231—Principal and agent—Agent contracting in his own name—Suit, right of—Agent and sub-agent—Privity of contract between principal and sub-agent—Dubashes, *position of—Sub-agent—Security money with agent—Principal adopting agent's acts, rights and liabilities of—Equity—Evidence Act (I of 1872), s. 92—Contracting party whether principal or agent, parol evidence to prove, whether admissible.*

Per *Wallis, Offg., C. J.*—Where an agent enters into a written contract in his own name and without mentioning his agency, he can sue and be sued upon that contract.

Higgins v. *Senior*, 8 M. & W. 334; 11 L. J. Ex. 199; 58 R. R. 884; *Montgomerie* v. *United Kingdom Mutual Steamship Assurance Association*, (1891) 1 Q. B. 370 at p. 372; 60 L. J. Q. B. 449; 64 L. T. 323; 39 W.R. 351; 7 Asp. M. C. 19; *United Kingdom Mutual Steamship Assurance Association* v. *Neville*, 56 L. J. Q. B. 522; 35 W. R. 746; 6 Asp. M. C. 226 *note*; 19 Q. B. D. 110; *Ocean Iron Steamship Insurance Assocciation* v. *Leslie*, 57 L.T. 722; 6 Asp. M. C. 226; 22 Q.B.D. 722, followed.

The position of Dubashes in the Madras Presidency is much the same as that of Banian in Northen India.

Peacock v. *Baijnath*, 18 C. 573; 18 I. A. 78; *Archibald Orr Ewing and William Miller* v. *Govinchunder Sein*, 1 Boul. 534; 3 Ind. Dec. (o. s.) 324; *New Zealand and Australian Land Company* v. *Watson*, 7 Q. B. D. 374; 50 L. J. Q. B. 433; 44 L. T. 675; 29 W. R. 694; *Kaltenback* v. *Lewis*, 10 A. C. 617; 55 L. J. Ch. 58; 55 L. T. 787; 34 W. R. 477, followed.

Where a party acts merely as a sub-agent, there is no privity of contract between that party and the principal under section 192 of the Contract Act.

Per *Seshagiri Aiyar, J.*—Where the question is whether under the terms of a contract a contracting party is acting for himself or on behalf of a principal, it is not a question relating to the terms of a contract within the meaning of section 92 of the Indian Evidence Act, and parol evidence is admissible. *Prima facie*, a contract by a person in his own name without more is a contract by him as a principal.

Soobromonian Chetty v. *Heilgers*, 5 C. 71; 4 C. L. R. 377; 4 Ind. Jur. 517; *Bateman* v. *Phillips*, 15 East 270; 104 Eng. Rep. 847; *Dutton* v. *Marsh*, 6 Q. B. 361; 40 L. J. Q. B. 175; 24 L. T. 470; 19 W. R. 754; *Parker* v. *Winlow*, 7 E. & B. 942; 27 L. J. Q. B. 49; 4 Jur. (N. S.) 584; 119 Eng. Rep. 1497; 110 R. R. 904, referred to.

The principle of section 231 of the Contract Act is that as against the agent transacting business in his own name, the principal can claim the full benefit of the contract; and as against the party contracting with the agent, the principal is bound by the equities subsisting between the agent and the contracting party.

Joachimson v. *Meghji Valji*, 3 Ind. Cas. 801; 11 Bom. L. R. 779; 34 B. 292; *Bristow* v. *Whitmore*, 9 H. L. C. 391; 31 L. J. Ch. 467; 8 Jur. (N. S.) 291; 4 L. T. 622; 9 W. R. 621; 131 R. R. 242; 11 Eng. Rep. 781; *Montgomerie* v. *United Kingdom Mutual Steamship Assurance Association*, (1891) 1 Q. B. 370 at p. 372; 60 L. J. Q. B. 429; 64 L. T. 323; 39 W. R. 351; 7 Asp. M. C. 19; *Ex parte Dixon, In re Henley*, 46 L. J. Bk. 20; 35 L. T. 644; 25 W. R. 105; 4 Ch. D. 133; *Borries* v. *Imperial Ottoman Bank*, 43 L. J. C. P. 3; 29 L. T. 689; 22 W. R. 92; 9 C. P. 38; *Semenza* v. *Brinsley*, 18 C. B. (N. S.) 467; 34 L. J. C. P. 161; 11 Jur. (N. S.) 409; 12 L. T. 265; 13 W. R. 634; 144 Eng. Rep. 526; 144 R. R. 573; *George* v. *Clagett*, 7 T. R. 359; 2 Esp. 557; Peak's Add. Cas. 131; 4 R. R. 462; 101 Eng. Rep. 1019, referred to.

Where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 34 of 1909.

Mr. *T. Richmond* (with him Mr. *A. Ramaswamy Mudaliar*), for the Appellants.

Messrs. *S. Srinivasa Iyengar*, *V. Ramesam* and *A. N. Sitarama Sastri*, for Mr. *T. Ramachandra Row*, for the Respondents.

JUDGMENT.

WALLIS, OFFG. C. J.—It will be convenient in the first place to state briefly the facts which have given rise to this litigation. Messrs. Arbuthnot & Co., hereinafter referred to as the firm, carried on business for a great many years in Madras as Bankers and General Merchants until they were adjudicated insolvents on their own petition in October 1906. The firm for many years had an agency at Bimilipatam, and according to the usual method of business made their purchases from local traders there through Dubashes, who guaranteed the transactions for a commission and gave security for the guarantee. The defendants' family had been the firm's Dubashes at Bimilipatam for many years and so continued until the failure. Purchases were made through them of other produce besides jute, such as indigo and gingelly seeds, but of late years nearly all the purchases were of jute to be used in the Jute Mill at Chittivalasa.

The conditions of business between the firm and the Dubashes were governed by written agreements, which were renewed

from time to time in consequence of changes in the Dubashes' family, see Exhibit II, dated 23rd February 1903, and Exhibit I, dated 11th March 1905, which was in force at the date of the failure. Under these agreements the Dubashes were prohibited from transacting business as agents or Dubashes for any other firm except Arbuthnot & Co. They were to guarantee delivery of all goods contracted for through them and pay 12½ per cent. of the value of the goods as liquidated damages for non-delivery; they were also to guarantee the re-payment of advances made by the firm to themselves or through them to local dealers, advances which are incidental to the sort of business. As security for the due performance of the terms and the conditions of the agreement and for the due performance of all present and future transactions between the Dubashes and the firm, "including the purchase by the Dubashes of gunny bags or other merchandise," it was recited that the Dubashes had deposited fifty-thousand rupees with the firm which was to carry interest at Rs. 5 per cent.; in other words, the defendants were to keep Rs. 50,000 on fixed deposit in the firm's Bank as security for the liabilities they might incur as the firm's Dubashes. In the last clause it was provided that the agreement was intended to operate as an agreement between the Dubashes and the firm of Arbuthnot & Co., whether it should continue as then constituted, or consists of other persons. The special provision that the security should be for the due performance of all transactions including the purchase of gunny bags or other merchandise, shows clearly that it was intended that business connected with the Chittivalasa Mill was to be done under this agreement. One of these agreements between the firm and the Dubashes, Exhibit II, was entered into after the Chittivalasa Mill had been transferred to a limited Company, the Chittivalasa Spinning and Weaving Company, Limited, owned by the firm, and the other, Exhibit I, after that Company had sold the mill to the present plaintiff's Company, brought into existence in October 1906 to take over the industrial undertakings carried on by the firm. The firm were the Managing Agents of both these Companies and it may be added, though t is not perhaps very material, that the firm had a very large interest in the industrials, as may be gathered from the order made by the Insolvency Court, Exhibit 16*a*, and also from the allusion in the plaintiff's evidence to the sale of the industrials by the Official Assignee.

In the present suit the plaintiff Company sues as principals to recover from the defendants, the firm's Dubashes, the amount of the defendants' indebtedness at the date of the firm's failure on contracts entered into with the firm in respect of the Chittivalasa Mill which contracts, it is alleged, were made by the firm as agents of the plaintiff Company. The main defences raised were that the defendants had never contracted with the plaintiff Company; that they were unaware before the failure that the firm in these transactions were acting for the plaintiff Company and were entitled to set off against the plaintiff's claim the greater sum of Rs. 50,000 deposited by them with the firm under Exhibit I; and that in any event, in the circumstances of the case the plaintiff Company should not be allowed to sue the defendants without giving credit for Rs. 50,000 which the defendants had deposited with the firm as security for the performance of these as well as other transactions with the firm. The Subordinate Judge in a very lengthy judgment has upheld the last contention and has dismissed the plaintiff's suit.

It may be said at once that the defendants' contention that they did not know the firm were acting as agents of the plaintiff Company in the suit transactions until after the failure in October 1906, is demonstrably false and is so found by the Subordinate Judge. The defendants from their intimate acquaintance with the affairs of the mill must have known of its transfer to the Chittivalasa Spinning and Weaving Company, and also of its subsequent transfer by the latter to the plaintiff Company; and their correspondence with the plaintiff Company and the firm soon after the plaintiff Company came into existence, Exhibit L series. proves conclusively that they did. The plaintiff Company which was registered in January 1905 was to take over from 1st October 1904. The defendants were responsible for short deliveries on that year's contracts and applied to the firm that they might be allowed to complete these

deliveries in the coming year, Exhibit L2, dated 26th January 1905. From Exhibit L, dated 10th February 1905, a letter from the firm's Bimilipatam Agent to the firm as Managing Agents of Arbuthnot's Industrials, Madras, it may be gathered that the firm had passed on Exhibit L2 to themselves as Managing Agents of the Industrials and that as Managing Agents of the Industrials they sent a reply addressed to the defendants, dated the 3rd February, which was handed to them by the firm's Bimilipatam Agent. It is significant that the defendants do not produce this letter of the 3rd from the Industrials to themselves, but we have their answer to it, Exhibit L, dated 10th February 1905, addressed, "The Managing Agents, Arbuthnot's Industrials, Ltd.," in which they thank the Industrials for allowing them to deliver in next November and December "the unfulfilled portion of contracts of jute of the present crops." This is the clearest proof that they knew that the firm was acting in these jute transactions as the Agents of the Industrials and indeed, as already observed, they could not have been unaware of it.

Nonetheless all along down to the date of the firm's failure the contracts with the defendants for the sale and purchase of jute and advances were made in the name of the firm, and the defendants' account appears in the account books of the firm, and with the exception of Exhibit L, the defendants are not shown to have directly corresponded with the firm, though the correspondence between the firm and the Industrials goes to show that communications may have passed verbally through the firm's agent at Bimilipatam.

The appellants' case was that in these transactions the firm acted as Agents for the plaintiff Company to the knowledge of the defendants, and were, therefore, disentitled to avail themselves of the defence of set-off or any other equitable defence under section 232 of the Contract Act. This of course assumes that in these transactions with the defendants the firm were acting as agents for the plaintiff Company and not as principals.

Assuming that the firm are to be considered as having acted as agents for the plaintiffs in their dealings with the defendants, which seems to have been the view taken in the lower Court, still having entered into these contracts in writing in their own name, and without mentioning their agency, they could sue and be sued upon by them because, as ruled in *Higgins* v. *Senior* (1), to hold otherwise would be to vary the terms of the written contract.

Secondly, it seems clear that in such a suit on these contracts by the firm against defendants, the defendants would have been entitled to rely on the Rs. 50,000 deposited by them with the firm as bankers to secure their performance of these and other contracts with the firm, as the amount of the deposit is largely in excess of the sum sued for and there are no other claims against it on the part of the firm. Where the agent enters into a written contract in his own name, there is a contract enabling him to sue and be sued on it within the meaning of section 230 of the Indian Contract Act.

Nonetheless, of course, the plaintiff Company as principals would ordinarily be entitled under section 226 to sue on contracts entered into by the firm as their agents in the same way as if the contracts had been entered into by the plaintiff Company itself, and if the defendants neither knew nor had reasonable ground for suspecting that in the contracts sued on the firm had been acting as agents, the plaintiff Company could only have succeeded subject to the rights and obligations subsisting between the firm and the defendants, and in the circumstances of the case the latter would, in my opinion, have been entitled to set up their claim to the Rs. 50,000 by way of equitable set-off.

But, as already stated, it is clearly proved that the defendants well knew of the relations between the firm and the plaintiff Company and if so, they (defendants) are not entitled to rely on such a defence. The Subordinate Judge has held, I think rightly, with reference to this section that the defendants are not entitled to set off their claim against the firm, the agent, but has held further that the deposit of Rs. 50,000 by the defendants with the firm as security for the performance of this and other contracts with the firm

(1) 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884.

creates an equity in favour of the defendants which justifies the dismissal of the suit. That would be so, if section 232 applied, but, as I have held, it has no application, seeing that the defendants knew of the relations between the firm and the plaintiff Company and in these circumstances, it seems to me that the defendants are not entitled in a suit by the plaintiff Company as principals to rely on any defence resting on "the rights and obligations subsisting between the firm (the agent) and the defendants, whether the defence be set-off or any other equity."

For these reasons I am unable to uphold the action of the Subordinate Judge in dismissing the suit on the ground of an equity subsisting between the plaintiff's agents, that is to say, the firm and the defendants.

Mr. S. Srinivasa Aiyangar has, however, contended that in this case the plaintiff Company have no right to sue at all, as the transactions which gave rise to the suit were intended to be exclusively between the plaintiff and the defendants. Such a defence would undoubtedly be available, if proved, in English Law. In Story on Agency, Article 413, it is observed: "Another exception is where an exclusive credit is given to and by the agent; and, therefore, the principal cannot be treated as in any way a party to the contract, although he may have authorised it or may be entitled to the benefit of it." And in *Montgomerie* v. *United Kingdom Mutual Steamship Assurance Association* (2) Wright, J., laid down and applied the same rule, "In all cases the parties can, by their express contract, provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal." See also *United Kingdom Mutual Steamship Assurance Association* v. *Neville* (3) and *Ocean Iron Steamship Insurance Association* v. *Leslie* (4).

Under the Indian Contract Act the principal's right to enforce a contract entered into by his agent rests on section 226, which does not contain the words "in the absence of a contract to the contrary" which are to be found in section 230, negativing the agent's right to sue and be sued in the absence of a contract to the contrary. Even so, I am not prepared to hold that a principal might not contract himself out of his right to sue on the contract under section 226 on the principle *quilibet potest renunciare juri pro se introducto*, there being no provision against contracting out. It would, of course, be necessary to prove such an agreement unless the relation of the defendants to the firm was that of sub-agents, in which case there would clearly be no privity between the plaintiff Company and the defendants. See section 192 of the Indian Contract Act.

Putting aside the question of sub-agency for the moment, I think the evidence on record is sufficient to prove an agreement, disentitling the plaintiffs to sue, of the kind referred to in Mr. Bowstead's Digest of the Law of Agency, Article 90.

It is admitted by Mr. O. Hearen, the plaintiff's only witness, and abundantly proved by the documents exhibited that business between the firm and the Dubashes went on in exactly the same form after the creation of the Chittivalasa and Industrial Companies as before. The suit contracts for the purchase of jute, A series, and the sale of gunnies, E series, were in terms between the defendants and the firm. K series are delivery orders of gunny bags to the defendants by the firm's agents. According to the evidence of witnesses the firm's agent was not asked to change the mode of correspondence or make any change in the modes of dealing after the Industrials were opened. Exhibits IV and VI series are contract orders between the firm's agent and the defendants. Exhibit V, dated 10th January 1903, during the time of the Chittivalasa Company is from the firm's agent to the defendants "enclosing your jute account with Messrs. Arbuthnot and Co." Exhibit VIII, dated 23rd July 1906, is from the firm's agent to the defendants enclosing a memo. of gunnies purchased for them and of their commission, as to which reference is made

(2) (1891) 1 Q. B. 370 at p. 372; 60 L. J. Q. B. 429; 64 L. T. 323; 39 W. R. 351; 7 Asp. M. C. 19.

(3) 19 Q. B. D. 110; 56 L. Q. B. 522; 35 W. R. 746; 6 Asp. M. C. 226, *N.*

(4) 22 Q. B D 722; 57 L. T. 722; 6 Asp. M. C. 226.

to the firm's letter dated 7th December 1894. Exhibit IX are orders for gunnies between the firm's agent and the defendants. X series are the gunny contracts and XI series the receipts by the firm's agent for the price of the gunnies and XII series are delivery orders issued by the firm's agent to the defendants.

Formerly, therefore, the suit contracts, the accounts and the correspondence were all along between the firm and the defendants and the formation of the Chittivalasa and the plaintiff Companies made no difference at all.

Then as to matters of substance, it is perfectly clear that the suit contracts were intended to come under the provisions of the agreement between the firm and the defendants, Exhibit I, which was entered into in renewal of former contracts at a time when the plaintiff Company had come into existence just as the earlier agreement in the same terms. Exhibit II was entered into between the same parties in the time of the Chittivalasa Spinning and Weaving Company.

Secondly, it is clear that these agreements, Exhibits I and II, were entered into by the firm as principals because they cover other business of the firm with which the plaintiff Company was not concerned. These contracts expressly stipulate at the outset that the defendants were not to transact business either as agents for, or Dubashes of, any individual or firm other than the firm of Messrs. Arbuthnot and Co., and of this the plaintiff Company were aware as Messrs. Arbuthnot and Co. were their Managing Agents. Further in all the documents the defendants are addressed as Arbuthnot and Co.'s Dubashes.

On the above facts it seems to me that the reasonable inference is that the suit dealings of the Dubashes were intended to be with their firm exclusively in accordance with Exhibit I, and I may further refer to Exhibit IV filed by the plaintiffs, dated 24th May 1905, in which the defendants say that "they were tied hand and foot and prevented from having any sort of dealing with any other firm." I do not think the fact proved by Exhibit L series that the defendants knew the firm were the agents of the plaintiff Company and that in one instance, Exhibit L1, they answered a letter addressed to them by the plaintiff Company and the fact that terms of the contracts were settled in correspondence between the firm's Agent at Bimilipatam and the plaintiff Company (Exhibit J series), even if brought home to the defendants, are sufficient evidence to show that they intended to depart from the terms of Exhibit I and deal with any one but the firm of Arbuthnot and Co.

It seems to me, however, that the right view of the case on the above facts is that the defendants were the sub-agents of the firm of Arbuthnot & Co. who were the agents of the plaintiff Company and that under section 192 of the Indian Contract Act and the decisions there was no privity between the plaintiff Company and the defendants and that on this ground the present suit should have been dismissed. In all these transactions the defendants acted and were addressed as Messrs. Arbuthnot & Co.'s Dubashes, that is to say, as intermediaries between the firm and local dealers and guarantors of the firm's transactions.

The position of Dubashes in this part of India is much the same as that of Banians in Northern India, which was considered in *Peacock* v. *Baijnath* (5) by Wilson and Cunningham, JJ., in a passage of their judgment at page 586, which was subsequently approved by the Privy Council on appeal.

The observations of Sir Lawrence Peel in *Archibald Orr Ewing and William Miller* v. *Govinchunder Sein* (6), that a Banian is a sub-agent of a peculiar kind, was quoted with approval and the learned Judges observed: "This case is really much stronger than the many cases in England, in which it has been held that no privity existed between foreign principals and English sub-agents, such as the *New Zealand and Australian Land Company* v. *Watson* (7) and *Kaltenback* v. *Lewis* (8), because the Banian is in the permanent employment of the Calcutta firm." Here it may be added that such employment of the defendants by the firm was not only permanent but conclusive.

The conclusion I have come to is that the defendants acted as the sub-agents of

(5) 18 C. 573 at p. 587; 18 I. A. 78.
(6) 1 Boul. 534; 3 Ind. Dec. (o. s.) 324.
(7) 7 Q. B. D. 374; 50 L. J. Q. B. 433; 44 L. T. 675; 29 W. R. 694.
(8) 10 A. C. 617; 55 L. J. Ch. 58; 53 L. T. 787; 34 W. R. 477.

Arbuthot & Co., who were the Managing Agents of the plaintiff Company that there was no privity between the plaintiff and the defendants and that both on this ground and on the ground already stated the present suit fails,—and the appeal must be dismissed with costs.

The memorandum of objections is dismissed.

SESHAGIRI AIYAR, J.—I entirely agree with the conclusion at which the learned Chief Justice has arrived. As the questions involved are of some importance, I shall state my own reasons for the conclusion.

The late firm of Arbuthnot & Co. had a gunny factory at Chittivalasa. They had also a spinning and weaving mill there. The defendants and their father were the agents and Dubashes of the company since 1890. A sum of Rs. 50,000 was deposited by them with the Company in fixed deposit as security for the due performance of their duties as agents and Dubashes. This deposit was being renewed from time to time. It remained with the Company until their insolvency in 1906. These facts are not disputed.

In January 1905, Arbuthnot & Co. converted the business in Chittivalasa into a limited Company known as Arbuthnot's Industrials. Plaintiffs are the successors-in-title of this new Company. It is in evidence that this new Company was worked by Arbuthnot & Co. as Managing Agents. I do not think that this fact admits of any doubt. I am also satisfied that the defendants were aware of the starting of the Industrials. Exhibits L and L1 are clear on this point. I do not think, however, these documents establish that the defendants undertook to transact their business in future with the new Company. It is true that they received a letter from the Industrials informing them of the extension of time for performance of their contract, and they addressed their reply to them; but I am not satisfied that this communication fixes them with an undertaking to deal thenceforward with the new Company. In the view that I have taken of the subsequent contract, this may not be material; but I think it right to state my conclusion upon the contention raised by Mr. Richmond that it is proved by Exhibit L1 that the defendants accepted the plaintiff's predecessors-in-title in the place of Arbuthnot & Co.

Exhibit L1 was in February 1905. On the 11th of March 1905, Arbuthnot & Co. entered into a new agreement with the defendants (Exhibit I). The object of this agreement was much commented upon at the Bar on both sides and as my decision rests to a great extent upon the view I take of it, I shall deal with it in some detail. Mr. Richmond says that this agreement was not entered into by Arbuthnot & Co. as Managing Agents of the Industrials. I think he is right. At the same time, I feel no doubt that it was under this agreement that jute was supplied by the defendants and that gunny bags were purchased by them. Paragraph 2 of the agreement refers to "the due delivery of all goods contracted for." This includes contracts for the supply of jute. It is not pretended that the defendants contracted to deliver jute to Arbuthnot & Co. prior to the formation of the Industrials under any other contract. The previous contracts renewed by Exhibit I contained the same terms. There is no force in the contention of the learned Counsel for the appellant that the contract to supply jute was *de hors* this instrument. Clause 7 of Exhibit I refers to the purchase of gunny bags. Clause 8 provides for the deficit due from the defendants being met from the security amount. Thus it is clear that after the floating of the Industrials and after Exhibit L1, defendants contracted with Arbuthnot & Co., not as agents of the Industrials, but admittedly as principals to supply jute to them, to purchase gunny bags from them and to the deposit of Rs. 50,000 being held as security for the due performance of these contracts. It is not alleged or proved that these defendants supplied to Arbuthnot & Co. any jute or purchased bags other than those relating to the subject-matter of this suit. *Prima facie*, therefore, the plaint transactions were with Arbuthnot & Co. as principals. One very good reason why Arbuthnot & Co. dealt with the defendants in their own name is, otherwise they would have had to refund the deposit amount.

It has been argued that the contracts sued for were under Exhibits A and E series which have no reference to Exhibit I,

The language of these Exhibits A and E series contracts does not help the appellant. They are entered into by the defendants as Dubashes and agents of Arbuthnot & Co. with Arbuthnot & Co., without indicating that the latter were agents for others. It is conceded that the defendants were not the Dubashes of the Industrials at any time; but it is said that the defendants knew that Arbuthnot & Co., were the Managing Agents of the Industrials, and that the evidence establishes that it is only as such agents they entered into the contracts with the defendants.

Mr. Srinivasa Aiyangar objects to the admission of this parol evidence. He relies upon section 92 of the Evidence Act and quotes an *obiter dictum* of Wilson, J., in *Soobromonian Shetty* v. *Heilgers* (9) in support of his position. As pointed out in *Venkatasubbiah Chetty* v. *Govindarajulu Naidu*(10), the question whether one of the contracting parties was acting for himself on behalf of a principal does not relate to the terms of the contract. *Bateman* v. *Phillps* (11) is a direct authority in favour of the admissibility of parol evidence under such circumstances. See also Bowstead on Agency, Article 90, and the cases quoted under it. But there can be no doubt that *prima facie* a contract by a person in his own name without more is a contract by him as principal. The authorities quoted by Mr. Srinivasa Aiyangar fully bear out this proposition [Vide *Dutton* v. *Marsh* (12)]. The case of *Parker* v. *Winlow* (13) is an extreme case. Even though the principal was disclosed, the personal liability of the agent was upheld on the ground that he did not sign as agent. There is nothing in section 230 of the Indian Contract Act which marks a departure from the rule of English Law, as contended for by Mr. Richmond. That section is not exhaustive of the rules of evidence. There is no authority for the position that only in the cases mentioned in the section, presumption as to the nature of the liability of the contracting party arises. In the case before us the principal's name is not disclosed and the person signs for himself. The presumption is, therefore, strong that the contract was with Arbuthnot & Co. as principals.

Mr. Richmond relies upon Exhibit J series to rebut this presumption. It appears from these documents that Arbuthnot & Co. debited the Industrials with the advances made to the defendants under the contracts. These adjustments have not been shown to have been done with the knowledge and consent of the defendants. On the other hand, this correspondence (Exhibit J series) reads as if the contracting party was still Arbuthnot & Co. and that they were transferring the purchases and sales made by them to the account of the Industrials. There is no satisfactory evidence that the defendants were aware of the correspondence contained in Exhibit J series. The fact that large sums of money were advanced to the defendants shows that it was on the strength of the security lodged by them as Dubashes that it was done. As practically no other business was done by the defendants with Arbuthnot & Co., if the intention was to enable the Industrials to start business with the defendants on a new footing the deposit would have been returned or transferred to the new Company. Neither of these things was done and I have no hesitation in holding that the defendants did contract, and believed they were contracting only with Arbuthnot & Co. in supplying jute and in purchasing the gunny bags. This position is rendered clearer still by a reference to Exhibit VIII. That document shows that for the Exhibit A series contracts, the defendants received a commission of one per cent. as Dubashes. Under Exhibit A series, there is no right to any commission; and it was admitted that there was no separate agreement for any commission with the Industrials. As I said before, the defendants were never the Dubashes of the Industrials. It is clear to my mind from these facts that the defendants transacted the plaint business only with Arbuthnot & Co. as their Dubashes. It was argued that as the jute was to be supplied at Chittivalasa and the gunny bags were to be taken from

(9) 5 C. 71; 4 C. L. R. 377; 4 Ind. Jur. 517.
(10) 31 M. 45; 3 M. L. T. 259; 18 M. L. J. 1.
(11) 15 East 270; 104 Eng. Rep. 847.
(12) 6 Q. B. 361; 40 L. J. Q. B. 175; 24 L. T. 470; 19 W. R. 754.
(13) 7 E. & B. 942; 27 L. J. Q. B. 49; 4 Jur. (N. S.) 584; 119 Eng. Rep. 1497; 110 R. R. 904.

there, it fixed the defendants with the knowledge that the contract was with the new Company. I do not see any force in this. These articles were sold and purchased even before the floating of the Industrials at Chittivalasa and the place of performance of the contracts continued to be the same.

Mr. O. Hearen, who gave evidence as plaintiff's first witness, makes admissions which show that there was absolutely no change in the mode of transacting business at Chittivalasa in consequence of the formation of the Industrials. That is what he says :—

"I do not remember whether any change was made in the modes of dealing after that spinning and weaving Company was formed. We were not asked to change the mode of correspondence or make any change in the modes of our dealings after the Industrials were floated. We received intimation to change the mode of accounts, I have not produced that intimation paper in Court. Separate accounts in the name of the Industrials were opened. It is that account book. In Exhibit II there is nothing to show that it was opened or kept in the names of the Industrials. I see the book shown to me (Exhibit III). There is no separate *khata* in it opened in the name of Arbuthnot Industrials prior to the insolvency of Arbuthnot & Co. Exhibit III is the account book of Industrials itself. There was no change in the mode of correspondence between Arbuthnot and Co. and the defendants after the Industrials was floated. This is a letter sent by the agent Mr. Greenfield to the defendants (Exhibit VIII). The same commission was being allowed to the defendants all through from 1894. The system of advances of moneys under contracts for jute has been enforced all through, both prior and subsequent to the floatation of the Industrials. These are the letters that passed between the agent of Arbuthnot & Co. and the defendants (Exhibit IX series). There was no change in the mode of correspondence. These are the gunny contracts (Exhibit X). They were in the same form all through. These are the receipts granted by the agent for the value of the gunnies received from the defendants (Exhibit XI series). The receipts were in the same form all through."

My conclusions on the facts are: (*a*) that the business of Arbuthnot & Co. in Chittivalasa was transferred to the Industrials in 1905; (*b*) that the defendants were aware of this (*c*) that even after this Arbuthnot & Co. continued their dealings with the defendants as principals and not as agents of the Industrials; (*d*) that the defendants had no reason to believe that Arbuthnots were acting in the sale and purchase of jute and gunny bags only as agents of the Industrials and not for themselves; and (*e*) the appropriation by the plaintiff's Company of the jute supplied by the defendants and debiting them with the price of the bags purchased must have been in pursuance of an understanding between Arbuthnot and Co. and the plaintiffs of which the defendants had no knowledge. I am inclined to think that Arbuthnot & Co., never severed the relationship subsisting between themselves and the defendants and that the plaintiffs were aware of this.

On these findings of fact, it follows that as the plaintiffs knew that the defendants and Arbuthnot & Co., were independent contracting parties, they can have no right of action. Even granting that the plaintiffs were not aware that Arbuthnot & Co. were dealing with the defendants in their own interests, the Industrials cannot put themselves in a more favourable position than their Managing Agents. The principle of section 231 of the Contract Act is this,—as against the agent transacting business in his own name, the principal can claim the full benefit of the contract; as against the party contracting with the agent, the principal is bound by the equities subsisting between the agent and the contracting party. Even as against the agent, it has been rightly remarked that the principal must take the benefit with the burden. He cannot both approbate and reprobate with reference to the ordinary incidents arising out of the contract. [See *Joachimson* v. *Meghji Valji* (14).] In claiming the benefit of a contract from a stranger the principle applies with greater force. The principal, if he wants to enforce the contract, must stand

(14) 3 Ind. Cas. 801; 34 B. 292; 11 Bom. L. R. 779.

in the shoes of the agent and practically sue *sub modo*. The observations of Lord Campbell (the Lord Chancellor) in *Bristow* v. *Whitmore* (15) apply to this case. His Lordship (Lord Cranworth) said: "The principle which must, I think, govern this case is one of universal application, namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens. The contract must be performed in its integrity. Here the appellant, as agent for the owner now represented by the respondents, stipulated for certain benefits in consideration of certain burthens which he undertook to bear, and certain labours which he undertook to perform. If he had authority to enter into such a contract the principal is, of course, bound. If he had not authority, then the principal may repudiate the contract; but he cannot take that part of it which is beneficial to him without performing that which is onerous." Wright, J., in *Montgomerie* v. *United Kingdom Mutual Steamship Assurance Association* (2) points out that "where the principal is an undisclosed principal, he must, if he sues, accept the facts as he finds them at the date of his disclosure, so far as those facts are consistent with reasonable and proper conduct on the part of the other party." The decision of the Court of Appeal in *Ex parte Dixon*; *In re Henley* (16) shows that if the third party had no reason to believe that the agent was not transacting business in his own name, the principal is bound by the obligations he had subjected himself to in the course of the transaction. The same principle was laid down in *Borries* v. *Imperial Ottoman Bank* (17) accepting as well-established the dictum of Willis, J., in *Semenza* v. *Brinsley* (18) to the effect: "In order to constitute a valid defence within the rule in *George* v. *Clagett* (19), the plea should show that the contract was made by a person whom the plaintiff has intrusted with the possession of the goods, that the person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as and believed him to be the principal in the transaction, and that before the defendant was undecieved in that respect the set-off accrued." The facts I have found bring this case within the above rule.

In the Cyclopædia of Law and Procedure, Volume XXXI, page 1598, the proposition is thus succinctly stated: "And where a principal accepts a contract made by the Agent, he takes it as the agent made it, and subject to all equities and defences arising out of the conditions thereof, and the means and instrumentalities by which the agent procured it, even though the agent acted withoutauthority or in excess of his powers." See also Halsbury's Laws of England, Volume I, section 447. In the present case it is admitted that the amount of the plaintiffs' claim can be met fully from the money deposited in Arbuthnot & Co.; consequently plaintiffs are not entitled to any decree against the defendants.

For all these reasons, I am of opinion that the suit fails. I would dismiss the appeal with costs.

Appeal dismissed.

(15) 9 H. L. C. 391; 31 L. J. Ch. 467; 8 Jur. (N. S.) 291; 4 L. T. 622; 9 W. R. 621; 131 R. R. 242; 11 Eng. 781.

(16) 4 Ch. D. 133; 46 L. J. Bk. 20; 35 L. T. 644; 25 W. R. 105.

(17) 9 C. P. 38; 43 L J. C. P. 3; 29 L. T. 689; 22 W. R. 92.

(18) 18 C. B. (N. S.) 467; 34L. J. C. P. 161; 11 Jur. (N. S.) 409; 12 L T. 265; 13 W. R. 634; 144 Eng. Rep. 526; 144 R. R. 573.

(19) 7 T. R. 359; 2 Esp. 557; Peake's Add. Cas. 131; 4 R. R. 462; 101 Eng. Rep. 1019.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 13 OF 1913.

October 20, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

Musammat MANJULA—DEFENDANT—APPELLANT

versus

SHANKAR—PLAINTIFF—RESPONDENT.

*Parties—Defendant—Living person sued but dead person entered as defendant by mistake—Summons rightly served on living defendant—*Ex parte *decree passed—Decree whether* ultra vires *as passed against a deceased defendant.*

A widow was sued on a bond executed by her husband. But in the plaint instead of her name the name of her husband's another wife, who had predeceased him, was wrongly entered as the defendant in the case. However, she accepted the summons as a good summons and on her failure to appear on the date fixed for hearing, an *ex parte* decree was passed:

AIYARAPPA MUDALIAR *v.* GULAM GHOUSE.

Held that the wrong description in the summons was a mere irregularity and that the decree was not a nullity on the ground that it had been passed against a person who was dead at the time the suit.

Miscellaneous appeal against the order of the Additional District Judge, Wardha, dated the 28th January 1913, reversing that of the Junior Munsif, Wardha, dated the 22nd April 1912.

Mr. *M. Chackerbutty*, for the Appellant.
Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—Suit No. 22 of 1908 in the Court of the Subordinate Judge, Wardha, was based on a bond executed by one Viswanath. The defendant in that suit was described as Lalita, widow of Viswanath. The plaint shows that the defendant was sued as legal representative of the obligor. An *ex parte* decree was passed, but the defendant's liability was limited to the extent of the assets of her deceased husband. Viswanath had three wives—Annapurna, Lalita and Laxmi. Two of them had predeceased him. On the death of the surviving widow, which admittedly took place after the passing of the *ex parte* decree, *Musammat* Manjula, the daughter of Viswanath, was brought on the record as the legal representative of the deceased judgment-debtor. She then took the objection that the decree had been obtained against a person who was dead at the time of the suit. Her case is that Laxmi alone survived her husband and that she was not made a party to Suit No. 22. Her objection has been disallowed by the executing Court on the ground that that Court had no power to go behind the decree. She now brings a suit for a declaration that the decree in Suit No. 22 is null and void. The defence is that all the wives of Viswanath came to be named Lalita after their marriage, and that the one who survived him was named Lalita. The first Court held that it was Laxmi who survived Viswanath and that Lalita was the name of the second wife only of Viswanath who had died before the suit. A declaratory decree was granted as prayed for. The lower Appellate Court has ordered an inquiry to be made as to whether the surviving widow was personally served or not, as the summons in that suit purports to bear her mark as Lalita, widow of Viswanath. Against this order of remand the plaintiff has filed this second appeal. Although there are no clear findings yet on the point by the District Judge, it may be assumed for the purposes of this appeal that Laxmi was the name of Viswanath's widow. It must also be assumed, till the inquiry on the point is completed, that she was personally served. Can the decree in these circumstances be treated as a nullity, as having been passed against a dead person? I think not. The suit was against the surviving widow of Viswanath. She may have been wrongly described as Lalita. If she had refused to sign the acknowledgment of service endorsed on the original summons, the question would have been quite different. Here she is said to have accepted the summons as a good summons ordering her to appear in Court on the date fixed for hearing, notwithstanding that she was wrongly described. In the absence of any fraud practised on her—and in this case there does not appear to be any such allegation—she must be taken to have waived the irregularity in describing her. The copy of the plaint, which is presumably sent with the summons, would have given her notice of the exact nature of the claim against her. She must have known that she was being sued as representing the estate of her deceased husband. I hold that if she had signed the summons, neither she nor the present plaintiff would be at liberty to question the decree as *ultra vires*. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 582 OF 1913.
October 7, 1914.
Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

AIYARAPPA MUDALIAR—DEFENDANT—PETITIONER

versus

KAJARAT IKBULAI *Syed* GULAM GHOUSE SAHIB KADIRI AVERGAL—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 195—Civil Procedure Code (Act V of 1908), O. XLIII, r. (1) (w), and O. XLVII, r. 7 (1)—Revenue Court, review granted by—Order, whether appealable.

No appeal lies to the District Court against the order of a Revenue Court granting a review in a summary suit.

AIYARAPPA MUDALIAR *v.* GULAM GHOUSE.

Hari Charan Saha v. *Baran Khan*, 25 Ind. Cas. 903; 41 C. 746 and *Oravukundiyil Parkum Elavana Tholan* v. *Palankundy Kunhi Kutti*, 18 Ind. Cas. 549; (1913) M. W. N. 52; 24 M. L. J. 93, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Tanjore, in Civil Miscellaneous Appeal No. 30 of 1911, preferred against that of the Court of the Revenue Divisional Officer of Kumbakonam, in Review Petition in Summary Suit No. 70 of 1910.

FACTS.—The suit was by a landlord against his tenant for rent. The main contention of the defendant was that the suit was barred by limitation. The Revenue Divisional Officer of Kumbakonam, who heard the case, upheld the plea of the defendant and dismissed the suit. The plaintiff thereupon applied for a review of this order on the ground that it was opposed to a decision of the High Court. The review applied for was granted. Against this order granting review, the defendant appealed to the District Judge who held that there was no appeal. The defendant thereupon preferred this civil revision petition to the High Court.

Mr. *S. Muthia Mudaliar*, for the Petitioner:—The District Judge erred in holding there was no appeal. Order XLIII, rule 1 (*w*), gives a right of appeal against all orders. Order XLVII, rule 7 (1) does not restrict this right.

Mr. *T. V. Gopalasami Mudaliar*, for the Respondent :—The District Judge was right in holding there was no appeal. *Hari Charan Saha* v. *Baran Khan* (1); *Oravukundiyil Parkum Elavana Tholan* v. *Palankundy Kunhi Kutti* (2) and Civil Miscellaneous Appeal No. 195 of 1910.

JUDGMENT.

OLDFIELD, J.—I agree with the learned District Judge that no appeal lay, the authorities in point being *Hari Charan Saha* v. *Baran Khan* (1) and *Oravukundiyil Parkum Elavana Tolan* v. *Palankundy Kunhi Kutti* (2).

The principle required was, moreover, stated also in an unreported decision of this Court in Civil Miscellaneous Appeal No. 195 of 1910. The civil revision petition is dismissed with costs.

(1) 25 Ind. Cas. 903; 41 C. 746.
(2) 18 Ind. Cas. 549; 24 M. L. J. 93; (1913) M. W N. 52.

TYABJI, J.—The cases cited by my learned brother are binding on us and we must follow them.

Had the matter been *res integra*, I should have been inclined to hold that the authorities above cited read into Order XLIII, rule 1 (*w*), of the Code of Civil Procedure words to the following effect: "Provided that no appeal shall lie from such an order except on the grounds referred to in Order XLVII, rule 7 (1)."

The three grounds mentioned in Order XLVII, rule 7, seem to me to be such as might to taken *in limine*. They refer to :

(*a*) the identity of the Judge;

(*b*) notice, or strict proof of the fact that the new matter was not within the applicant's knowledge;

(*c*) limitation.

With regard to these three objections the rule, in my opinion, permits two methods (or occasions) for taking them, *viz.*—

(1) at once by way of a special appeal from the *order* of review;

(2) at the hearing of the appeal from the final *decree* passed after the review.

That two methods or occasions are provided for these specified objections does not, in my opinion, derogate from the unrestricted right of appeal granted by Order XLIII, rule 1 (*w*), from all orders. Clause (*w*) does not contain any restriction as to the grounds on which the granting of the review application may be attacked in appeal.

The fact that these three objections might be taken at the final hearing as well as the special appeal (*i.e.*, on both the occasions above referred to) does not imply that no other objections might be taken at the special appeal, to which Order XLIII, rule 1 (*w*), refers, without any restriction ; according to the interpretation above referred to, both provisions of the Code of Civil Procedure, *viz.*, those in Order XLIII, rule 1 (*w*), and Order XLVII, rule 7 (1), would be given effect to and I should have preferred this interpretation had I not felt concluded by authority. As it is, following the cases cited by my learned brother, the petition must be dismissed with costs.

Petition dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 262 OF 1912.

January 3, 1915.

Present:—Mr. Justice Chevis and Mr. Justice Rossignol.

KHAIRA *alias* KHAIR-UD-DIN AND OTHERS —DEFENDANTS—APPELLANTS

versus

JAGGU SHAH AND OTHERS—PLAINTIFFS —RESPONDENTS.

Mortgage—Conditional sale—Foreclosure proceedings —Expiry of year of grace—Lease by mortgagor—Acknowledgment of ownership—Decree for possession obtained by mortgagee—Formal possession taken—Validity of foreclosure proceedings cannot be questioned.

M mortgaged a house and shops to *A* by a deed of conditional sale on the 24th July 1894. The deed provided that the mortgagor was to remain in possession and pay interest. In default the mortgagee could take possession. If the mortgage was not redeemed within three years, the property was to be sold outright.

In 1898 the mortgagee got the foreclosure notice issued, and after the expiry of the year of grace without redemption in November 1899 *M* executed a lease mentioning the foreclosure proceedings and saying that he took the house on lease and handed over the rest of the property. In 1901 *A* sued for possession of the house and rent, got an *ex parte* decree, and took formal possession in execution, the *dakhilnama* being signed by *M* and others. After that *M* again took possession of the house and some eight or nine years after, *A* again sued for possession:

Held, that *M* or his representatives could not deny the plaintiff's title, nor question the validity of the foreclosure proceedings.

Second appeal from the decree of the Divisional Judge, Sialkot, dated the 19th August 1911, affirming that of the Subordinate Judge, first Class, Sialkot, dated the 21st April 1911, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, Kunwar *Dalip Singh* and Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The defendants' father Malhi mortgaged two houses and some shops to plaintiffs' father by a deed of conditional sale on 24th July 1894. The deed provided that the mortgagor should remain in possession and should pay 6 annas per cent. per mensem interest, in default the mortgagee could take possession. If the mortgage was not redeemed within three years the property was to be sold outright.

In 1898 the mortgagee got the usual foreclosure notice issued. The year of grace expired without redemption having been effected and on 11th November 1899 Malhi executed a deed of lease, mentioning the foreclosure proceedings and saying that he took the houses on lease and had handed over the rest of the property. In 1901 the mortgagee (or owner) sued for possession of the houses and for rent, and got an *ex parte* decree against Malhi for possession of the houses and Rs. 45 rent. The mortgagee (or owner) took formal possession in execution proceedings; the *dakhilnama* was signed by Malhi and others. Since then defendants have again taken possession of the houses—Malhi is now dead—and plaintiffs sue for possession.

The defendants plead that the foreclosure proceedings were irregular, and this plea has been allowed on the ground that no copy of the application for issue of foreclosure notice was given to the mortgagor along with the notice. But the lower Courts have held that the mortgagor having acknowledged the mortgagee to be owner and executed a lease in his favour, and the mortgagee having subsequently obtained a decree, the defendants cannot now deny the plaintiffs' title or pick holes in the foreclosure proceedings. So the defendants have come to this Court. This is an appeal under section 70 (1) (*b*) of the old Punjab Courts Act.

For the appellants Mr. Muhammad Shafi first points out that apart from all foreclosure proceedings, the mortgagee was at liberty to take possession under the terms of the deed simply because the interest had not been paid. Further he urges that in the decree which was subsequently obtained the plaintiff was, no doubt, given a decree for possession, but that the decree does not say whether he is given a decree as mortgagee or as owner. But reference to the lease and to the plaint and judgment in the former suit makes it perfectly clear that the mortgagor, after the year of grace had expired, took the houses on lease recognizing the lessor as owner, and that the plaintiff subsequently sued not as mortgagee but as owner, and obtained a decree and took possession as owner.

The question now is whether Malhi's sons can question the validity of the foreclosure proceedings and deny plaintiffs' title. The learned Counsel for the appellants quotes the following rulings.

PALANIAPPA CHETTI v. RAMA NATHAN CHETTI.

Ramji v. *Chinto Sakharam* (1). This simply lays down that the mere expiry of the time laid down in the deed for redemption does not extinguish the right to redeem. This follows the English rule. In the case before us, however, we have to consider the effect of the foreclosure proceedings and of the subsequent conduct of the mortgagor.

Abdul Rahim v. *Madhavrav Apaji* (2). This follows the above ruling. Counsel points out that in this case, too, there was a decree. But it was a decree in a suit brought by the mortgagee "to recover a different mortgage-debt secured by different property," whereas in the present case the former decree passed against Malhi was for the same property as is now in dispute.

Kanhayalal v. *Narhar Laxmanshet Varu* (3). This, too, follows *Ramji* v. *Chinto Sakharam* (1). The parties acted for several years on the understanding that the mortgage had been converted into a sale, but it was held that there had been no fresh transaction independent of the mortgage and so it was held that the right to redeem still subsisted. Here, however, the lease seems to have been a fresh and independent transaction; it recognizes that the mortgagor's title has ceased and enters into an entirely new transaction of lease.

Then it is urged that Malhi's admission of the plaintiff's title was only an admission of law made under a mistake, and that in such cases there can be no estoppel. But here there has been more than an admission. Malhi not only admitted the title, but took the property in lease from the plaintiff as owner; and subsequently in a suit brought by the plaintiff as owner neglected to deny the plaintiff's title. Had not Malhi acted in this manner, it would have been perfectly easy for the plaintiff to cure the defect in the foreclosure proceedings by getting a new foreclosure notice issued. It is urged that plaintiffs could get a new foreclosure notice issued even now. This is true, but plaintiffs' position has very possibly altered for the worse, since Malhi's sons may now be in a position to redeem though presumably Malhi was not able to do so in 1899, as he had allowed the year of grace to expire which he would not have done had he been able to redeem.

We consider that the defendants are now estopped from denying plaintiffs' title.

We dismiss this appeal with costs.

Appeal dismissed.

(1) 1 B H. C. R. 199.
(2) 14 B 78.
(3) 27 B. 297: 5 Bom. L. R. 140.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 130 OF 1912.

November 3, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

PALANIAPPA CHETTI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAMANATHAN CHETTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Fraud against creditors, transfer of part of debtor's property, if constitutes—Mortgage-debt, discharge of.

The mere fact that a mortgagee acted as the agent of the mortgagors in collecting their outstandings, does not show that the mortgage-debt is discharged.

A transfer by a debtor, for a genuine debt, of part only of his property is not voidable under section 53 of the Transfer of Property Act.

Mahomed Mira Ravuthar v. *Savvai Vijaya Raghunadha Gopalar*, 23 M. 227; 27 I. A. 17; 4 C. W. N. 227; 10 M.L.J. 1; *In re Jukes, Ex parte Official Receiver*, (1902) 2 K. B. 58; 86 L. T. 456; 50 W. R. 560; 9 Manson 249; 71 L. J. K. B. 710, followed.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 329 of 1910.

FACTS.—Defendants Nos. 2 to 5, members of a banking firm, were heavily indebted to the firms of the plaintiff and of the 1st defendant (who was a close relation of theirs) in respect of *adathi* transactions between them. While on the eve of bankruptcy they mortgaged a portion of their immoveable properties to the 1st defendant's firm in respect of a portion of their dues. Later on, owing to the inability of the said firm to manage their affairs, the firm of the 1st defendant took up the management into its hands and collected some of its outstandings as its agent. The plaintiff firm, having obtained a decree against the firm of defendants Nos. 2 to 5, attached the properties mortgaged to the 1st defendant's firm. The latter preferred a claim and it was allowed. The present suit is for a declaration that

the mortgage in favour of 1st defendant's firm was not binding on the plaintiff's firm, as being a fraud against creditors, and that further the same had been discharged. The Subordinate Judge found that the mortgage was a genuine transaction, that mere knowledge of the existence of other creditors did not make the transaction a fraudulent preference and that the mortgage in question had not been discharged. He, therefore, dismissed the suit. Hence this appeal.

Mr. *K. N. Aiya*, for the Appellants :—The non-production of accounts and the relationship of the parties clearly show that the transaction is a fraudulent one.

Mr. *K. S. Jayaram Iyer*, for the first Respondent :—The mortgage is perfectly valid. *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1); *In re Jukes, Ex parte Official Receiver* (2) and *Hakim Lal* v. *Mooshahar Sahu* (3).

JUDGMENT.—We agree with the Subordinate Judge. There is no evidence that the mortgage taken by the 1st defendant from the other defendants was discharged. The mere fact that the 1st defendant acted as agent to collect the Ragoon outstandings of the other defendants does not of itself show that the mortgage-debt was discharged. Nor can that mortgage be impeached under section 53 of the Transfer of Property Act, as it was taken for a genuine debt, *Mohamed Mirza Ravuthar* v. *Savvai Vijaya Raghunadha Gopalar* (1), and was not of the whole of the debtor's property as in *In re Jukes, Ex parte Official Receiver* (2). The appeal is dismissed with costs.

Appeal dismissed.

(1) 23 M. 227; 27 I. A. 17; 4 C. W. N. 227; 10 M. L. J. 1.

(2) (1902) 2 K. B. 58; 86 L T. 456; 50 W. R. 560; 9 Manson 249; 71 L. J. K. B. 710.

(3) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889,

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 247 OF 1913.

January 21, 1914.

Present:—Mr. Mittra, Offg. A. J. C.

JIWANLAL—PLAINTIFF—APPELLANT

versus

CHUDAMAN—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Grant of maintenance to Hindu widow—Writing not necessary—Oral evidence.

Under the Hindu Law, no transaction need be in writing; therefore a grant of immoveable property to a Hindu widow for maintenance, is perfectly valid if proved by oral evidence.

Appeal against the decree of the District Judge, Seoni, dated the 28th February 1913, reversing that of the Munsif, Lakhnadon, dated the 15th January 1913.

Mr. *A. C. Roy*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondents.

JUDGMENT.—The lower Appellate Court has assumed that a grant of immoveable property to a Hindu widow for maintenance can only be made by a registered instrument. No reasons have been given by the District Judge for this view. The Munsif thought that this was the effect of section 17 of the Registration Act. But in this case there was admittedly no document. If there had been a document evidencing the grant, it would have required registration.

The Registration Act is silent as to whether a transaction must be in writing or not. No doubt the Transfer of Property Act requires certain transfers of certain value to be by a registered instrument. But this is not a case of sale, gift, mortgage, or lease. The transfer in question is one not specifically dealt with by that Act. The question must, therefore, be decided under the Hindu Law. No transaction need be in writing under that law. Therefore the grant, if proved by oral evidence, would be perfectly valid. The decree of the lower Appellate Court is reversed and the case remanded to that Court for a fresh decision with reference to the above remarks. There will be no order for refund of Court-fees. Other costs will follow the result.

Decree reversed; Case remanded.

SANYASI CHARAN MANDAL *v.* ASUTOSH GHOSH.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEALS FROM ORDERS NOS. 264 AND 298 OF 1912.

March 17, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

IN NO. 264 OF 1912

SANYASI CHARAN MANDAL, MINOR, BY GUARDIAN, MOTI LAL ROY—APPELLANT

versus

ASUTOSH GHOSH, RECEIVER TO THE ESTATE OF NILRATAN MANDAL AND OTHERS INSOLVENTS, AND OTHERS—RESPONDENTS.

IN NO. 298 OF 1912

KISHEN CHAND-KESHARI CHAND AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SANYASI CHARAN MANDAL, MINOR, BY GUARDIAN, MOTI LAL ROY—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 247—Partnership—Infant partner, liability of—Liability of infant partner to be adjudged insolvent—Position of infant in joint Hindu family business—Insolvency of one partner, effect of—Position of Receiver—Provincial Insolvency Act (III of 1907), s. 16.

An infant may be admitted to the benefits of a partnership, though he cannot be made personally liable for any obligation of the firm.

An infant partner of a firm cannot as such be adjudicated an insolvent.

There is no difference in principle between the nature of the liability of an infant admitted by agreement into partnership business and that of another on whose behalf an ancestral trade is carried on by the guardian.

Therefore, a Hindu infant on whose behalf a family trade is carried on is not personally liable for the debts incurred in such a trade, but his share therein is alone liable.

When a partner has been adjudged an insolvent, the partnership is not necessarily dissolved and the Receiver appointed under section 16 of the Provincial Insolvency Act merely replaces the insolvent partner in respect of the business of the firm and cannot claim, as Receiver in insolvency, to take exclusive possession of the entire assets of the firm.

Appeals against the orders of the District Judge, 24-Pergannas, dated respectively 15th and 28th May 1912.

Mr. *Chakravarti*, Counsel (with him Babus *Umakali Mukherjee*, *Satish Chandra Mukherjee* and *Kshetra Gopal Benerjee*), for the Appellant in No. 298 and for the Respondent in No. 264.

Dr. *Rash Behary Ghosh* (with him Babu *Panchanan Ghosh*, for Babu *Kshetra Mohan Sen*), for the Respondents in No. 298 and for Appellants in No. 264.

JUDGMENT.—These appeals are directed against an order under section 16 of the Provincial Insolvency Act of 1907. The circumstances under which the order in question has been made may be briefly narrated. One Bhuban Mohan Mandal left five sons, Nil Ratan, Amulya Charan, Satya Charan, Fatik Charan, Sannyasi Charan. During his life-time Bhuban Mohan Mandal carried on business in cloth, rice and fuel. After his death his sons, two of whom were infants, inherited the firms mentioned. On the 19th February 1912 Kishen Chand-Keshari Chand, the appellant in one of these appeals, made an application under the Provincial Insolvency Act to have the partners of these firms adjudicated insolvents. At the time the application was made, one of the two infants had already attained majority, but the other, Sannyasi Charan, was and is even now an infant. The District Judge found upon the evidence that the acts of insolvency imputed to four of these persons had been established, namely, that they had acted in the manner described in clauses (*b*) and (*g*) of section 4 of the Provincial Insolvency Act. The District Judge thereupon declared the four adult brothers insolvents. But he dismissed the application for adjudication of the infant as insolvent, because in his opinion the infant could not be declared an insolvent. He further appointed a Receiver and directed him to proceed to realise the assets of all the four brothers and of all the properties purchased since the death of Bhuban, and four-fifths only of the other properties which it was alleged had been inherited by all the five brothers from their father. Exception has been taken to this order by the infant as also by the creditor at whose instance these proceedings have been commenced.

The infant objects to the validity of the order on the ground that the Receiver was not competent to realise in its entirely the assets of the business and of the properties acquired since the death of his father. His contention is that the property of his four insolvent brothers alone had, under section 16 of the Provincial Insolvency Act, vested in the Receiver, who was consequently competent to realise a four-fifths share only

of the assets of the partnership business as also of all after-acquired properties. The objection urged by the creditor is two-fold: namely, *first*, that the infant should have been adjudged an insolvent; and *secondly*, that in any view the Receiver was entitled to realise the whole of the properties inherited by the five brothers from their father.

The first question for determination is, whether the infant should have been adjudicated an insolvent. On behalf of the creditor it has been argued that although under the law of England, an infant is not liable to be adjudicated an insolvent, the principle on which that doctrine is based is not recognised in this country and consequently the doctrine itself should not be applied here. There is no room for controversy, as is clear from the decision of the House of Lords in *Lovell and Christmas* v. *Gilbert Walter Beauchamp* (1), that the District Judge correctly held that under the English Law, an infant partner cannot be adjudicated an insolvent. The question for determination is whether a different view should be taken under the Indian Law. Section 247 of the Indian Contract Act provides that a person who is under the age of majority, according to the law to which he is subject, may be admitted to the benefits of a partnership but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm. It is not necessary for our present purpose to determine whether the principle which underlies section 247 is in harmony with the principle which underlies section 11 as interpreted by their Lordships of the Judicial Committee in *Mohori Bibee* v. *Dharmodas* (2). But the position is incontrovertible that an infant may be admitted to the benefits of a partnership although he cannot be made personally liable for any obligation of the firm; yet the share of the infant in the property of the firm is liable for the obligations of the firm. It has been urged on behalf of the creditor-appellant that as the infant is liable to satisfy the debts of the firm, though it may be to the extent of his interest in the property of the firm, he is liable to be adjudicated an insolvent if it transpires that the debts of the firm cannot be satisfied out of the property of the firm. In our opinion, this contention is obviously fallacious. As regards the infant partner, the creditors of the firm are not entitled to proceed against him personally. They are restricted to a special fund, namely, his interest in the property of the firm. If the value of such interest is not sufficient for the satisfaction of the dues of the creditors, it cannot be maintained that the infant is unable to pay his debts which must be the true foundation of all proceedings in insolvency against him. The remedy of the creditors is restricted in its scope, and if that remedy is partial, it cannot be maintained that the person against whom the limited remedy is available is liable to be declared an insolvent. Indeed he may have ample funds other than the partnership assets, though such funds cannot be reached by the creditors of the firm, simply because under the law they cannot hold him personally liable to satisfy the obligations of the firm. We are of opinion that the law under the Indian Contract Act does not in this respect differ from the English Law on the subject and that here, as in England, an infant partner of a firm cannot as such be adjudicated an insolvent.

Our attention has been also invited to the circumstance that a joint Hindu family firm is not in all respects on the same footing as an ordinary partnership arising out of a contract. It has been argued that the rights and obligations of the co-parcener cannot be determined by exclusive reference to the provisions of the Indian Contract Act, but must be considered also with regard to the rules of the Hindu Law which regulate the transactions of Hindu families; and as an illustration of this fundamental difference, reference has been made to the rule that the death of one of the co-parceners does not dissolve a Hindu family partnership. This position may be accepted as sound. But it is equally clear that there is no difference in principle between the nature of the liability of an infant admitted by agreement into a partnership business and that of another on whose behalf an

(1) (1894) App. Cas. 607; 11 R. 45; 71 L. T. 587; 43 W. R. 129; 1 Manson 467; 63 L. J. Q. B. 802.
(2) 30 I. A. 114; 30 C. 539; 4 Bom. R. L. 421; 7 C. W. N. 441 (P. C.).

ancestral trade is carried on by his guardian. It is on this basis that it has been ruled in the cases of *Joykisto Cowar* v. *Nityanundnundy* (3) and *Rampartab Samrathrai* v. *Foolibai* (4), that a Hindu infant on whose behalf a family trade is carried on is not personally liable for the debts incurred in such a trade, but his share therein is alone liable. In so far as the propriety of the order of the District Judge with regard to the infant is concerned, we must consequently overrule the contention of the creditor.

The question next arises, what is the precise position of the Receiver appointed under section 16 of the Provincial Insolvency Act? On behalf of the creditor, it has been argued that he is entitled to take possession of and to realise the entire assets of the trading firms, all the after-acquired properties and also all ancestral properties inherited by the five brothers. In support of this proposition reliance has been placed upon the decision of the House of Lords in *Lovell Christmas* v. *Gilbert Walter Beauchamp* (1). That case, at first sight, seems to lend some support to the contention of the creditor, but upon closer examination, turns out to be of no real assistance to him. In that case, Gilbert Walter Beauchamp was a partner in the firm of Beauchamp and Brothers. He was an infant and the other partner was Ralph Beauchamp. Goods which had been supplied upon the order of the firm were not paid for. An action was consequently brought in the Queen's Bench Division against the firm in the firm's name. An appearance was entered for Ralph and also for Gilbert, the infant, by his guardian *ad litem*. Objection was taken on behalf of the latter that the infant could not be made liable. This objection was overruled, and on the 2nd August 1893 an order was made, adjudging the plaintiff to recover against the defendants the sum claimed. A similar judgment was obtained by another creditor who has supplied goods to the firm. On appeal to the Divisional Court to set aside the latter judgment, the appeal was dismissed, but it was also ordered that execution was not to issue against the separate property of the infant or against his share, if any, in the partnership profits. The Court of Appeal refused to disturb the order thus made by the Divisional Court [*Harris* v. *Beauchamp* (5)]. On the 2nd August 1893, that is, on the date when the first judgment had been obtained, Lovell and Christmas (the persons who had obtained the judgments) served a bankruptcy notice on Beauchamp Brothers, founded on their judgments, intimating that if the requisitions of the notices were not complied with, an act of bankruptcy would be committed. The money was not paid and the creditors presented a petition for a receiving order in respect of the estate of Beauchamp Brothers, whereupon a receiving order was made. This order was rescinded by the Court of Appeal on the ground that as one of the partners was an infant, the receiving order could not properly be made against the firm [*In re Beauchamp Brothers* (6)]. The Court of Appeal granted leave to appeal to the House of Lords, but on the term that the judgment of the Queen's Bench Division of the 2nd August 1893 should be treated as affirmed in the Court of Appeal, with leave to the respondent Gilbert to lodge a cross-appeal. The position consequently was that when the matter was taken to the House of Lords, the question of the validity of the judgment in the suit against the firm as also of the order made in the partnership proceeding were both open for consideration. It was under these circumstances that Lord Herschell stated that the judgment was erroneous and required to be amended; and he directed it to be amended by the insertion of the words "other than Gilbert Walter Beauchamp" after the word "defendants." Lord Herschell after giving the direction proceeded to observe as follows: "I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute, as from its date, a valid receiving order against Ralph Beauchamp, and, I think, the Receiver appointed under that order should also be appointed Receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors." It is plain that the order authorising the Receiver to deal with the partnership

(3) 3 C. 738; 2 C. L. R. 440; 3 Ind. Jur. 117.

(4) 20 B. 767 at p. 777.

(5) (1893) 2 Q. B. 534; 63 L. J. Q. B. 99; 69 L. T. 373; 42 W. R. 37; 4 R. 550.

(6) (1894) 1 Q. B. 1; 63 L. J. Q. B. 101; 9 R. 35; 69 L. T. 646; 4 W. R. 110; 10 Marrell 277.

assets for the purpose of protecting them for the benefit of the creditors was made, not merely in the partnership proceeding, but also in the proceeding on the judgment against the firm, as there was in fact a judgment against the firm represented by the adult partner. The decision of the House of Lords cannot consequently be rightly regarded as an authority for the proposition that in a bankruptcy proceeding, it is open to the Court to direct the Receiver to deal with assets other than those belonging to the persons who had been adjudged insolvents. It would indeed be surprising if the Court could, in a proceeding under the Insolvency Act, deal with the property of a person who had not been adjudged an insolvent. This is plain from familiar statements in books of authority. "On the bankruptcy of one only of several partners the joint assets do not vest in the trustee. Consequently an action in the Chancery Division to ascertain the share of the bankrupt was formerly necessary, but now under section 102 of the Bankruptcy Act, 1883, the Court in Bankruptcy can ascertain such share. It is, however, not so in the case of an infant." [Lindley on Partnership, 8th Edition, page 762]. Section 102 of the Bankruptcy Act, 1883, to which reference is made, is in these terms: "Every Court having jurisdiction in bankruptcy under the Act shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." To the rule thus laid down a proviso is added that "the jurisdiction hereby given shall not be exercised by any County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto or the money, money's worth, or right in dispute does not in the opinion of the Judge exceed in value £200." The following is an accurate statement of the principles which govern the matter now before us: "Upon the bankruptcy of a partner, his power over the partnership property ceases from the commencement of the bankruptcy and his share of the property, that is, of the surplus after payment of the partnership debts and the claims of all his co-partners, will vest together with his all other separate estate, in his trustee, who in respect of the bankrupt's share of the partnership assets will become tenant-in-common with the solvent partner and entitled to have the partnership affairs wound up according to the rule in bankruptcy" [Robson on Bankruptcy, 7th Edition, page 682]. This position is amply supported by judicial decisions of the highest authority, amongst which may be mentioned specially *Fox* v. *Hanbury* (7); *Ex parte Ruffin* (8) and *Fraser* v. *Kershaw* (9).

We may observe that the principle formulated in the cases just mentioned rests on the theory familiar to English lawyers, that the bankruptcy of one partner operates as a dissolution of the partnership among all the partners, *Fox* v. *Hanbury* (7); *Ex parte Smith* (10) and *Crawshay* v. *Collins* (11). It is essential to note, however, that the effect of the bankruptcy of a partner on the partnership is not, in this country, indentical with that under the Law of England, as becomes clear from a comparison of section 33 of the Bankruptcy Act, 1890, with the provisions of sections 253 and 254 of the Indian Contract Act. Under the Bankruptcy Act, 1890, bankruptcy is placed on the same footing as death, and there is a dissolution of partnership by reason of the death or bankruptcy of one of the partners. In section 253 of the Indian Contract Act, on the other hand, in the absence of any contract to the contrary, the relation of partners to each other is determined by the death of any partner, whereas under section 254, at the suit of a partner the Court may dissolve the partnership when a partner, other than the partner suing, has been adjudicated an insolvent under

(7) 2 Cowper 445 at p. 448; 98 Eng. Rep. 1179.
(8) 6 Ves. 119; 5 R. R. 237; 31 E. R. 970.
(9) 2 Kay. & J. 496 at p. 499; 25 L. J. Ch. 445; 2 Jur. (N. S.) 880; 4 W. R. 431; 69 Eng. Rep. 878; 110 R. R. 340.
(10) 5 Ves. 295; 31 E. R. 595.
(11) 15 Ves. 228; 10 R. R 61; 33 Eng. Rep. 736.

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any law relating to insolvent debtors. Thus whereas in England the bankruptcy of a partner works a dissolution without an order of the Court, in this country the bankruptcy of a partner may have the same effect only if a suit is instituted for dissolution of partnership on that ground by a partner other than the one who has been adjudged insolvent. Consequently in this country, when a person has been adjudicated an insolvent, the partnership is not necessarily dissolved, and the Receiver who is appointed under section 16 of the Provincial Insolvency Act merely re-places the insolvent partner in respect of the business of the firm, that is, the Receiver and the partners who have not been adjudicated insolvents continue to constitute the firm. It may possibly be open to the Receiver to take steps for the dissolution of the partnership, but he cannot claim as Receiver in insolvency to take exclusive possession of the assets of the firm, including, in this case, the interest of the infant who has not been adjudicated an insolvent. We are clearly not concerned in the present proceedings with the question, whether the particluar debt which the creditor seeks to realise may be realisable from the interest of the infant in the firm; that is a question which can be adjudicated in a suit properly framed for the purpose. What concerns the Court in these proceedings is the true position of the Receiver in relation to the partnership property. As regards such property, we feel no doubt whatever that he is not entitled to deal with the entire assets, inclusive of the interest of the infant who has not been adjudicated an insolvent.

A question has been raised before us not only as to the partnership assets but also as to what has been described as the after-acquired properties. On behalf of the creditor it has been contended that the after-acquired properties have not only been acquired out of the funds of the partnership, but that they have been treated as part of the partnership property. In the view we take the distinction suggested is immaterial, because whether what is described as after-acquired property be treated as included in the partnership assets or be deemed independent thereof, the Receiver is not entitled to take possession of and to deal with more than the four-fifths share held by the persons adjudicated insolvents. In respect of these properties the Receiver is precisely in the same position as the persons who have been adjudicated insolvents and have been re-placed by him by operation of law. The essence of the matter is that the share of the infant has not vested in him, and he is consequently not entitled to deal with it. The Receiver may, if so advised, institute a suit for dissolution of the partnership, in which appropriate proceedings may be taken for realization of the assets. The creditor also may, if so advised, pursue his remedy, if any, against the infant in a suit properly framed for enforcement of his claim. But whatever remedies may be available hereafter to the Receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings.

The result is that the appeal of the creditor (No. 298 of 1912) is dismissed and the appeal of the infant (No. 264 of 1912) is allowed. The order of the District Judge is varied in the manner following. The Receiver will take possession of four-fifths share of the business and four-fifths share of all the properties purchased since the death of Bhuban Mohan Mandal as also four-fifths share of other properties jointly held by the infant and his brothers.

The creditor will pay the costs of the infant in both the appeals. We assess the hearing fee in each case at one gold *mohur*.

Appeal No. 298 *dismissed;*
Appeal No. 264 *allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 171 OF 1911.

November 10, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

AMBALAVANA PANDARASANNADHI AVERGAL—PLAINTIFF—APPELLANT

versus

SREE MINAKSHY SUNDARESWARA DEVASTANAM, THROUGH ITS MANAGER, P. S. ANANTHANARAYANA IYER, AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession of limited right—Prescription—Limited right of management, whether can be prescribed for—Document containing assertion of rights, admissibility of—Evidence Act (I of 1872), *ss.* 13, 35—*Suit to recover possession as* hukdar—*Limitation Act (IX of* 1908), *s.* 10.

A limited right of management of an endowment can be prescribed for as well as any other limited right.

A document containing an assertion of certain rights, though not a public document within the meaning of section 35 of the Evidence Act, is admissible in evidence under section 13.

A suit to recover possession of certain villages as *hukdar* and for an injunction restraining defendants from interfering with the plaintiff in the discharge of his duties is barred by limitation when it appears that the right of management has been in the adverse possession of the defendant for nearly 60 years before suit. Section 10 of the Limitation Act has no application to such a suit.

Appeal against the decree of the District Court of Madura, in Original Suit No. 8 of 1909.

Mr. *R. Sadagopachariar* (with him Messrs. *K. Srinivasa Iyengar*, *S. Srinivasa Iyengar* and *S. Muthia Mudaliar*), for the Appellant.

Mr. *T. Rangachariar* (with him Mr. *C. V. Ananthakrishna Iyer*), for the Respondents.

This appeal coming on for hearing on 16th, 20th, 21st, 22nd and 23rd days respectively of October 1914, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, OFFG. C. J.—This is a suit brought by the Pandarasannadhi of the Tiruvaduthurai Mutt against the Manager of the Madura Temple and the Temple Committe of the Madura District to recover possession with mesne profits of four villages as *hukdar* or Trustee of the Thanappa Mudaly Kattalai, or endowment for the performance of certain ceremonies in the Madura Temple, and for an injunction restraining the defendants from interfering with him in the discharge of his duties. The District Judge has found that he has not shown that he was ever entitled to possession and also that his suit is barred. With the latter conclusion I agree, but as the case may not stop here and has been very fully argued, I propose to state my reasons for differing from the conclusions at which the District Judge has arrived on the facts. It may well be that in the opinion of those best qualified to judge, the Manager appointed by the Temple Committee would be a much more satisfactory Trustee of the endowment than the plaintiff but, this of course is not a matter which can affect our judgment as to the effect of the evidence. The judgment of the District Judge contains an elaborate examination of the voluminous documentary evidence in the case, but fails altogether, in my opinion, to recognise the strength of plaintiff's case upon facts which are either admitted or proved beyond reasonable doubt. It is not disputed that the endowment of the four suit villages and another, which has ceased to belong to it, was founded by one Thanappa Mudaly whose name it bears, long before Madura came under the Government of the East India Company at the beginning of the nineteenth century. According to the tradition he was a Minister of the ruling Nayak at the beginning of the eighteenth century. It is also not disputed that the donors of endowments, such as this, for temple purposes were in the habit of appointing separate Trustees, or that many such endowments in different temples in Southern India were entrusted to the predecessor of the plaintiff Pandarasannadhi and were managed by him through the agency of Thambirans, as his ascetic followers are called, who resided in Mutts belonging to him in the neighbourhood of the temples in question. He has been compared in one of the cases to a bishop, but his position more resembles that of an abbot of a monastery with dependant priories or Mutts in different parts of India, many of them in charge of a single ascetic or Thambiran.

There is one such Mutt at Madura which bears an inscription showing that it was presented to the Mutt by Chockalinga Mudaliar, son of Koneriappa Mudaly, son of Thanappa Mudaly, or by all three persons

as the words "son of" are not in the original. This shows that the Pandarasannadhis were the Gurus or religious superiors of the family, and makes it exceedingly likely that the founder or his heirs should have entrusted this endowment, according to a very usual practice, to the care of the Pandarasannadhi, more especially as during the time of the Nayaks there does not seem to have been any Temple trustee and the general management of the temple seems to have been in the hands of the Government itself.

Down to the present time a Thambiran appointed by the plaintiff and residing at the Mutt performs the duties of Vicharanai or Manager of the Kattalai as regards the ceremonial observances; and it is not disputed that this office is vested in the plaintiff and discharged on his behalf by one of the Thambirans. There is no reason for doubting that his possession of this office goes back far beyond the introduction of the Company's Government, either to the time of the founder or of his grandson who built the Mutt, and the fact that in the accounts at the beginning of last century, H series, the word Vicharanai is used in connection with the mangement of the property of the endowment as well as the ceremonies, suggests that both were in the hands of the Thambiran as agent of the Pandarasannadhi. All that is in question in the present suit is his right to possession of the four suit villages which admittedly originally formed part of the endowment and were attached under the Muhammadan Government and retained under attachment under the Company's rule. His case is that they were in his possession when first attached and that whilst under attachment they were held on his behalf, and there are strong grounds for thinking this was the case down to 1849 when the Company handed them over to the temple authorities.

There are other villages and lands belonging to the endowment which were not attached and which continue in the plaintiff's possession down to the present day. None of these villages or lands are shown to have been acquired subsequently to the introduction of the Company's rule, and the most reasonable explanation to my mind appears to be that they were additions to the original endowment of five villages made from time to time to the Pandarasannadhi for the purposes of the Thanappa Mudaly Kattalai of which he was the Trustee. One of these villages is entered in the Inam Register as Koneriappa Mudaly Kattalai, which would point to its having been given by Thanappa Mudaly's son who bore that name (Exhibit AJ). The District Judge is largely influenced by the fact that these lands and villages have always been in the possession of the plaintiff, whereas the suit villages have never been in his possession since the introduction of the Company's Government in 1801. A simple explanation of this is that those other villages and lands escaped attachment under the Muhammadan Government, whereas the suit villages did not. The suit villages stood in the Madura revenue accounts in the name of this Kattalai with numerous other Devastanam villages which under the Hindu Rulers had been exempted from assessment; and after the Muhammadan Government took Madura, they were all dealt with as a fresh source of revenue. Of the other villages Kadipatte was in the Saptur *Zemindari* and not separtely assessable, and other villages were outside the District of Madura, while the other lands were in villages which did not come within the class of Devastanam villages. When the Muhammadans took Madura they appear to have at first imposed a Poruppu, which is the name for a favourable quit-rent as distinct from the full assessment, upon the Devastanam villages, and later on in the financial embarrassments in which they found themselves, they resumed all these villages and merely made such allowances as they chose for the upkeep of the temples, etc. This was the state of things which the Company found existing in this and other districts when they took over the Government at the beginning of the last century. Among the villages which the Company found under attachment were the suit villages belonging to the Thanappa Mudaly Kattalai.

The only evidence as to any one but the Pandarasannadhi and his agents having anything to do with this Kattalai before the Company's time is to be found in Exhibit H7, an extract from the accounts of 1816, in which the endowment is said to have been made by Thanappa Mudaly in the time of Vijiaranga Chokanada Nayakar, and Vedanayaga Bhattar and Tirumalaya Pillai are entered under the heading, "Name of previous *mirasidars*", as the persons who

got the *Danam* or gift. Nothing is known of these persons, it is not stated that any office was granted them, and the same account enters under the head of "Name of person entitled to manage, etc.," Manickavachaka Thambiran Paradesi of Tiruvaduthurai Mutt, Vicharanai or Manager, thus showing that the management was then in the hands of the plaintiff's agent. As I have already said, the effect of Exhibit H7 is to show that the general management at the time was in the hands of the Thambiran. Exhibit C, an extract from accounts for 1799, refers to the five villages as *inam* villages of the temple of Minakshy Thanappa Mudaly Kattalai, but does not show that any one but the plaintiff's predecessor was the trustee of this endowment. Nor is the fact entitled to any weight that in Exhibit D7 one of the villages, Amur, is referred to as the temple Kattalai, whereas in Exhibit D5 of the previous year it is referred to as a Thanappa Mudaly Arakattalai village. The defendants also rely on Exhibit V*a*, which is a list of *pattadars* or lease-holders of the village of Velangudi from the accounts of 1801, in which Arakattalai Nallaperumal Pillai appears as one of the *pattadars*. This is one of the Kattalai villages which has been all along down to the present in the possession of the plaintiff, and the accounts prove nothing. The defendants also refer to Exhibit V, an extract from the Revenue accounts relating to the temple for 1802, in which under the heading "person who is Kattalai Vicharanai or Manager," are entered the names of two persons, Nallaperumal Pillai—possibly the same person whose name was found in Exhibit V*a*—and Ponnambala Pillai. This merely shows that these two persons, under what circumstances does not appear, were then discharging in the year 1801 the office of Vicharanai of the Kattalai, which has admittedly been discharged by the plaintiff through his agents from 1816, the date of Exhibit H7, down to the present time. It may very well have been that the post of the Thambiran of the Mutt was vacant at the time the Company took over, but we never hear of any one but the Thambiran being in management. Exhibit E, an extract from an account relating to the Thanappa Mudaly Kattalai for 1814, under the heading, "purpose for which *inam* was granted and in whose charge," mentions Amur village as granted to the temple, Chettikulam as granted to Thanappa Mudaly Arakattalai and the other villages of Chinna Ulgani and Kasulkolam as being in charge of Manickavachaka Thambiran. Here so far as any one is mentioned as in charge of the villages, it is the Thambiran. As the position was admittedly the same with regard to all these villages, these divergencies as to the different villages show that the statements in these accounts are to be received with caution. Exhibit D series shows that from 1801 to 1817 the income of the villages, after deducting the Poruppu or quit-rent, was paid to the *inamdar*, but leaves it open who the *inamdar* was. Exhibit H6 is an account of the revenue collections for 1816 from all the Kattalai villages in charge of Government at that time showing as to each the amount payable after deducting Poruppu, mentioning the name of the person superintending the Kattalai, to whom presumably the money was to be paid for the performance of the Kattalai as no one else is mentioned. Manickavachaka Thambiran is shown as the person superintending the Thanappa Mudaly Kattalai and was presumably the person to whom payment was made. This Exhibit, in my opinion, very strongly supports the plaintiff's case that from the time the Company assumed the Government in 1801 down to 1816, the net income after deduction of quit-rent was paid to the Thambiran as Manager; and he relies on the statement to this effect contained in Exhibits B1 and B2, extracts from books produced from the Collector's office, and in Exhibit O4, which will be noticed subsequently.

In 1817 there was admittedly a change in consequence of the passing of Regulation VII of 1817 which gave the Board of Revenue complete control over temples and endowments. Instead of the income being paid over as formerly to the Superintendents of the different Kattalais, Tasdiks or budgets were framed for each Kattalai providing for the expenses of the Kattalai, and only so much of the income was paid over as was sufficient to provide for this expenditure, the balance being reserved in the hands of Government. Exhibits G and G2 as the Tasdiks for 1817, and the fact that the

Thambiran is only allotted a small salary of 3 *pons* per month as Vicharanai or Manager, and that Exhibit G2 directs that payments are only to be made to the employees, among whom apparently the Thambiran was included, if they discharge their duties, are relied on by the defendants to show that it was not intended that payments should be disbursed through the Thambiran. Exhibits J and I show that the Thambiran continued in management of the other villages and lands, though it appears from Exhibit II of 1824 that, under the powers conferred by Regulation VII of 1817, he was required to account for his collections, and the village of Kudipatti was attached for failure to perform his duties. It further appears that in 1836 a new Tasdik or budget was framed including for the first time the revenues of these other villages which, however, were still left to be collected by the Thambiran, as they still are.

Very much has been made on the part of the defendants of the subordinate position to which the Thambiran as Vicharanai or Manager of the endowment was reduced in this period in the exercise of powers conferred by Regulation VII of 1817, but, in my opinion, too much weight should not be attached to this, as we find that the same control was exercised over the collections of the villages and lands belonging to the Kattalai of which the Pandarasannadhi was admittedly Trustee in possession as over the collections of the villages which were under attachment. If this control was not inconsistent with the Pandarasannadhi being Trustee or *hukdar* of the other villages and lands, though deprived of all effective authority, it is equally not inconsistent with his having been *hukdar* or Trustee of the suit villages which were under attachment from the time Company took over. As regards the smallness of the Thambiran's salary it must be remembered that he was an ascetic, and it seems not improbable that the amount allowed him in the Tasdik was the amount which he had been allowed to spend on himself when the income was paid over to him.

I have now to deal with what seems to me a very important part of the case. In 1836 Mr. Blackburn, the Collector of Madura addressed instructions, Exhibit B, to the *peishkar* or Revenue Officer of the district instructing him with referrence to the Devastanam and Chuttram villages, that is to say, the villages belonging to endowments for religious and charitable purposes, which had been attached by the Company and were then under the *peishkar's* control as regards income and expenditure, to inquire and report under whose management they were before the attachment by the Company, that is to say, before 1801. He was to furnish full information as to the Vicharanai or Manager, particulars of the Kattalai, the name of the founder and of the present *hukdar* or Trustee, the names of the villages, who made the collections, who incurred the expenditure and to whom accounts were rendered. He was also required to state the year in which the Tasdik or budget system was introduced, and the year in which a new Tasdik or budget was framed. The inquiry was held, and the result was recorded in two books which were produced at the trial from the Collector's office, the extracts relating to the endowment, which are duplicates being marked as Exhibits B1 and B2. How the other Kattalais were dealt with we do not know, as the parties and the Pleaders were not allowed to inspect the rest of the book; what we find as to the suit Kattalai is a statement taken from Namasivaya Thambiran, Vicharanai (Manager) of the Thanappa Mudaly Kattalai, who was admittedly the representative of the Pandarasannadhi. The book as a whole was signed by the Gumastah who copied the statements into it and countersigned by the *peishkar* who put it forward as embodying the result of his inquiry. The fact that in the performance of his duty to inquire and report the *peishkar* contented himself as regards this Kattalai with recording a statement from the Thambiran, is to my mind very strong evidence that he was recognised at the time as Vicharanai or Manager and *hukdar* of the endowment, including the suit villages, as the plaintiff's agent, and that there was no other claimant in the field in the shape of the temple itself as any one else. The general effect of the statement taken from the Thambiran is also in entire accordance with the inferences which I draw from the earlier evidence which I have already examined. It, no doubt, represents not only the suit

villages, but the other properties as well, as forming part of the original endowment, whereas it is more probable that they were acquired subsequently before the Company's time. The account of the way in which the five villages came into the hands of the Company is also not candid, as they are represented as having been taken over at the request of the *hukdar*, whereas we knew from Mr. Hurdis' report Exhibt A that the Company found these as well as the other Devastanam villages under attachment and so continued them. I see no reason to doubt the next statement that under the Company the income of the villages after deducting the Poruppu or quit-rent had been paid over from the Government Treasury to the Thambiran and that he had performed the Kattalai with the aid of such income and the income of the other properties in his possession until November 1817, when a budget, Exhibit G1, was introduced, after which another budget, Exhibit G1, was introduced in 1833. In so far as it relates to the matters on which he was required to report I think the *peishkar* must be taken to have accepted this as satisfactory statement. I am entirely unable to agree with the statement of the District Judge in paragraph 14 of his judgment that Exhibits B1 and B2 have not the slightest probative value.

I do not consider it necessary to go into the rest of the evidence in detail. Exhibit N series is an interesting series of public documents showing the change of policy as to the connection of Government with temples. In 1842 they gave up the management and appointed a Manager for the Madura Temple in the exercise of the powers given them by Regulation VII of 1817. In 1849 they decided also to give up possession of the Devastanam villages, including the suit villages, which they had retained under attachment since 1801. If I am right in the conclusion I have come to, the plaintiff through his agent was then entitled to possession. As regards the villages attached to various Kattalais in the Madura Temple, the Collector in Exhibit O2 proposed to hand them over to the temple Manager, and the Board, in Exhibit O 3, dated the 25th May 1849, approved of this course in the case of the suit villages, whilst directing generally that claims by the descendants of the founders might be reported for special consideration. Shortly after this on the 2nd June 1849 we find a descendant of Thanappa Mudaly putting forward in Exhibit O4 a claim that the suit villages should be handed over to him jointly with the Pandarasannadhi. He asserted that his ancestors had put the villages in possession of the Pandarasannadhi, and that his descendants had been managing the property with him, and that they should not be handed over to the temple Manager, who was a mere stranger. The endorsement refusing the petition accepts the petitioner's statement that he was agent or *hukdar* with the Pandarasannadhi and states that the villages had never been in possession of the *hukdars* since the attachment by the Company, but that they had been receiving settled Dastabery—the budgeted allowances, first from Government direct, and afterwards (subsequently to 1842) from the Manager of the temple out of the net income of the villages; and as the management which had been in the hands of Government had been handed over to the temple Manager, it was only right that these villages should be handed over also, and these were the Board's orders. We do not hear of the descendants of the Thanappa Mudaly having claimed before or since, and their intervention may have been invited in view of the fact that in the proceeding already cited the Board had stated that it would only recognise the claims of descendants of the founders. This endorsement, however, appears to me to be a recognition of the Pandarasannadhi's position as *hukdar* or Trustee of these villages, though accompanied by a refusal to restore them to him on the ground he had been so long out of possession. It is significant that it was not suggested on this occasion that the villages were being handed over to the temple Manager because the temple itself and not the Pandarasannadhi was the *hukdar*, which is now the case for the defendants. The Pandarasannadhi did not contest, as he might have done, the handing over of these villages to the temple Manager in 1849, nor did he apparently claim to have them registered in his name at the Inam Commission in 1863, and they were registered in the name of the temple Manager, Exhibits K10, K14, K15, and K16. In

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conclusion I may mention that the position of the plaintiff as *hukdar* was recognised by the temple authorities in the litigation of the seventies. The opposite theory, in my opinion, fails to account for the connection of the plaintiff with the endowment and appears to proceed on grounds which are highly speculative. Whatever the reasons which induced the Pandarasannadhi to acquiesce in the suit villages being handed over to the Manager of the Temple in 1849, there is no doubt that they have since been in possession of the Manager of the temple when there was one and when these were not in the possession and management of the local temple Committee under Act XX of 1863 who for some periods managed the affairs of the temple themselves instead of appointing a manager as they are required to do under the Act. Their possession equally with that of the Manager when there was one, was clearly on behalf of the temple, and also as it seems to me on the facts already stated clearly adverse to the plaintiff. It is no doubt true that the plaintiff has all along been in possession of the office of *hukdar* of the Kattalai so far as the ceremonial observances are concerned and also in possession of the other villages and lands belonging to the endowment through accounts for their proceeds, but he has been out of possession of the suit villages which have been in the management of the temple claiming adversely to him, though the revenues of these villages have also been applied for the purposes of the endowment. It has been contended for the plaintiff that a limited right of possession and management of part of the endowments of a religious office could not be acquired by prescription. Admittedly there is no direct authority for this proposition, which was also raised before me in another appeal from Madura (Appeal No. 31 of 1909) where, however, it was unnecessary to decide the point. I cannot see why a limited right of management of an endowment should not be prescribed for as well as any other limited right, and I agree with my learned brother that the decision of their Lordships of the Judicial Committee in *Balwant Rao* v. *Puran Mal Chaube* (1), which was not cited in the argument, is an authority that it may. The plaintiff in that case in their Lordships' opinion was "suing only for his own right to manage or in some way to control the management of the endowment," and it was held that such a right might become barred. In the present case I think the limited right of management claimed by the plaintiff in this suit has been barred by adverse possession for nearly sixty years before suit, and that on this ground the appeal fails and must be dismissed with costs.

SESHAGIRI AIYAR, J.—I have the misfortune to differ from the learned Chief Justice on the facts of the case, and I am, therefore, obliged to examine them in greater detail than I would otherwise have done.

The plaintiff in this case is the Pandarasannadhi of the Tiruvaduthurai Mutt. The first defendant is the Manager of the Minakshy Sundareswara Devastanam at Madura. The other defendants are the members of the Temple Committee.

The plaintiff's case is that the villages in dispute were granted by one Thanappa Mudaly for performing certain "*Pujas*" in the temple at Madura (the endowment is known as "Thanappa Mudali Kattalai"), that his predecessor-in-title, as head of the "Thiruvaduthurai Adinam," was appointed hereditary Trustee in respect of the said endowment, that he was in possession and enjoyment of those villages, that on his behalf the British Government were managing the villages, that after the constitution of the Temple Committee, under Act XX of 1863, the Committee was managing on his behalf, that the present Manager refused either to account to the plaintiff for the income received from the villages or to deliver over possession of the properties to him and that consequently he is entitled to recover possession or to be paid the income. The defendants denied that the plaintiff was ever constituted Trustee of the Kattalai, and pleaded that the villages were directly given to the temple, that certain agents of the plaintiff at Madura were entrusted as paid servants with the management of the Kattalai from time to time, that the plaintiff had no right either to the management or to the possession of the properties, and that the claim in respect of possession was barred by limitation. The

(1) 10 I. A. 90; 6 A. 1; 13 C. L. R. 39; [4 Saraswati's P. C. J. 435.

most important issue relates to the plaintiff's predecessor having been constituted Trustee by Thanappa Mudali: The other questions are covered by issue IX which runs as follows:—"Whether the defendants' possession of the suit properties is only on behalf of the plaintiff and permissive and if not, whether the suit is in time."

The District Judge held that there was no evidence of the plaintiff's predecessor having been constituted Trustee of the Kattalai, that the defendants were not agents of the plaintiff in the management of the villages and that the claim was barred by limitation. The plaintiff has appealed.

Before dealing with the questions relating to the plaintiff's title and the bar of limitation, I must make a few remarks on the term "Kattalai." That expression is used with reference to three different kinds of endowments. Properties may be endowed for the performance of "*Pujas*" in the temple, or for the performance of certain festivals in the temple, or for the performance of "*Archanas*" to the deity in the name of the donor. In the first class of cases, the endowment is utilised for conducting the necessary and vital part of the worship and of the ritual in the temple. Ordinarily, the *Puja* is not performed in the name of the donor and consequently supplemental grants are made for the purpose of the service being more efficiently performed. Instances of this nature are to be found in the famous temple at Chidambaram where almost all the necessary daily services are conducted by means of Kattalais endowed by pious donors. In the second class of cases where grants are made for the purpose of "*Ootsavams*," if in consequence of a rise in prices or for other reasons the funds are not sufficient for performing a festival on the same scale as was begun with by the original donor, it is usual for others to supplement the funds either by making permanent grants of land or money or by yearly contributions towards the celebration of the festival. It has to be remembered that it is not uncommon among Hindus to make anonymous gifts. The preferable form of gift is for the donor to remain unnamed. Consequently, it very often happens that, where the funds in respect of a particular service or festival are not sufficient for conducting them on the original scale, new donors come forward to supplement those funds. In the third class of cases (for example, the Pachaiyappa's Kattalais in various parts of the Presidency) where grants are made for performing "*Archanas*" in the name of the donor either daily or on stated occasions, if the funds are not sufficient to meet the expenses, others will not come forward to supplement the resources. The "*Archana*" is intended solely for the grantor and it is not the concern of third parties to help in its performance if the funds are for any reason not fund sufficient. In the present case Thanappa Mudali's Kattalai was intended for two services known as the "*Oochikala*" or mid-day service and "*Ardhajama*" or mid-night service. These are more important than festivals and unlike *Archanas* they cannot be dispensed with. They are a necessary function of the worship of the idol. I have made these remarks in order that the history of the subsequent additions to this Kattalai may be understood in their proper perspective.

It was argued by Mr. K. Srinivasa Aiyangar for the plaintiff that if a service is known by a particular name and if its expenses have been met from a particular source, it is not likely that that source will be supplemented by contributions from other donors. I do not think this contention is well-founded. As I have already stated, subsequent donors very often add to the funds devoted for a necessary ritual in the temple. The first question for consideration is whether Thanappa Mudaly constituted the Thiruvaduthurai Adhinam the hereditary Trustee of the Kattalai in question. It is admitted that no written grant relating to this endowment exists. It is said (see Exhibit B1) that the papers relating to the grant were lost during the Muhammadan invasion. The suggestion is that they were with the agents of the plaintiff in Madura. There is no reason why the title-deed should not have been in Tanjore, the headquarters of the Adhinam, where it is well-known that grants of this description are carefully preserved by the head of the Mutt. One would have expected a copper-plate grant to have been produced if the story of the plaintiff is true. It is the case both for the plaintiff and the defendants that the original donor, Thanappa Mudaly, was the Pradhan or Prime Minister of Vijiaranga Chokanatha, who ruled in Trichinopoly

between the years 1704 to 1731. This King granted the suit villages to his Minister in order that he might endow them to the temple. It is, therefore, most likely that some writing evidencing the grant would have been executed to the plaintiff's Mutt if it was constituted Trustee. I am not satisfied that the allegation that the papers relating to the grant were lost at the time of the Muhammadan invasion, has any foundation. There is absolutely no evidence given in this case as to what those papers were and how and when they were lost.

On the other hand, it seems clear that the grant was made to the temple itself and not to the plaintiff's predecessor. Mr. Nelson in his interesting Manual of the District of Madura says that the temple was nominally under the direct supervision of the Kings of Madura, and that they appointed a chief Brahmin priest to look after the temple properties (see Madura Manual, part III, page 159). As pointed out by Mr. Ghose in his "Tagore Law Lectures" on "Hindu Law relating to Impartible Property and Endowments," the idea of a *shebait* and a Trustee is a modern one. He says that "in ancient Hindu society when there were no regular trusts or trust-deeds, in the case of the setting up of an idol, gifts of land were usually made to priests and other persons who were necessary for carrying on the worship." Mr. Nelson's account that the properties of the temple were managed by the Kings through a chief Brahmin priest is in accordance with what happens in Hindu temples throughout India. And, if a Brahmin priest was in management of this temple, the grant would have been made to him on behalf of the temple and not to the plaintiff's predecessor who had his headquarters in the District of Tanjore. This is borne out by the report of Mr. Hurdis (Exhibit A) in which he says that the Church Brahmins, as he calls the priests, were in possession of the properties belonging to the temple. It was pointed out in *Ramasami* v. *Ramasami* (2) that in most of the temples in this Presidency there are no regular Trustees, but that the *Archakar* or *Pujari* Brahmin is really both the officiating priest and the secular manager of the affairs of the temple. In this case there is Exhibit H7 which places the matter beyond doubt. This is an extract from the account of *Fasli* 1226 relating to the temple which was kept in the Collector's Office. In the column relating to the name of the previous *Mirasidar*, the entry is "person who got the *danam*," "Vedanayaga Bhattar and Tirumalayya Pillai." Under the heading of the "name of the grantor" the entry is "Thanappa Mudali who was the *Pradhan* of Vijiaranga Chockanatha—it is 90 years." There can be no doubt that this document comes from proper custody and contains the information available in 1816 regarding the persons who made the grant, and the persons who received the gift. This Vedanayaga Bhattar, it is conceded, was a Brahmin. The word *Bhattar* in Madura indicates the profession of a priest in the temple. Who Tirumalayya Pillai was, there is no evidence. It is not suggested that this Tirumalayya Pillai had anything to do with the Thiruvaduthurai Mutt. He could not have been one of the Thambirans who were in Madura. However there is no doubt that one of the donees was a Brahmin and this, as I said before, is in accordance with the usage in this behalf and in accordance with what Mr. Hurdis says in Exhibit A. My conclusion is that there is not only no evidence to show that the original grant was made to the Adhinam for the purpose of conducting the Kattalai in the temple, but that there is positive evidence that it was made to two persons one of whom was a Brahmin, who must have been the Chief priest of the temple at the time of the grant.

I shall now refer to the subsequent history of this Kattalai. Vijia Chockanatha ruled over the Karnatic until 1731. His wife, as guardian of his minor son, was in possession of it till 1735 or 1736. About that time the Muhammadan Rulers seized the districts of Trichinopoly and Madura. As Mr. Hurdis points out (and Mr. Nelson supports him), the Muhammadan Rulers confiscated all endowments belonging to the temple in these districts. In 1790 the Madras Government assumed possession of the Madura District, because the Nabob of the Karnatic was not able to contribute his share of the expenses of the alliance with the Company; and they appointed Mr. Mcleod to manage the district. As is pointed out

(2) 2 M. L. J. 251.

in the Gazetteer (pages 68—70), Mr. Mcleod was content with receiving the profits from the renters of the district. Finally, in the year 1801 by a treaty between the Nabob of the Karnatic and the East India Company the District came into the hands of the East India Company, and the first Collector of Madura was Mr. Hurdis. After he took charge, he submitted a number of reports of which we have only Exhibit A before us. It is stated in the Gazetteer that the Board ordered the Collector to restore to the temples the lands resumed from the Pagodas, but for some reason not now traceable Mr. Hurdis never carried out these instructions; and the Devastanam lands remained in the hands of the Government until 1841. In 1842, in pursuance of the policy of the Government to divest themselves of all connection with Indian religious institutions, the Devastanam properties were handed over to a Manager appointed by Government. I am of opinion that the Brahmin priest or Church Brahmin, as Mr. Hurdis calls him, was in possession of the property until he was deprived of it during the Muhammadan invasion in or about the year 1736, that from 1736 to 1790 the Muhammadan Rulers enjoyed the rents and profits, and that finally in 1801 the villages came into the possession of the East India Company. From this date there is no doubt that even, though the possession of the villages was with the Government till 1842, their income was utilised for temple purposes. From 1842 onwards, the general Manager of the temple was placed in possession of these villages.

I may here refer to two documents which have to a great extent influenced my decision in this case, and they are Exhibits V and V*a*. Exhibit V is an extract from the account relating to the Minakshy temple, Arakattalai, prepared for the *jamabandi*. It is dated 1802, shortly after Mr. Hurdis took charge of the district. It gives the name of Thanappa Mudaly as the donor and under the heading "person who is Kattalai Vicharanai," the names given are Nallaperumal Pillai and Ponnambala Pillai. Under the column "property security, personal security," the entry is, "Village Panaiyur, Veerabhadra Pillai; Village Iravatanallar, Muthu Pillai". Now, this document whose authenticity is beyond question gives the names of the above two individuals as being the Kattalai Vicharanaidars, that is the Managers of the Kattalai. It is not pretended that these two persons were the agents of the plaintiff. A feeble suggestion was made that they might have been the agents of the local Tambiran. If that were so, it is inconceivable that the agents of the Tambirans would have been entered as Vicharanaidars when the Tambirans themselves were on the spot. In the next place, these two persons had to find security for the management of the Kattalai. Veerabhadra Pillai of one village and Muthu Pillai of another village stood sureties for the management. If the Tambirans were the actual managers, it is unbelievable that they would not have come forward at least to stand surety for their servants. The only conclusion I can draw from this document is that in the year 1802 Mr. Hurdis appointed these two persons to be the Managers of the Kattalai and asked them to find sureties for their proper management. If any person had any hereditary right at this period, he would certainly have been mentioned in this document. In the next document, Exhibit V*a*, which is with reference to another village, Vilangudi (which is even now in the possession of the plaintiff), the name of the *pattadar* is entered as Nallaperumal Pillai. To my mind, these two documents are almost conclusive evidence that until the year 1802 the plaintiff or his predecessors-in-title had no right whatsoever to the management of this Kattalai. How they got in and under what circumstances, I shall mention later on. But these documents, which are of the same period as the entry of the British Government into possession of the district, are the strongest pieces of evidence against the claim of the plaintiff for a hereditary trusteeship in respect of the Kattalai. If they had acquired any such trusteeship, it must have been subsequent to 1802.

I shall now trace the connection of the plaintiff's Mutt with the management of this Kattalai. It was in the year 1814 for the first time that we hear of a Tiruvaduthurai Tambiran as being in charge of this Kattalai. Exhibit E is an extract from the register of accounts relating to Kattalais. It was compiled in *Fasli* 1224 corresponding to 1814. In the column, "purpose for which the *Inam* was granted and in whose charge"

there are two entries: (a) "to the temple of Minakshy Sundareswara at Madura;" (b) "for Devastanam Oochakala Kattalai in charge of Manickavachaga Tambiran". Under the column "by whom was the *inam* granted," the name of Thanappa Mudaly appears. In this document there is absolutely no reference to any hereditary right in Manickavachaga Tambiran. Manickavachaga Tambiran was admittedly the agent of the plaintiff's Mutt in Madura and he remained in the district from 1814 to 1833. I do not attach any importance to the fact that in Exhibit F, a copy of the above extract sent to the Board of Revenue, the name of Manickavachaga Tambiran does not appear. It was probably not necessary to communicate to the Board of Revenue the fact of the existence of a person who was a mere Manager; but if Manickavachaga had any hereditary right that would have undoubtedly been mentioned in Exhibit E, and it would be a significant omission in Exhibit F, the copy which was sent to the Board. Therefore, on the very first occasion that we hear of a Tambiran's connection with this temple, he is simply referred to as being in charge of the Kattalai.

Then we come to Exhibit G which was prepared in October 1817. It is an account of the budget allotment for the Thanappa Mudaly Kattalai. In giving the names of the persons to whom salaries were paid, under the heading "establishment," the very first entry is Vicharanai (*i. e.*, manager), Manickavachaga Tambiran; and his pay is entered as 3 *pons*, equivalent to Rs. $4\frac{1}{2}$. I cannot believe that if a person had a hereditary right to theloffice of the Trustee, he would have been mentioned under the heading "establishment," and as having been paid a salary of Rs. $4\frac{1}{2}$ a month. It has to be remembered that the other persons who are mentioned in this document are the Monigar who is given the same pay as the Manager, the Kanakkan whose pay is slightly less, the Paricharakan who is paid Rs. $1\frac{1}{2}$, the Purohit (who performs Rudra Japam) who is paid one rupee, and so on. Therefore, in the year 1814 we find a Tambiran of the plaintiff's Mutt entered as being a paid Manager of this Kattalai. Then, we go to Exhibit G2 which is for *fasli* 1226 corresponding to 1816. In the budget for that year, under the heading "establishment" Manickavachaga Tambiran figures as the first of the paid servants and his pay is again entered as 3 *pons* or Rs. $4\frac{1}{2}$. Then we come to Exhibits H6 and H7 which are for the year 1819 and under the heading "name of the donor," the entry is, "granted by Thanappa Mudali, superintended by Manickavachaga Tambiran." Here again, there is no reference to any right of trusteeship as pertaining to the plaintiff's Mutt. These documents are very important. I have already referred to the entry in Exhibit H7, which shows that the original grant was made to a Brahmin and a Pillai. Exhibit H6 is an account of all the endowments of the Pagodas and contains the names of the persons who were managing them. Tirumal Nayick's Kattalai, which comprises more villages than Thanappa Mudali's, has a paid Manager; a large number of similar endowments are also mentioned, each one of them being managed by a paid servant. It is in evidence that all these properties excepting those endowed by one Tirugura Sambanda Swami, are now in the possession of the temple, and no one has ever put forward any claim to them as being hereditary *hukdars*. Then we come to Exhibit J; this belongs to the year 1821. This is a notice issued by the Collector to Manickavachaga. Therein he is referred to as being attached to the Tiruvaduthurai Mutt. It was suggested that the language of this document indicates that the Kattalai itself was attached to the Tiruvaduthurai Muttam. I have looked into the original and I am satisfied that it is not so. Exhibit J is a notice issued by the Collector and the descriptive title of being attached to the Tiruvaduthurai Muttam cannot be construed as indicating that the Kattalai itself was attached to the plaintiff's Mutt. The document certainly does not say that this Manickavachaga was a *hukdar* of the Kattallai. A similar description of this Manickavachaga is to be found in Exhibit II with reference to another village, Kulipatti, which is still in the possession of the plaintiff and about which I shall have to say a few words later on. One cannot attach any importance to notices of this kind sent by the Revenue Authorities, wherein a casual reference is made to the addressee as being attached

to a particular Muttam. The word *hukdar* for the first time appears in Exhibit G1 of the year 1834. There was some argument about the date of this document, but a reference to Exhibit VIII*f* puts it beyond doubt that this document was prepared in the year 1834. This is an account of the budget prepared in that year. The entry very much relied on is, "Beriz of Kudipatti, etc., through the *hukdar*." This Kudipatti was in the possession of the plaintiff's agents in Madura. There is no doubt, therefore, that the reference to "*hukdar*" is a reference to the plaintiff's agent. It is this word "*hukdar*" which was first used in this year that has been given an importance and a meaning which undoubtedly it does not deserve and which has enabled the plaintiff to put forward his present claim. But Exhibit G1, in giving details of the budget under the heading "Sibbandi" or establishment, puts Manickavachaga Tambiran at the head of the list and gives him a salary of 4 *pons* or Rs. 6. If he was *hukdar* in the sense in which that term is now sought to be employed, is it likely that he would have received a salary for doing the honorary duties of a Trustee? The document at the end of it, moreover, says: "Disburse pay to the above-mentioned persons after taking work from them." This does not read as if Manickavachaga was anything but a paid servant.

The other documents, which I do not think it necessary to refer to in detail, are Exhibits II, VII, VII*a*, VIII*b*. They all refer to the Tambiran at Madura as the Superintendent of the Kattalai. Then we have Exhibits M1, M2, M3, M4, which relate to the period when Manickavachaga was succeeded by Namasivaya Tambiran. Exhibit M1 is important, as being the first occasion when a reference is made to the Pandarasannadhi of Tiruvadurthurai. The document says, "that the *arzi* written to our office on the 3rd February current from Pandarasannadhi stating he has appointed and sent Namasivaya for the Vicharanai of the Meenakshy Temple at Madura was received." It was argued by Mr. K. Srinivasa Aiyangar that, unless there was an hereditary right to the Vicharanai of this Kattalai, the Pandarasannadhi of Tiruvaduthurai would not have appointed an agent and intimated the name to the Revenue Authorities in Madura. It has to be remembered that the Tiruvaduthurai Mutt is a religious institution of great sanctity and importance to the non-Brahmins of Southern India. It has extensive properties in almost all the Tamil Districts and, as is customary with such religious institutions it has branches in every important religious centre for the purpose of giving religious instructions to the disciples of the Mutt. And, it is in consequence of this position of the Mutt that agents were from time to time appointed and placed in charge of the Mutt at the sacred city of Madura. I feel no doubt that it was in consequence of the sanctity of the local agent and having regard to the fact that he had a large number of disciples to whom he was giving religious instruction, that originally the Government requested him to be in charge of this Kattalai. As to when the branch of the Mutt of the Tiruvaduthurai Athinam was established in Madura, there is some little doubt. It is said that the grandson of the original Tanappa Mudali built a Mutt in Madura for the residence of the agent. A stone inscription has been exhibited in this case, Exhibit (AJ), which says that it was a gift by this grandson to the Tiruvaduthurai Adhinam. Therefore, the fact that in Exhibit M1 the head of the Tiruvaduthurai Mutt intimated to the Revenue Authorities that he had appointed a local agent is not evidence that the Tiruvaduthurai Mutt had hereditary title to this Kattalai. It is in the natural course of events that the Collector of the district should have looked to the head of the Mutt at Tanjore to send a proper person to manage the affairs of this Kattalai. Exhibit M4 is apparently the order of appointment from the Tahsildar to this Namasivaya Tambiran. It says, "we have ordered you should look after the management in the place of the deceased. You should, therefore, conduct the said Kattalai accordingly." If by the nomination of the Pandarasannadhi a right to the Kattalai trusteeship *ipso facto* accrued to the nominee, how is this to be accounted for that before the nominee could discharge his duties, he had to receive the orders of the Revenue Authorities for that purpose?

In Exhibit VIII*f* which is also of the year 1834, the Manager of the Devastanam writes to the Collector recommending that there should be an increase in the pay of the Vicharanai of the Thanappa Mudaly Kattalai. He points out that the Manager of the Thirumalai Naick's Kattalai gets 20 *pons*, and that it is reasonable that the Manager of the Thanappa Mudaly Kattalai should have an increase. There is no mention of *hukdar* in this document. In Exhibit VIII*g* dated the 16th July 1835, the increase of pay is sanctioned; the entry is, "enter in the accounts pay 8 *pons* a month for him and forward acquittance roll from the 1st August disbursing to him that salary regularly." In Exhibit VIII*h*, a letter written by Namasivaya Tambiran to the Collector, he says: "I succeeded to the post of *hukdar* of the said Kattalai from the Tiruvaduthurai Adhinam. You referred the matter as to my appointment to the Collector of Tanjore District; the authorities of the Tiruvaduthurai Adhinam, therefore, gave deposition before the Tahsildar of Kuttalam Taluq in favour of my being appointed to the place and an order of my appointment was passed on the 25th April 1834..... .....I had been looking after the duties of *hukdar* of the said Kattalai. I am entitled to pay for the said period, namely 16 *pons* I request the orders of the investigating *peishkar* to the said amount in my charge being debited to the *jamakarchu* account and allowed to me." The Collector endorses upon it: "It appears that you did not do the work of Superintendent of the said Kattalai for four months and five days from the date of the death of the late Superintendent to the date of your appointment. Hence there is no need for orders to disburse to you the pay for that period." It is curious that although Namasivaya styles himself as the *hukdar* of the Kattalai, the Collector simply calls him the Superintendent of the Kattalai. It is clear that in the years 1834 and 1835 the term *hukdar* was used as convertible with the term Vicharanai or Superintendent. Thus from the year 1802 to 1835 we hear of the local agents of the Mutt being employed as Superintendents of the Thanappa Mudaly Kattalai: they start on a pay of 3 *pons*; their pay is increased to 8 *pons*; they call themselves Superintendents at first and subsequently assume the ambitious title of *hukdar*; they are placed at the head of the establishment of the servants of the Kattalai; the *peishkar* is directed to get work from them; their pay is stopped for the days that they absent themselves from work. Their duties are defined in Exhibit VIII*f* in these terms: "To take the necessary care in bringing to this place the emoluments from the villages for the purpose of administering the charity attached to the Kattalai; to visit the temple every day and night and exact the temple work without delay from the servants attached to the Kattalai; to see that Padi Kattalai, etc., go on properly and in time to the above Kattalai, and the duty devolves upon the incumbent also to attend with patience and care to all the other duties pertaining to the above Kattalai." These duties are more like those of a paid servant than those of a hereditary office-holder.

Before I leave this period, I shall refer to some documents on which reliance was placed for the appellant. In Exhibit D series after referring to the villages one by one, there is a remark to the effect that the balance was paid to the *inamdar* after deducting the "poruppu" upon the village. It was contended that the reference to the *inamdar* in these documents was to the plaintiff. It has to be remembered that prior to these documents there is no reference to the plaintiff as *inamdar* anywhere. In Exhibit C it is stated that the five villages are the absolute *inam* villages of the temple of "Meenakshy Thanappa Mudaly Kattalai." Reading Exhibit C and Exhibit D it seems to me that the term *inamdar* applies to the idol, and not to the plaintiff who was never before spoken of as the *inamdar*.

Another point which was pressed was that the Tasdik amount was paid to the plaintiff and that that indicates a hereditary right in the plaintiff to spend the income of the village. The evidence upon the question of the payment of the budget amount is very meagre. There is some support to the suggestion made by the plaintiff, in Exhibit N series and also in Exhibit XX. From the stray references to the disbursements of the budget by the

Tambiran one can hardly come to a conclusion that as a matter of right the amounts budgeted for were given to the Tambiran for expending them on the Kattalai. But, granting for a moment that in some years the budget amount was in the hands of the Superintendent for expenditure in the temple, it does not follow that it was entrusted to him as a Trustee. It has to be remembered that the Tambirans were in possession of other villages whose income had been dedicated to this Kattalai and it was only natural that the Government, when they managed the endowment, and the Manager, when he was in charge of the general supervision of the temple, should have given the income from these five villages to the Tambiran, who had other incomes in his hands, for the purpose of expending both together for the Kattalai. To my mind, the evidence only leads to the conclusion that the Tambiran when he was Superintendent was consulted in the preparation of the budget: but that would not amount to a recognition of his right as Trustee of the Kattalai.

Much stress was laid upon the fact that the Tambiran was and is still in possession of certain other villages whose income admittedly is being spent upon the Thanappa Mudali's Kattalai. It has first to be remembered that there is no evidence as to when these other villages came to the possession of the Tambirans. The original contention of the plaintiff that they formed part of the same endowment, is absolutely untenable. Exhibit C of the year 1809 refers only to the five villages as forming the Kattalai. Exhibit D series also refers only to those five villages. Exhibit E, a statement prepared to be sent to the Board of Revenue, does not refer to any village other than the five as forming the Kattalai. Exhibit F is to the same effect. Exhibit VII is decisive of the question. It is an extract from the register of Takids sent to the Tahsildar by the Collector in the year 1827. It says: "Apart from the villages entered in the Tasdik for Thanappa Mudaly Kattalai for Minakshy Sundareswara Madura, there are four other villages for the Kattalai, two in the Karur Taluq, one Kulipatti, and so on." This shows beyond doubt that the original endowment consisted only of the five villages to which reference is made in numerous documents, and that the other villages were not part of the original endowment. As I said before, there is no evidence as to when the other villages came into the possession of the Tambirans and under what circumstances. The decision must depend upon probabilities; but there are certain undisputed facts which would show that these other villages came into the possession of the Tambirans long after the original grant. Exhibit AJ is a stone inscription to be found in the Tiruvaduthurai Muttam, which was a gift "to Namasivaya by one Chockalinga, Mudaliar, who was the son of Koneri Mudaliar and who was the son of Thanappa Mudaliar." The date of this document is not given anywhere, but it must have been two generations after the death of the original founder, Thanappa Mudaliar. We may take it, it was about the end of the 18th century. If the Mutt was founded about that time, it was only natural that the disciples of the Mutt should make grants for the performance of the *puja* in the temple and should make that gift through their religious preceptor who was then in Madura, and as the Oochakala service and Ardajama service are very important rituals in the temple, devotees would have been anxious to supplement the funds of that Kattalai by making grants. This probably accounts for the Tambirans being subsequently appointed Managers of the original endowment. Moreover the fact that these grants consisted of small portions of property in scattered villages is an indication that there was a large number of donors and that they did not come from a common source. As regards Kulipatti the position is somewhat different. It was an *inam* village in the Saptur *zemindari*. There was litigation concerning it its income which was granted either by the *zemindar* or by some other person was not being utilised by the Tambirans for Thanappa Mudaly's Kattalai; complaints were presented by the *zemindar* to the Collector that the income was being misspent. Ultimately there was a suit which resulted in a compromise between the Tambiran and the *zemindari* by which the income was permanently secured for the purposes of the Kattalai. It is very likely that the grant was anterior to the year 1811, because the subsequent

compromise speaks of a previous one in that year. My conclusion is that these other villages including Kulipatti were granted to the agents of the Tiruvaduthurai Mutt who were in Madura, having regard to the fact that they were men of sanctity and in the hope that they would supplement the income from the original villages for the purposes of the sacred *pujas* at midday and at midnight. The possession of these villages is no indication that the plaintiff was the *hukdar* in reference to the original five villages. On the other hand, the fact that they never had possession of these five villages, while they were in possession of the other villages, shows that they were only paid Managers with reference to the former.

I must now deal with the document on which the plaintiff's case practically rests (Exhibit B1). Mr. Rangachariar objected to the admissibility of this document on various grounds. I do not think the document comes under section 35 of the Evidence Act. It is not an entry made by any public officer and as pointed out in *Saraswati Dasi* v. *Dhanput Singh* (3) unless the facts mentioned are within the personal knowledge of the public officer recording it, section 35 will have no application. The decision of the Privy Council in *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillay*, (4) would seem to show that documents of this description are not public documents. But I think the document is admissible under section 13. There is an assertion of certain rights in it and the plaintiff is entitled to rely on it to show that so long ago as 1856 the rights now claimed were asserted. I am also inclined to think that it can come in under section 32, clause 4. There is no doubt about its genuineness, whatever may be the value to be attached to it. It comes from proper custody and in a case of this great magnitude, it is desirable to have the document on record unless it is shown clearly that it is inadmissible. I, therefore, proceed on the footing that Exhibit B1 is admissible in evidence. I must now consider its probative value.

The Collector sent an *arzi* to the *peishkar* of the Madura Devastanam on the 18th November 1836 asking him for particulars regarding the Thanappa Mudaly Kattalai. He asked for the name of the person who founded the Kattalai, the name of the present *hukdar*, the name of the person who collected the money, the name of the person who received and expended the Paditharam, the name of the person to whom accounts were rendered, etc. The *peishkar* asked Namasivaya, who was then Superintendent of the Kattalai, to furnish the requisite information; Exhibit B1 was the result of this request. In order to estimate the true value of this document we will have to look to the credentials of the person who made it. Until 1834 Manickavachaga Tambiran was the Superintendent of this Kattalai. Therefore, Namasivaya was in office only for two years when this information was asked of him. During the two years his conduct of the management was not above suspicion. On the 20th September 1836 we find the Collector finding fault with him for not having given a proper account of the articles purchased for the Kattalai and for having retained in his hands certain moneys without accounting for them, that is, Exhibit VIII*m*. Then we find in Exhibit VIII*n* in November 1836 the Collector stating that other articles purchased were not paid for and that Namasivaya was using the money for purposes of lending it to third parties. The *peishkar* was asked to get an explanation from Namasivaya. In Exhibit VIII*o* Namasivaya tried to put the blame upon the Monigar and the Karnam. In Exhibit VIII*p* the Moniam Gumasta said that it was Namasivaya that was responsible for the misuse of the funds. There was in consequence an inquiry into the conduct of Namasivaya with reference to his management of the funds of the Kattalai. It was at this time that Exhibit B1 was sent by Namasivaya Tambiran. It is dated the 11th January 1837. It would not be an unreasonable presumption to make that Namasivaya was anxious to screen himself from the scrutiny which was instituted against him by pleading that he had a hereditary right to the villages endowed for the Kattalai.

Let us examine the document itself to see whether the recitals in it are reliable. It says that the founder built a Mutt for the Tiruvaduthurai Adhinam at the time of the

(3) 9 C. 431; 12 C. L. R. 12.
(4) 1 I. A. 209.

grant. We know from Exhibit A*j* that the Muttam did not come into existence until the time of Thanappa's grandson. Then, the document says that in addition to the five villages other villages, including Kulipatti, were granted by Thanappa Mudaly. I have shown already that the original grant consisted only of five villages and that the other villages were subsequent accretions to the Kattalai. The statement proceeds to say that Thanappa Mudali built a Mantapam and Arakattalai within the Prakaram ; there is absolutely no evidence of any such construction. Then it says that the grant was made in 1704. The Madura Manual, to which I have frequently referred, shows that Vijia Chockanatha was a minor until the year 1705 and that the Kingdom was being managed for him by Mangammal. It is incredible that any grant would have been made by this young boy at a time when such a masterful person as Mangammal was in charge of the Kingdom. And it is also belied by Exhibit H7, which shows that the grant must have been made in the year 1725. It is next stated in Exhibit B1 that Thanappa Mudaly made the grant to Velappa Pandaram at Tiruvaduthurai Adhinam. As to who this Velappa Pandaram was, there is no evidence. If he was the head of the Tiruvaduthurai Mutt at the time of the grant, he would not have been referred to by a Kattalai Tambiran as Velappa Pandaram at the Adhinam ; the plaintiff could have easily produced the genealogical tree showing the names of the various Pandarasannadhis and the dates of their accession from the records of the Mutt ; that has not been done. It is further in evidence that if a donation is made to the Mutt, it is always made in the name of Namasivaya who was the founder of the Adhinam. (See Exhibit A*j*.) Then we have a curious statement in the document that in the year 1794 Ponnambala Tambiran, the then Manager of the Kattalai, entrusted the management of its properties to the Nabob's Government and that accounts were being rendered to the Tambiran. There is absolutely no record anywhere of such an entrustment and of accounts having been rendered. Lower down there is a reference in this statement to Mr. Hurdis having sent for Manickavachaga Tambiran and having investigated the *mamool* regarding the endowment. This is not borne out by what Mr. Hurdis says in Exhibit A. It was argued that Namasivaya would not have made such a bold statement regarding a Collector unless it was true. If any action was taken directly on this document and if the statement was found to be untrue, a note of it would have been made by the Revenue Authorities: but if a deponent chose to make a statement which did not immediately affect the position of the Government, it is not to be expected that they would have taken the trouble of noting against the statement its falsity. The statement proceeds to says : "As it was not possible for us to make *bandobast* for the collection of the *Aiveji* of the said villages, it was accordingly requested that they should be kept under the attachment by the Circar and the amounts collected, etc." This is pure fiction : there is not a scrap of paper or any other evidence to support this statement. Lastly, the document ends by saying that the records, etc., were lost during the invasions. It seems to me that Namasivaya was drawing largely on imagination, partly for the purpose of saving himself from trouble which was impending regarding his mismanagement of the properties in his possession and partly to give himself an importance, which he did not possess, in the eyes of the Revenue Officials. I am unable to attach any weight to the statements, contained in this document unless they are corroborated in material particulars by other unimpeachable evidence. I may here refer to two documents which do not belong to this period, but which have a bearing on the statements contained in Exhibit B1.

In Exhibit XVII Kandasawmi Mudali, the grandson of Thana Koneri Mudali of Madura, writing on the 24th July 1857 protested against the use of the word *hukdar* by the Tambirans who were managing the Kattalai. Exhibit XVII*a* of September 1857 is also to the same effect. If the original grant was made to the Adhinam and if it had been the *hukdar* for over a century, it is incredible that the descendants of the grantor would have protested against the use of the word *hukdar* by the Adhinam, especially as the Tambirans were the religious preceptors of the community to which the writer of these documents belonged. It seems to me that

we have before us an example of the assumption, in the first instance, of a designation which was innocuous at the commencement but to which subsequently an endeavour is being made to attach privileges and claims which were not originally contemplated.

I have now traced the history of the Kattalai down to 1837 when the statement of Namasivaya was given. I shall very briefly pass over the remaining period, because it is not of any special significance except on the question of limitation. Nothing important happened between the years 1837 and 1840. In 1841, the Government resolved to divest themselves of responsibility for the management of Devastanams throughout the whole of the Madras Presidency. In Exhibit N1, dated the 6th October 1841, the Collector submitted to the Secretary to the Board of Revenue his proposals for the transfer of possession of Devastanam properties from Government to some persons who can be entrusted with the management of their affairs. Then follows Exhibit N2, which is a letter from the Board to the Government sending up the recommendations of the Collector. Exhibit N3 is an extract from a letter from the Court of Directors dealing with the recommendations of the Madras Government. Exhibit N4 is from the Secretary to the Government of India to the Chief Secretary to the Madras Government. As a result of this correspondence, in 1842 one Muthuchella Thevan, who was the Dewan of the Ramnad *zemindari*, was appointed manager of the Devastanam (see Exhibit M7). He was the Trustee of the temple without any hereditary right thereto. That he took possession of the property including the Kattalai is not disputed. Some protest must have been made at this time regarding possession, because we find that in the Exhibit O series final orders were passed in the year 1849 to the effect that possession must be in the General Manager and not in the Superintendent of the Kattalai. This is what Exhibit O3 says : "In the meantime some parties in whose names the Kattalais themselves are entered prefer a claim to possession instead of the Managers of the Devastanams, and Mr. Parker solicits instructions as to whether their wish should be complied with. The Board are of opinion that it may be productive of inconvenience if the administration of the institutions and of their endowments were entrusted to different hands. As a general rule, therefore, the Devastanam villages, whether Sarva *inam* or subject to *jodi*, should be made over to the Managers of the institutions to which they appertain, but should there be any special occasion, the claims of the parties in whose names the Kattalais are entered (by which the Board presume is meant the descendants of the parties by whom the endowments were made) seem to merit particular consideration. The Collector should report such instances for further orders." According to this document, notwithstanding the claims of the Superintendents for possession of the Kattalai properties, the Government deliberately put the General Manager in possession of them. It is important to note that from 1849, notwithstanding the saving clause which enabled persons who had any right to independent possession to come forward and to convince the Collector of their rights, none of the Tambirans had put forward a hereditary right to the possession of the villages. If we contrast this attitude with that of the disciples of one Gnanasambanda Pandaram, who founded a Kattalai and who claimed independent possession as against the Manager and succeeded in establishing it, there can be no doubt that the Tambirans never had or believed they had a hereditary right to possession as Trustees of the Kattalai. After 1849 there were a number of General Managers or Trustees who managed the temple properties including the Kattalai villages. It is only necessary to point out that the persons who were appointed in 1842 and who remained in possession after 1849 were really the Trustees of the temple—See Exhibit N7. Then Act XX of 1863 was passed and under it a Committee was appointed for this temple; the Committee appointed Managers for this Devasthanam from time to time in the same way as the Government did. It is true in some years the Committee was directly in possession of the temple villages. Their possession must be taken to have been as *de facto* Trustees. Anyhow from the year 1842 when the Government handed over management to the person whom they appointed as Trustee or General Manager of

the temple and when in the year 1849 they definitely refused to recognise the right of the Superintendents of the Kattalais to be in possession, the temple Trustee's possession was not on behalf of the plaintiff or with his permission.

There is only one other aspect of the case to be considered before I deal with the question of limitation. It is well-settled that if there is no evidence regarding the devolution of management at the time of grant, the usage of the institution must be the guide. This was laid down in *Nilakandan* v. *Padmanabha* (5) and *Nilakandhen Nambudirapad* v. *Padmanabha Ravi Varma* (6).

What has been the course of management in this institution? As I pointed out more than once, there is no evidence that the founder prescribed any particular mode of devolution. From 1735 to 1800, possession was in the hands of persons who did not recognise the right of the founder of the Kattalai or even of the temple. From 1800 the Superintendents of the Kattalai were not in actual physical possession of the villages. We find that the Superintendent was a salaried officer. There is evidence that as regards dignities, the General Manager took precedence over the Kattalai Manager. We find that the funds of the villages were used, not only for the purpose of the particular Kattalai, but for the general purposes of the temple, such as sanitation, keeping of a garden (Exhibit AA6), general repairs (Exhibits G and G1), lighting (Exhibits XXXIV*az* and XXXIV*d*), employing watchmen (Exhibits XXXIV and XXXIV*h*), Court expenses (Exhibit AA10), repairing of vehicles and so on—thus showing that the income was regarded as part of the Devastanam endowment. From these facts it is clear that the usage of the institution does not show any right in the Superintendents of the Kattalai, whether they called themselves *hukdars* or not, to remain in possession of the villages appertaining to the Kattalai or to receive the income of the villages themselves; on the other hand, the usage indicates that the General Manager of the temple was regarded as the person entitled to possession and management. My conclusion on the facts is that the plaintiff has not established his right to be Trustee of the Kattalai.

I do not attach much weight to the circumstances pointed out by the District Judge in paragraphs 35 and 36 of his judgment They, no doubt, show that the Government scrutinised the minutest details of the management of the Kattalai. The regret is that such supervision and control ceased in 1842. Till then, the Government regarded themselves as being in the position of the ancient Sovereigns of India. These latter managed the Devastanams directly, as is being done to-day in Mysore and Travancore. The documents referred to by the District Judge show that the Government thought it was their duty to see that the income from the endowments was scrupulously applied towards the expenses of the Devasthanam. The acts of interference were not in derogation of hereditary rights, if any there were, but in furtherance of the right of over-lordship which was inherited from the Ruling Chiefs of India: *Venkatabalakrishna Chettiyar* v. *Kaliyanaramaiyangar* (7) shows that similar acts of supervision were not to be considered as depriving of their hereditary right the persons entitled to it.

Upon my finding on the facts the question of law does not arise, but I should like to give my decision upon that question also, having regard to the fact that the learned Chief Justice is inclined to take a different view of the facts. The question of law may be looked at from two positions—one as affecting prescription, the other limitation. Mr. S. Srinivasa Aiyangar contended that as the plaintiff through his agent, the Tambiran, was in possession of part of the properties of the endowment and had also performed part of the functions of the office appertaining to the *hukdarship* of the Kattalai, there could be no adverse possession. The contention of the learned Vakil is that a Trustee can be totally deprived of his rights by another, but there cannot be a partial deprivation of the functions of the office and a partial acquisition of rights appertaining to that office. Neither he nor Mr. K. Srinivasa Aiyangar who argued this point in repl y

(5) 14 M. 153.

(6) 18 M. 1; 21 I. A. 128; 4 M. L. J. 233; 6 Sar. P. C. J. 478.

(7) 5 M. H. C. R. 48.

quoted any authority for this position. They said that they were unable to find direct authority, and one may take it that what the learned Vakils were unable to find, does not exist. I am unable to say that such a right cannot be acquired by prescription. In the case of a landlord, it is now well-established that although he may be in receipt of rents, a person can prescribe as against him the limited rights of a tenant [Vide *Thakore Fatesinghji* v. *Bamanji A. Dalal* (8); *Icharan Singh* v. *Nilmony Balidar* (9); *Subbayya* v. *Madduletiah* (10)]. This amounts to a partial deprivation of the right of the owner and a partial acquisition of that right by another; similarly other limited rights derogating from full ownership can be prescribed. In *Subbaroya Chetty* v. *Aiyaswami Aiyar* (11) it was decided that a widow's estate can be acquired by prescription. It has also been held that where a person who is the real owner of the property holds it in the belief that he is only a tenant, he will acquire a right to the property only as such tenant and that the right as owner can be acquired by another. [See *Secretary of State for India* v. *Krishnamoni Gupta* (12).] The *ratio decidendi* of these pronouncements is that the fact that a person is in possession of property is no obstacle to the acquisition of partial rights in it. Applying this principle, I fail to see why the *hukdar* of the Thanappa Mudali Kattalai could not be deprived of his right to possession whilst still retaining his right to the other dignities connected with the office, and why the General Manager and the Trustee of the temple is not entitled to acquire that possession adversely. Much reliance was placed upon the decision of their Lordships of the Judicial Committee in *Bhaiaji Thakur* v. *Jharula Das* (13). In that case, the office of Panda was capable of being held only by a Brahmin. The co-owners of that office were in the habit of utilising the surplus funds for their own use. A right in this surplus fund was sold to a non-Brahmin, and he was in receipt of the income of the share sold to him. Their Lordships of the Judicial Committee held that the receipt of the income did not give a right to the office of Panda, because, they pointed out, that the office of Panda could not be acquired by such a person. I do not think that that case really helps the plaintiff. The judgment says: "The right to the office of *shebait* did not arise from, or depend upon, the receipt of a share of the surplus daily income from the offerings to the temple, although the right to receive daily a share of the net income from the offerings to the temple was attached to, and dependent on, the possession of the right to the *shebaitship*.....By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, Jharula Das acquired no title and no right to a share of that income.....; it did not constitute him the *shebait* for the time being or affect in any way the title to the office." This case only lays down that the receipt of the income from the office did not constitute the *shebaitship*. I do not think that that case is an authority for the position that an office cannot be split up and that a right to a portion of it cannot be acquired by prescription. The case in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (14) only lays down that there is no distinction between the claim to the office and the claim to the property in regard to the application of Article 124. It does not follow from that that the claim to the property cannot be dissociated from the claim to the office. The decisions in *Raghunatha Chariar* v. *Thiruvengada Ramanuja Chariar* (15) and *Kamalathammal* v. *Krishna Pillai*(16) do not take the matter any further. The decision in *Mulji Bhulabhai* v. *Manohar Ganesh* (17) does not affect the present case. Apart from the observation that the right to the property inheres in the idol, which to a certain extent cannot be controverted, it is no authority for the position that

(8) 27 B. 515; 5 Bom. L. R. 274.

(9) 35 C. 470; 7 C. L. J. 499; 12 C. W. N. 636.

(10) 17 M. L. J. 469.

(11) 1 Ind. Cas. 749; 32 M. 86; 5 M. L. T. 80.

(12) 29 C. 518; 6 C. W. N. 617; 29 I. A. 104; 4 Bom L. R. 537.

(13) 24 Ind. Cas. 501; 18 C. W. N. 1020; 27 M. L. J. 100; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176 (P. C.).

(14) 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29.

(15) 3 Ind. Cas. 123; 19 M. L. J. 257; 6 M. L. T. 167.

(16) 8 Ind. Cas. 998; 20 M. L. J. 781; 9 M. L. T. 73.

(17) 12 B. 322.

there cannot be adverse possession with reference to the right of management of a trustee. On the other hand, we have the authority of *Alagirisami Naickar* v. *Sundareswara Ayyar* (18) which holds that a joint trusteeship can be acquired with another [see also *Kannan* v. *Nilakandan* (19); *Pattaikara Mannakkal Kuppen* v. *Chvorakkapatti Munde Kotttil* (20) and *Jagan Nath Das* v. *Birbhadra Das* (21)]. I am, therefore, of opinion that even thoug the *hukdar* was in possession of some of the properties and was performing some of the functions pertaining to the office, there is no principle or authority which compels us to hold that his other rights could not have been acquired by prescription against him. The quotation from Bacon's Abridgment regarding incompatibility does not apply to the present case. There is nothing incompatible in the Trustee of a temple holding possession of the villages which may rightly be claimed to belong to a subordinate Superintendent.

I think upon another ground, that of limitation, the plaintiff's suit fails. Mr. Rangachariar contended that the proper Article applicable was 142. Mr. Srinivasa Aiyangar, on the other hand, argued that section 10 of the Limitation Act would apply, and that there was no bar of limitation. It has to be remembered that there is no complaint in this case (the contention relating to mismanagement and misapplication of funds were given up in the Court below) that the income of villages is not being utilised for the purpose of the Kattalai ; this is not a suit, therefore, by the plaintiff to recover the property for the Kattalai as against a trespasser, who claims it for himself. The profits of the property are being utilised for the purpose of the trust only ; the person who so utilises them is different from the person who claims a right to utilise them in that way. In such a case, if possession was lost more than 12 years before suit, the claim will be barred by limitation. In *Balwant Rao* v. *Purun Mal* (1) it is pointed out: "Here there is no question of recovering the property for the trusts of the endowment, because the defendant admits that he is a Trustee and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the plaintiff were to succeed in his suit than it is at this moment. The plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment." The conclusion of the Judicial Committee was that the suit would be barred either by six or twelve years' limitation. The principle of the decision has been followed in *Karimshah* v. *Nattan Bibi* (22), in *Nilakandan* v. *Padmanabha* (5) and in *Sankaran* v. *Krishna* (23). In the present case, the claim of the plaintiff, at its best, only amounts to this. The first defendant who is the general Trustee is not entitled to manage the plaint villages and to apply the proceeds for the purposes of the Kattalai, but it is the plaintiff's prerogative to have the management in his own hands and to apply the income himself. The case is exactly covered by the *dictum* of the Privy Council already referred to and by the other cases following it. I, therefore, hold that even if the plaintiff be regarded as the *hukdar* of the Kattalai villages and as being entitled in his own right to their possession, inasmuch as the Government expressly vetoed his right in 1849 and handed over possession to the general Trustee of the temple, his right to recover possession arose in 1849 and he did not choose to bring the suit within 12 years of that period, his claim is barred by limitation.

I, therefore, agree with the learned Chief Justice upon the question of limitation and in his conclusion that the appeal should be dismissed with costs.

Appeal dismissed.

(18) 21 M. 278.
(19) 7 M. 337.
(20) 14 Ind. Cas. 168; 37 M. 373; (1912) M. W. N. 445; 11 M. L. T. 355.
(21) 19 C. 776.

(22) 7 M. 417.
(23) 16 M. 456.

NISARUL RAHMAN *v.* TIKAM DAS.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 29 OF 1912-13 OF BARA BANKI DISTRICT.

April 14, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Shaikh NISARUL RAHMAN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Mahant TIKAM DAS—DEFENDANT—RESPONDENT.

Wajib-ul-arz *showing* muafi *to be resumable, effect of* —Muafi-khairati, *interpretation of.*

An entry in a *Wajib-ul-arz* showing a *muafi* to be resumable is no proof of the fact that the *muafi* is resumable, where the entry is not the record of a custom or practice ascertained after due inquiry, but merely the statement of a landlord in his own favour as that of an interested party.

The word *muafi-khairati* does not in itself imply that the *muafi* has an effect only during the pleasure of the grantor.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 2nd May 1913, modifying the order of the Deputy Commissioner, Bara Banki, dated 29th August 1912, reversing that of the Assistant Collector, Bara Banki, dated 2nd July 1912.

Mr. *Muhammad Faiq*, for the Appellants.

Pandit *Sarju Prasad Misra*, for the Respondent.

JUDGMENT.—The claims made for the appellants are,—*first*, that the *Wajib-ul-arz* of the First Settlement shows the *muafi* to be resumable and, *second*, that as the land in question is *muafi-khairati* it is for that reason to be considered resumable. On both claims I think I must agree with the Commissioner. The *Wajib-ul-arz* was not a *Wajib-ul-arz* prepared to ascertain custom or practice after due enquiry. It was merely the statement in his own favour of an interested party. The word *khairati*, too, does not in itself imply that it has an effect only during the pleasure of the grantor. It is, in my opinion, not proved that this is a resumable grant and the order of the Commissioner is, therefore, upheld and the appeal dismissed with costs on the appellants.

Appeal dismissed.

RAJENDRA KUMAR GHOSH *v.* ADINADI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3245 OF 1911.

May 20, 1914.

Present:—Mr. Justice Teunon.

RAJENDRA KUMAR GHOSH—DEFENDANT No. 7—APPELLANT

versus

Sheikh ADINADI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage suit—Ex parte *decree set aside—Suit on subsequent mortgage and decree against prior mortgagee —Proceedings in first suit re-opened—Subsequent mortgagee impleaded—Limitation Act* (*IX of* 1908), *s.* 18 *—Priority not set up in subsequent suit*—Res judicata *—Civil Procedure Code*(*Act V of* 1908), *s.* 11, *Expl. IV.*

In a suit on a mortgage where a subsequent mortgagee was also impleaded in the name of his *benamidar*, an *ex parte* decree was passed, but the *ex parte* decree and also the sale held thereunder were set aside on the application of the mortgagors. Meanwhile the subsequent mortgagee brought a suit on his mortgage which was also decreed *ex parte*. The proceedings in the 1st suit having been re-opened, the subsequent mortgagee was made a party in his own name, but more than 12 years after the due date specified in the bond, and it was not disputed that prior to the proceedings the plaintiffs' cause of action against the real subsequent mortgagee was kept concealed from him:

Held, (1) that whether section 18 of the Limitation Act was applied or the view be taken that the mortgagee was on the record from the outset in the naem of his *benamidar*, the suit as against him was not barred by limitation; and

(2) that the plaintiffs having failed, in the suit on the subsequent mortgage, to which they were made parties, to set up their right of priority under their prior mortgage, they could not now set up that right and their suit was barred by Explanation IV to section 11 of the Civil Procedure Code.

Appeal against the decree of the Sub-Judge, Khulna, dated 19th August 1911, modifying that of the Munsif, 3rd Court, Bagerhat, dated 30th August 1910.

Dr. *Sarat Chandra Basak* (with him Babu *Bepin Chandra Ghose*), for the Appellant.

Babus *Jogesh Chandra Roy* and *Sarat Chandra Ghosh*, for the Respondents.

JUDGMENT.—This appeal was heard in part on the 28th and 30th January, but it being there found necessary to send for certain records the hearing could not be completed before the 1st of May.

It appears that on the 14th $\frac{\text{Baisakh 1301}}{\text{April 1894}}$ to secure an advance of Rs. 100, defendants Nos. 1 to 5 (the Malo defendants) executed a registered mortgage-bond in favour of one Nazir Sheikh, whose estate is now represented

by the plaintiffs. It further appears that on the 11th $\frac{\text{Aghan 1303}}{\text{November 1896}}$ to secure a further advance of Rs. 200, the Malo defendants next executed a registered mortgage-bond in favour of three ladies, Hiramati Dasi (defendant No. 6), Rajlakhi Dasi and Matangini. Hiramati is the wife of Rajendra Kumar Ghosh, now defendant No. 7, Rajlakhi was the wife and is now the widow of Basanta Kumar Ghosh, whose estate is represented by Rajendra Kumar, and Matangini is the wife of Hemanta Kumar Ghosh, now defendant No. 8.

On the 12th April 1901 the plaintiffs brought their present suit to enforce the mortgage of *Baisakh* 1301 and in this suit they impleaded the mortgagors, the Malos, and also Hiramati as a subsequent mortgagee entitled to redeem. The suit was decreed *ex parte* on the 20th June 1901. The decree was made absolute on the 15th February 1902 and on the 29th July of that year, the mortgaged property was brought to sale and purchased by the plaintiffs, then decree-holders. On the 10th May 1909 the Malo defendants applied to have the *ex parte* decree and the sale set aside and on the 23rd of August of that year both applications were granted.

Meanwhile on the 7th of April 1909 Rajendra Kumar, for himself and as administrator to the estate of Basanta, and Hemanta Kumar brought a suit (No. 283 of 1909) to enforce the mortgage of *Aghan* 1303. They alleged that the ostensible mortgagees, Hiramati, Rajlakhi and Matangini, whom they made parties defendants, were merely their *benamidars* and that the sum advanced was taken from the joint funds of Rajendra, Basanta and Hemanta. They further impleaded the present plaintiffs and one Satu Bibi, a purchaser of the mortgaged properties. In that suit there was a decree *ex parte* against all the defendants on the 11th May 1909. This was followed on the 7th December of the same year by an order absolute, made also *ex parte* and apparently without the issue of notice to any of the judgment-debtors. On the 20th December 1909 an application was made by the present plaintiffs to have the *ex parte* decree set aside. This application was dismissed by the first Court on the 18th July 1910, and by the Appellate Court on the 3rd July 1911.

The present suit having been re-opened by the order of 23rd August 1909, defendant No. 5, Shib Ram, filed a written statement on the 17th September 1909. In accordance with the objections therein taken, on the 21st September 1909 Rajendra Kumar and Hemanta Kumar were made parties and in their written statement filed on the 29th November 1909 pleaded *inter alia* that the suit as against them was barred, *first*, by limitation and *secondly*, by the principle of *res judicata* by reason of the *ex parte* decree in Suit No. 283 of 1909 in which the present plaintiffs, being defendants, had failed to set up any prior lien.

The 1st Court negatived these and the other pleas of the defendants and decreed the suit of the plaintiffs. On appeal by Hiramati, Rajendra and Hemanta, the learned Subordinate Judge agreed with the first Court as regards the plea of *res judicata*, but taking the view that the three ladies, the ostensible mortgagees, were the *benamidars* each of her own husband, on the ground that Rajlakhi and Matangini had never been made parties and that Rajendra as administrator to the estate of Basanta and Hemanta had been impleaded more than 12 years after the due date of payment, dismissed the suit as against the estate of Basanta and as against Hemanta as barred by limitation.

Rajendra now appeals to this Court against the decree made against him personally. There is no appeal by Hiramati and there is no cross-appeal by the plaintiffs.

In the appeal, as in the Court below, the contentions of the appellants are (1), that the suit is barred by limitation and (2) that by reason of the decree in Suit No. 283 of 1909 the present suit is barred by the principle of *res judicata*.

It is not disputed that the appellant was brought on the record more than 12 years after the due date specified on the bond, and in support of the first contention, reliance is placed on section 22 of the Limitation Act (IX of 1908). But it is not disputed that prior to the proceedings of 1909 the plaintiffs' cause of action against Rajendra had been concealed from them. It follows that whether we apply section 18 of the Limitation

Act, or take the view that Rajendra was on the record from the outset in the name of his *benamidar* Hiramati, the suit as against him is not barred by limitation.

The question raised by the second contention is perhaps not free from difficulty. The respondents rely upon the case of *Surjiram* v. *Barhamdeo* (1) and the case of *Musammat Dhapi* v. *Barham Deo Pershad* (2). But in so far as these cases support the contention of the respondents it must, I think, be taken that they have in effect been overruled and the principle laid down in *Gopal Lal* v. *Banarasi Pershad*(3) affirmed by the decisions of their Lordships of the Privy Council in *Muhammad Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (4). The plaint, judgment and decree in Suit No. 283 of 1909 have been put in evidence and it is clear that the suit was not as stated by the Subordinate Judge, for the sale of the mortgaged property subject to all prior encumbrances. No doubt in the plaint the present plaintiffs are described as purchasers, their purchase in execution of their mortgage-decree having taken place prior to the institution of that suit, but they as well as the mortgagors were called upon to redeem. They should, therefore, have set up in that suit their right to priority under their prior mortgage and if they had done so successfully, the decree that has been made against them could not have been made. It would seem, therefore, that Explanation IV to section 11 of the Code of Civil Procedure applies and that the plaintiffs cannot now set up their claim to priority.

The plaintiffs-respondents have then urged that they should be now given an opportunity of showing that all the proceedings in Suit No. 283 of 1909 as against them were fraudulent. It is suggested on their behalf that if they had been aware of the effect of the decree in that suit, they would have taken other and further steps to have the *ex parte* decree set aside. But of the effect sought to be given to that decree they were aware from the written statement filed on the 29th November 1909. Neither then nor when the evidence was taken in August 1910, after the dismissal of their application to have the sale set aside, did they seek to raise this issue. I am, therefore, unable to accede to the prayer for a remand.

In the result this appeal is decreed and the plaintiffs' suit as against the appellant is dismissed. Having regard to all the facts, I direct that as between the appellant and the plaintiffs parties bear their own costs throughout.

Appeal decreed.

(1) 1 C. L. J. 337.
(2) 4 C. W. N. 297.
(3) 31 C. 428; 8 C. W. N. 385.
(4) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1623 OF 1913.

November 23, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

GANGA PRASAD AND OTHERS—PLAINTIFFS —APPELLANTS

versus

RAM PRASAD AND ANOTHER—DEFENDANTS —RESPONDENTS.

Jurisdiction—Suit for declaration between rival claimants to a tenancy—Jurisdiction of Civil or Revenue Court.

The plaintiffs, who were formerly members of a joint Hindu family with the defendants, sued for a declaration that they had some interest in an occupancy holding which belonged to the family. The defendants pleaded that the holding in question had been divided and that the plaintiffs had got consideration for the giving up of all interest therein:

Held, that the claim was one between rival claimants to the tenancy and as such was cognizable by a Civil Court.

Second appeal from the decision of the District Judge of Ghazipur, dated the 7th of August 1913.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they had certain rights in cultivatory holdings specified at the foot of the plaint. The facts up to a certain point seem to be undisputed by either side. It is admitted that at one time both the plaintiffs and the defendants were members of a joint Hindu family. In 1898 there

was a partition of some property, but the *zemindari* and cultivatory holdings remained undivided. In the year 1907 the *zemindari* was divided. The plaintiffs allege that the cultivatory holdings still remained undivided and that the defendants had begun to lay claim to the whole of them to the exclusion of the plaintiffs. Hence they brought the present suit. The defendants raised a number of technical pleas but on the merits their defence was that the cultivatory holdings had also been divided and that the plaintiffs had got consideration for the giving up of all interest therein. This question on the merits has not been decided by the lower Appellate Court. The case in the first instance came before a Subordinate Judge, who seems to have considered that the relation between the parties in respect of the cultivatory holdings was a matter for the Revenue Court, and he accordingly directed the defendants to institute a suit in the Revenue Court. A suit was in fact instituted and the present defendants obtained a decree in their favour. (The Revenue Court, however, as we shall presently show, never decided the real question between the parties.) The present suit then came on for decision before another Subordinate Judge, who had succeeded the learned Subordinate Judge before whom the case came in the first instance. He considered that his predecessor ought not to have ordered any proceedings in the Revenue Court but ought to have decided the present case on its merits. He found that the plaintiffs were entitled to an interest in the cultivatory holdings, and accordingly decreed the plaintiffs' claim. On appeal the learned District Judge came to the conclusion that the finding of the Revenue Court was conclusive and that he was not entitled to go behind it.

The plaintiffs now come here in second appeal, contending that the decision of the District Judge was not correct. It is necessary that we should have clearly before our minds what was the nature of the plaintiffs' claim in the present suit. They claimed that they had an interest in these cultivatory holdings. Their claim was not as *zemindars*, or in any way based on the fact that they may have been, and probably are, *zemindars* of the villages in which these cultivatory holdings are situate. In other words, their claim in the present suit was a claim beween rival claimants to the cultivatory holdings, while the defendants allege that the plaintiffs gave up all claim to the cultivatory holdings for good consideration. A careful examination of the judgments both of the Assistant Collector and the Commissioner in the Revenue Court proceedings will clearly demonstrate that the Revenue Court never decided this question. True it is that the Revenue Court did decide that the plaintiffs were *zemindars* and that the defendants were tenants, but this was not denied. The Revenue Court also seems to have come to a decision as to what was the nature of the tenancy in the cultivatory holdings. Its finding on this question may no doubt be binding, but it has never decided whether or not the plaintiffs had an interest in the cultivatory holdings. Of course it may turn out that the plaintiffs' case is wrong and that the defendants' case is right. All that we decide in the present appeal is that the plaintiffs are entitled to have this question tried out. We allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal upon its original number in the file and to proceed to hear and determine the same according to law. The appellant will have his costs of this appeal including fees on the higher scale. Other costs will abide the result.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 933 OF 1913.

November 13, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

RAMASAMI AIYAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TRICHINOPOLY—DEFENDANT—RESPONDENT.

Madras Compulsory Labour Act (I of 1858), s. 6—

RAMASAMI AIYAR v. SECRETARY OF STATE.

Levying of Kudimaramath *dues—Payment under protest —Suit for recovery—Limitation—Madras Revenue Recovery Act (II of* 1864), *s.* 59—*Limitation Act (IX of* 1908), *Sch. I, Art.* 16.

Steps taken to recover *Kudimaramath* dues under section 6 of Act I of 1858, are in effect proceedings under Act II of 1864, and a person aggrieved thereby must bring his suit for redress within six months from the date of the cause of action as provided by section 59 of Act II of 1864 and not within one year under Article 16 of the Limitation Act, 1908.

The phrase "proceedings under this Act" found in section 59 of Act II of 1864, has the same meaning as "means by which arrears of land revenue are recoverable" in section 6 of Act I of 1858.

Ramachandra v. *Pitchaikanni*, 7 M. 434; *Ravula Vengala Reddi* v. *Secretary of State for India in Council*, 15 Ind. Cas. 328; *Orr* v. *Secretary of State for India in Council*, 23 M. 571; 10 M. L. J. 261; *Sankarappa Naicken* v. *Secretary of State for India*, 7 Ind. Cas. 339; 20 M. L. J. 977; 8 M. L. T. 201; (1910) M. W. N. 404, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suit No. 75 of 1912, preferred against that of the District Munsif of Srirangam, in Original Suit No. 275 of 1909.

Mr. *S. T. Srinivasagopalachariar*, for the Appellants.

The *Government Pleader*, for the Government.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. The Secretary of State for India in Council is the defendant (respondent) in this second appeal. The only question in this case is whether the plaintiffs' suit for damages against the Government is barred by limitation.

The facts are as follows. The Collector of Trichinopoly believed that an old custom (now extinct, according to the finding of the learned Subordinate Judge) of demanding *kudimaramath* labour was still in force and demanded contribution of labour from the plaintiffs and on the plaintiffs' neglecting to so contribute labour, purported to act under Madras Act I of 1858, section 6, and proceeded to recover the value of the labour "by the same means by which arrears of land revenue are recovered." The Collector attached the plaintiffs' crops on 6th October 1908 according to the procedure prescribed in section 8 of the Madras Act II of 1864. Thereupon, the plaintiffs paid up the amount a few days after the attachment. The suit was brought on the 2nd September 1909, more than six months after the attachment of the crops and the payment of the sum for which the crops were attached, but within one year of the said dates. The question is whether limitation for the suit is one year under Article 16 of the Limitation Act (relating to suits against Government to recover money paid under protest in satisfaction of the claim made by the Revenue Authorities on account of arrears of revenue or on account of demands recoverable as such arrears) or whether it is six months, the period provided in section 59 of Act II of 1864 (for suits by parties deeming themselves aggrieved by any proceedings taken under Madras Act II of 1864). The lower Appellate Court has held that the special period of limitation provided in the provisions of section 59 of Act II of 1864 applied and dismissed the suit with costs. Hence this second appeal.

Now section 6 of Act I of 1858 says that the amount payable for *kudimaramath* dues may be recovered "by the same means" by which arrears of land revenue are recoverable. Arrears of land revenue were then recoverable under the provisions of Act XXIII of 1856 (an Act for the better recovery of arrears of revenue under *Ryotwari* Settlement in the Madras Presidency). That Act was repealed by Act XXXIX of 1858, which was again repealed by section 65 of Act II of 1864. Section 65 of Act II of 1864 was itself repealed by Act XII of 1873. But, of course, these repeals of later Acts and sections did not revive the repealed provisions of earlier Acts. (See section 8, clause (*b*), of the Madras General Clauses Act I of 1891.) The references in section 6 of Act I of 1858 to "the means by which arrears of land revenue are recoverable," if made to the provisions of Act XXXIX of 1858, must, by section 18 of the Madras General Clauses Act, be held now to be references to the provisions of Act II of 1864, which repealed Act XXXIX of 1858 but re-enacted most of the provisions of Act XXXIX of 1858. The Collector's action against the plaintiffs for recovery of the *kudimaramath* dues was, therefore, the adoption of "means" under Act II of 1864, which is the Act by whose "means" arrears of land revenue are now made recoverable.

The next question is whether the phrase "proceedings under this Act," found in section 59 of Act II of 1864, has the same meaning as "means by which arrears of land revenue are recoverable" in section 6 of Act I of 1858. If it has the same meaning, a person aggrieved by the adoption of "the means by which arrears of land revenue are recoverable" is, *ipso facto*, a person aggrieved by proceedings taken under Act II of 1864 and it seems to follow that he must bring his suit for redress within six months from the date of the course of action.

Mr. Srinivasagopalachari, the learned Counsel for the appellant, relied upon the cases decided under the provisions of the Madras Abkari Act, the Madras Local Boards Act, the Madras Income Tax Act and the Madras Agricultural Loans Act, in which cases it had been held that a sale of the defaulter's lands (for the recovery of moneys due to Government under those Acts) did not attract the provisions of section 42 of Act II of 1864, that is, did not give the purchaser under the said sale a title free of all encumbrances. The *ratio decidendi* for those decisions was thus stated in the earliest reported case, namely, the case in *Ramachandra* v. *Pitchaikanni* (1), decided by Sir Charles Turner, C. J., and Mr. Justice Muthusami Aiyar: "Section 3 of the Madras Act II of 1864 declares that the land, the buildings upon it, and its products shall be regarded as the security of the public revenue. Section 37 reserves to persons claiming an interest in the land power to save such interest by payment of the arrears. Section 42 declares that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. Taking these sections together, the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue, of which the land is the first security by statutory declaration. By section 10 of the Abkari Act, it is enacted that Collectors may proceed against Abkari renters or other persons licensed under that Act for the recovery of the arrears due by them in like manner as for the recovery of arrears of land revenue, and may further, at their discretion, take the farm under Government management at the risk of the renter, or may declare the lease forfeited, and re-sell the farm at the said renter's risk and loss. The question is:—Has section 42 been extended by section 52 to sales for arrears of Abkari revenue? We must certainly answer it in the negative. The expression, 'In like manner as for the recovery of arrears of land revenue,' indicates only that the same procedure is to be followed, and the language used in section 52 is to the same effect. Arrear of Abkari revenue is not due upon any specific land owned by the Abkari renter, and section 3 of Madras Act II of 1864 can have no application, and section 42, which must be construed in relation to it, cannot otherwise apply." The reason then by which the provisions of section 42 were held not to apply, namely, that those provisions were intended to apply *only when the revenue sought to be recovered had been made the first charge upon the land*, does not seem to apply when we have to consider the ambit of the provisions of section 59 of Act II of 1864, which deals with the limitation period applicable to a suit brought for redress on account of proceedings taken in accordance with the Act. This has been so held in several cases. In *Orr* v. *Secretary of State for India in Council* (2), Sir Arnold White, C. J., and Benson, J., held that even where a demand was made by the Collector, not for recovery of any revenue due to the Government, but for fees payable to the village servants and the demand was complied with under protest, a suit for the recovery of the money so paid should be brought within six months under section 59 of Act II of 1864 read with section 52 of that Act. The question whether a mere issue of a demand can be taken as a proceeding taken under the Act seems not to have been considered in that case. [See *Ravula Vengala Reddi* v. *Secretary of State for India in Council* (3). Also *Ravala Nagama* v. *Secretary of State for India* (4).] But in the present case, an

(1) 7 M. 434.

(2) 23 M. 571; 10 M. L. J. 261.

(3) 15 Ind. Cas. 328.

(4) 18 Ind Cas. 699; (1913) M. W. N. 75.

actual attachment had been made and the question whether the mere issue or even service of a demand is a proceeding under the Act need not be further considered. In *Sankarappa Naicken* v. *Secretary of State for India* (5) it has been quite broadly decided that the special limitation of six months mentioned in section 59 of Act II of 1864 is applicable to a suit brought for any kind of redress, if the cause of action arose out of proceedings which were purported to be held in accordance with the provisions of Act II of 1864. That was a very extreme case in which the suit was brought, not only for recovery of the assessment levied but, for any injunction against the Government who had ordered the removal of certain steps and for a declaration that the site of those steps belonged to the plaintiff. And yet Benson and Munro, JJ., held that the suit even for the declaration and the injunction reliefs was barred because the penal assessment had been levied from the plaintiff in accordance with Act II of 1864, and these other reliefs (for declaration and injunction) were so connected with the grievance relating to the levy of the penal assessment that these other reliefs also came within the purview of section 59 of Act II of 1864. I think I am bound by the uniform course followed in this Court so far as the applicability of section 59 is concerned to such cases. No doubt, the cases in which this special rule of limitation has been made applicable are cases covered by section 52 of Madras Act II of 1864. But that special rule of limitation was applied, not because the sums sought to be recovered by the Government were sums referred to in another section found in the same Act II of 1864 in which section 59 is found, but because those sums were made recoverable in the same manner as if they were arrears of land revenue. On the whole then, though not without some hesitation (hesitation caused by the consideration that Article 16 of the Limitation Act also covers the case and that Courts should incline not to press questions of limitation too hard against plaintiffs), I hold that the present suit does fall within the six months' period provided for by section 59 of Act II of 1864 and that the lower Appellate Court's decision is correct.

The second appeal is, therefore, dismissed but under the circumstances without costs.

HANNAY, J.—I think that the decisions in *Orr* v. *Secretary of State for India* (2) and *Sankarappa* v. *Secretary of State* (5) are authorities binding upon us for the view that the period of limitation applicable to the present case is that prescribed by section 59 of Act II of 1864, and not Article 16 of the Limitation Act. For the reasons given by my learned brother I agree that this second appeal should be dismissed without costs.

Appeal dismissed.

(5) 7 Ind. Cas. 339; 20 M. L. J. 977; 8 M. L. T. 201; (1910) M. W. N. 404.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEALS FROM ORDERS Nos5 AND 594 OF 1912.

March 11, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BAISHNAB CHARAN SHAHA AND ANOTHER—APPELLANTS

versus

THE BANK OF BENGAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXX, rr. 5, 7, O. XXI, r. 50 (1), (2)—Execution—Order directing execution—Decree—Appeal—Partner in a firm individually served—Service without notice, effect of—Failure to appear—Right of decree-holder to proceed with execution.

An order directing execution to issue against a judgment-debtor is a final order under section 47, and is essentially a decree as it determines a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree and as such it is appealable.

The concluding words of Order XXX, rule 5, of the Civil Procedure Code do not merely raise a rebuttable presumption, but lay down a definite rule of law that service on a person without the written notice contemplated by the rule is equivalent to a service as a partner.

Sub-section 2 of rule 50 of Order XXI is only applicable in the absence of the conditions in sub-section 1.

Rule 7 of Order XXX must be read as subject to rule 5 and contemplates only a case where service is on a Manager, and not a case where the person served is deemed to be served as a partner.

Where one of the partners of a firm refused to accept a summons, and the peon hung up a copy of the summons on the outer door of the place of business of the firm, and the partner failed to appear in execution proceedings,

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Held, that he was individually served as a partner and that since notwithstanding such service he failed to appear, it was open to the decree-holder to proceed with execution against him under Order XXI, rule 50 (*i*) (*c*) of the Civil Procedure Code.

Appeal against the order of the District Judge, 24-Parganas, dated 17th September 1912.

Mr. *A. Caspersz*, Counsel (with him Babus *Biraj Mohan Mazumdar* and *Harendra Nath Ganguly*), for the Appellants.

Mr. *J. W. Chippendale*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against an order made on the 17th September 1912 for execution of a decree for money obtained by the respondent (Bank of Bengal) against two firms. The suit was instituted on the original side of this Court against the firms of Dinanath Narayan Chandra Shaha and Churamoni Dey and Jotindra Narayan Dey. As regards the first firm the names of the partners were not disclosed in the plaint, but as regards the second, it was stated that Jatindra Narayan Dey, Narindra Narayan Dey and Ganendra Narayan Dey were the members of the partnership business. The decree as drawn up was against these two firms. We are not concerned with the second firm, as execution in the present instance is sought against three persons who are alleged to have been partners of the firm named Dinanath Narayan Chandra Shaha. The District Judge has dismissed the application as against Lakshikant Shaha, on the ground that he has not been proved to be a partner; but he has directed execution to issue against Abhoy Charan Shaha and Baishnab Charan Shaha as, in his opinion, the case as against them has been brought within the terms of rule 50 of Order XXI of the Code of 1908. The present appeal has been preferred by these two judgment-debtors against the order in so far as it directs execution to issue against them.

A preliminary objection has been taken on behalf of the respondent to the competency of the appeal and reliance has been placed in support of it upon the cases of *Deoki Nandan Singh* v. *Bansi Singh* (1) and *Panch Duar Thakur* v. *Mani Raut* (2). It has not been disputed that if the order made falls within section 47 of the Code of Civil Procedure and is a final order, it is a decree within the meaning of the Code and is liable to be challenged by way of appeal. In order to determine whether the order falls within the terms of section 47, sub-section (1), it is necessary to determine whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. There is no room for controversy that the order relates to the execution of the decree; nor is there any room for discussion that the question does arise between the parties to the suit. The case for the decree-holder is that although the suit was instituted nominally aginst the firm, it was in essence a suit against all the partners of that firm. But it has been argued that the order is not final, and reliance has been placed upon the circumstance that, at the present stage, the District Judge has only directed the issue of a notice under rule 22 of Order XXI, and it has been pointed out that after the judgment-debtors have been arrested, it will be open to them to show cause under rule 40 why they should not be released. In our opinion the fact that it is open to the judgment-debtors to avail themselves of the provision of sub-rule (1) of rule 40 does not alter the nature of the order. The order is not interlocutory and it is final in the sense that, in so far as the execution Court is concerned, it determines finally the liability of these persons to have execution issued against them on the basis of the decree. An order of this description is plainly a final order made under section 47 and is essentially a decree, as it determines a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree [*Jogodishury Debea* v. *Kailash Chundra Lahiry* (3); *Mukhtar Ahmad* v. *Moqarrab Hussain* (4)]. The cases upon which reliance has been placed by the respondent are clearly distinguishable. In those cases, an order had been made by the execution Court determining the value of the property sought to be seized in execution, and it was ruled that an order of that description was not a final

(1) 10 Ind. Cas. 371; 16 C. W. N. 124; 14 C. L. J. 35.
(2) 17 Ind. Cas. 88; 16 C. W. N. 970.
(3) 24 C. 725 at p 739; 1 C. W. N. 374.
(4) 15 Ind. Cas. 50; 34 A. 530; 10 A. L. J. 56.

order, as it determined a merely incidental question as to the mode of conduct of the proceedings. The preliminary objection must consequently be overruled.

As regards the merits of the appeal, it has not been disputed that the casses of the two appellants do not stand on the same footing. In so far as Abhoy Charan is concerned, his case is covered by clause (*b*) of rule 50 of Order XXI of the Code. Sub-rule (1) of clause (*b*) of rule 50 provides that where a decree has been passed against a firm, execution may be granted against any person who has admitted on the pleadings that he is or has been adjudged to be a partner. In so far as Abhoy Charan Shaha is concerned, in the written statement which he filed in the suit on the 25th November 1909 he admitted that he and his partners carried on business in the name and style of Dinanath Narayan Chandra Shaha. His case consequently is completely covered by rule 50, sub-rule (1), clause (*b*), and execution has rightly been directed to issue against him.

The case of Baishnab Charan Shaha stands on an entirely different footing. On behalf of the decrees-holder it has been argued that his case is covered by clause (*c*) of sub-rule (1) of rule 50. That clause provides that where a decree has been passed against a firm, execution may be granted against any person who has been individually served as a partner with a summon and has failed to appear. The question for consideration is, whether Baishnab Charan Shaha was individually served as a partner with a summons in the suit, and notwithstanding such service failed to appear. The facts necessary for the determination of this question may be briefly stated. On the 2nd September 1909, an application was made on behalf of the plaintiff, in which it was stated that Baishnab Charan Shaha was a partner of the firm and it was prayed that the writ of summons in the suits might be served on him on behalf of the firm. On this petition the following order was recorded: "Be it so, at the applicant's own risk, under Order XXX, rule 3, sub-rule (*a*)." That rule provides that where persons are sued as partners in the name of their firm, summons shall be served either (*a*) upon any one or more of the partners or (*b*) at the principal place at which the partnership business is carried on within British India, upon any person having at the time of the service the control and management of the partnership businees, as the Court may direct. It is plain consequently that the plaintiffs elected to have summons served in accordance with clause (*a*) of rule 3 of Order XXX of the Code. When the summons came to be served, so far as can be gathered from the return of the peon, it was tendered to Baishnab Charan Shaha who refused to grant a receipt, whereupon the peon hung up a copy of the summons on the outer door of the place of business of the firm. The affidavit of the identifier describes Baishnab Charan Shaha as the agent of the firm, who was found present and was asked to receive the summons in the name of his master. There is no evidence on the record, except what appears on the affidavit, as to what was precisely stated to Baishnab Charan Shaha. But it may be assumed for our present purpose that the summons was tendered to him and he was asked to receive it as the Manager and agent of the firm. The question arises, whether this mode of service may be deemed individual service on him as a partner within the meaning of clause (*c*), sub-rule (1), of rule 50. As already explained, rule 3 of Order XXX defines the two alternative modes of service of summons in a suit instituted against a firm. The first mode is by service upon one or more of the partners. The second mode is by service upon the person who has the control or management of the business. If service is effected in either of these modes in accordance with law, there is a good service upon the firm as a corporate entity, and it is immaterial whether all or any of the partners are within or without British India. But there is a fundamental difference in the result of the two modes of service. In the case of service upon a partner, there is a good service not only on the firm but also upon the partner personally, which may render him liable in proceedings in execution to the extent stated in rule 50 of Order XXI. On the other hand, if there has been service upon a person who has the control or management of the business but is himself not a partner, although there is good service upon the firm, there is no individual service upon any of the partners. In this latter case, however, the decree-holder is entitled to proceed under sub-rule (2) of rule 50.

In this connection the effect of rule 5 of Order XXX requires careful consideration. That rule is in these terms: "Where a summons is issued to a firm and is served in the manner provided by rule 3 (that is, in accordance with either of the modes specified in that rule), every person upon whom it is served shall be informed by notice in writting given at the time of such service whether he is served as a partner or as a person having the control or management of the partnership business or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner." The object of the notice as to the capacity of the person served is obvious, namely, the Legislature intended to remove the possibility of dispute as to the character in which a particular person has been served. If there is a notice in writing, the person served is apprised of the character in which he is sought to be made liable. The notice may intimate to him that he is served as a partner or that he is served merely as the manager or that he is served in a two-fold capacity, namely, both as a partner and as a manager. It is worthy of note that the language used is, not that the person served shall be *presumed* to be served as a partner, but that the person shall be *deemed* to be served as a partner. The Legislature plainly intended, not merely to raise a rebuttable presumption as to the character in which he was served, but to lay down definitely the legal effect of the service. In the absence of a notice, consequently, the person must be deemed to have been served as a partner, and if he is in reality not a partner he should proceed in accordance with rule 8. That rule lays down that any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared. In the case before us, there was no written notice in terms of rule 5 of Order XXX. Consequently the appellant whose case is now under consideration must be deemed to have been served as a partner, and he cannot rely upon any representation alleged to have been made to him as regards his capacity by the agent of the plaintiff decree-holder. It would, indeed, defeat the whole policy of the law, if the provisions expressly formulated in rule 5 were allowed to be evaded by any representation made at the time of service. The object of the Legislature was to secure the service of process in partnership suits against a firm without practical difficulty, and that object would be completely defeated if the precise statutory rule were allowed to be evaded in the manner suggested by the appellant. There is no room for question that the appellant was duly served. The notice was tendered to him; he declined to sign the receipt and it was thereupon posted on the outer door of the premises of the firm; and the service effected in this manner was clearly in accord with rule 17 of Order V, which has in this respect altered the procedure laid down in section 80 of the Code of 1882. It was, consequently, incumbent upon the appellant to appear in the suit, if he wished to raise the question that he was not a partner of the firm and could not be made liable in that character. Rule 7 of Order XXX, to which reference was made in the course of argument, does not militate against this view. That rule merely provides that where summons is served in the manner provided by rule 3 upon a person having the control and management of the partnership business, no appearance by him shall be necessary, unless he is a partner of the firm sued. In the present case, the legal effect of the service of summons upon the appellant without the prescribed notice under rule 5 was service upon him in his capacity as partner, and the only method by which he could contest his liability as partner was by appearance under protest in accordance with rule 8. On these grounds I hold that the appellant was individually served as a partner with summons in the suit, and that notwithstanding such service, he failed to appear. It is consequently open to the decree-holder to proceed with execution against him under rule 50, sub-rule (1), clause (*c*). The ground upon which the appeal is sought to be supported must consequently be overruled in so far as both the appellants are concerned.

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The result is that the order of the District Judge is affirmed and this appeal is dismissed with costs. We assess the hearing fee at three gold *mohurs*.

The other appeal, it is conceded, will be governed by this judgment, and a similar order will be drawn up therein.

BEACHCROFT, J.—The decree has been passed against the firm of which the appellant Baishnab is alleged to be a partner. Therefore under Order XXI, rule 50 (1) (*c*), execution may be granted against Baishnab who admittedly failed to appear, if it be shown that he was individually served as a partner. That he was individually served there is no question. Not only is service proved, but the appellant relies on the affidavit of the indentifier, who accompanied the serving peon, to support the argument that he was served not as a partner but as Manager of the firm, for it is on this argument that he relies to escape the provisions of Order XXI, rule 50 (1) (*c*).

The appellant did not appear at any stage of the proceedings, still he filed his appeal against the order for the issue of a warrant of arrest against him. It appears that he refused to accept service of summons and it may be a matter for argument whether a person who has refused to accept service of a summons can plead that he was in fact served in one capacity and not in another. This point has, however, not been argued and I prefer to rest my decision on other grounds.

The only question then is whether he was served as a partner.

The application for service of summons on appellant on behalf of the firm alleged that he was a partner in the firm, and the order was for service on him under Order XXX, rule 3 (*a*). The affidavit shows that the summons was handed to him at the place of business of the firm and that he was asked to receive it in the names of his masters, the defendants, the identifier regarding him as the *Am-mukhtar* and agent of the firm. When he refused to give a receipt, the summons was affixed to the door of the place of business. This was good service under Order V, rule 17, whether appellant was served as partner or as a person having the management of the partnership business. Now under Order XXX, rule 5, when a summons has been served in the manner provided by rule 3, the person served is to be informed by written notice whether he is served as a partner or as a person having the control or management of the partnership business or in both characters and in default of notice, he shall be deemed to be served as a partner. The concluding words of rule 5 do not merely raise a rebuttable presumption, but lay down a definite rule of law that service on a person without the written notice contemplated by the rule is equivalent to service with notice that the person is served as a partner. Can this definite rule of law be affected by the fact that the identifier or the serving peon, the affidavit does not state which, asked him to accept the summons in the capacity of Manager, assuming that the affidavit means this, of the firm? I am of opinion that it cannot.

It is clear that a person may be both partner and Manager of the partnership business. Rule 5 of Order XXX also contemplates such a position. The affidavit does not suggest that the request to accept service as Manager involved the representation that appellant was not regarded as a partner. But, in any case, the terms of rule 5 of Order XXX are clear and whether the appellant was addressed as partner or Manager when the summons was handed to him, the absence of a written notice had the effect of making the service as on a partner.

It was suggested that the Court might under Order XXI, rule 50 (2), order trial of the question whether appellant was in fact a partner or not. But that sub-section is only applicable in the absence of the conditions in sub-section (1). I put it to Mr. Caspersz in the course of argument whether clause (*c*) of sub-section (1) of rule 50 would be applicable in the case of a person who was in fact not a partner, if the summons was accompanied by a notice that he was served as a partner. Counsel's reply, which was undoubtedly correct, was that it would be applicable. That being so clause (*c*) must be equally applicable when by Order XXX, rule 5, the absence of the notice has the same effect as

notice that the appellant was served as a partner.

There is no real hardship in the rule. If the appellant wished to take the position that he was not a partner, he could have appeared under rule 8, Order XXX, under protest denying that he was a partner. It is suggested that as he was served as Manager, it was not necessary for him to appear under rule 7. But that rule must be read as subject to rule 5, and contemplates only a case where service is on a Manager and not a case where the person served is deemed to be served as a partner.

The appellant could have appeared under protest, but did not do so and if it be a fact that he is not a partner, he has only himself to thank for not having taken advantage of the steps which the law allows him to protect himself.

I agree that the appeals of both the appellants should be dismissed.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1578 OF 1913.

December 19, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

DEO NARAYAN SINGH—PLAINTIFF—APPELLANT

versus

GANGA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by father—Son's right to question—Alienation made when he was in mother's womb.

A Hindu son subsequently born alive is competent to contest an alienation made by the father when the son was in his mother's womb.

Sabapathi v. *Somasundaram*, 16 M. 176; 2 M. L. J. 244; *Datla Venkatasubba Raju Garu* v. *Gattem Venkatarayudu*, 26 Ind. Cas. 61; 16 M. L. T. 508; 27 M. L. J. 580, followed.

Musammat Goura Chowdhrain v. *Chummon Chowdhry*, W. R. (1864) 340, not followed.

Kalidas v. *Krishna Chandar Das*, 2 B. L. R. 103; 11 W. R. 11 (P. C.); *Hanmant Ramchandra* v. *Bhimacharya*, 12 B. 105; *Minakshi* v. *Virappa*, 8 M. 89, referred to.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated 25th June 1913.

Dr. *S. M. Suleman*, for the Appellant.

Mr. *Durga Charan Banerji*, for the Respondents.

JUDGMENT.—The suit which has given rise to this appeal was brought by the plaintiff-appellant for a declaration that a sale-deed, dated the 17th August 1909, executed by his father, Hansraj Singh, in favour of Naurang Singh, the predecessor-in-title of the defendants, is null and void as against the plaintiff. The validity of the sale is questioned on various grounds. The lower Court has dismissed the suit, on the finding that the plaintiff was born after the date of the sale and is not, therefore, entitled to question its validity. It has further been found that the plaintiff was in his mother's womb when the sale was made, and it is not disputed for the purposes of this appeal that the property sold is ancestral property. The question to be determined in this appeal is, whether a son who was in his mother's womb at the date of an alienation by the father of ancestral property can contest the alienation. The decision of this question depends on the further question, whether a son in the mother's womb can be deemed to be a co-owner of joint ancestral property.

Under the *Mitakshara* a son acquires an interest in ancestral property by birth, the reason for the rule being, as pointed out by Mr. Golap Chandra Sarkar in his work on Hindu Law, page 210, 4th Edition, that the father and other ancestors are reproduced in the son. The question is whether birth relates back to the period when the child was in its mother's womb. Under other systems of law, such as the Civil Law and the English Law, a child is deemed for some purposes to be born when it is in its mother's womb. This rule is in several instances recognised by the Hindu Law. In the case of succession by a posthumous son, he takes a share in his father's property from the date of his father's death and he is regarded as being in existence, though he is only in his mother's womb and not actually born until afterwards. Again, in the case of partition, a son *in utero* at the time of partition is deemed to be in existence and the partition may either be postponed or a share should be set apart for him. [See Strange's Hindu Law, page 182, Jolly's

Tagore Law Lectures page 132; *Kalidas Das* v. *Krishna Chandar Das* (1); Mayne's Hindu Law, section 472, 7 Edition.] It has also been held that the "rights of a son in the womb could not be defeated by a Will made by the father." [*Hanmant Ramachandra* v. *Bhimacharya* (2) and *Minakshi* v. *Virappa* (3).] So that in the cases of succession, partition and Will, a son in the womb has been regarded as one *in esse*. There is nothing to show that in the case of an alienation by sale a different rule obtains. Our attention has not been called to any text of Hindu Law in which an alienation has been excluded from what is deemed to be the general rule. The Courts below have relied on a passage in Mr. Golap Chandra Sarkar's Hindu Law, page 210, 4th Edition, which is as follows: "A child in the womb is not entitled to all the rights of a child *in esse*. A son's right of prohibiting an unauthorized alienation by the father of ancestral property cannot be exercised in favour of an unborn son." The learned author has referred to the case of *Musammat Goura Chowdhrain* v. *Chummun Chowdhry* (4) as an authority for the proposition laid down by him. That case, no doubt, supports his view, but it was dissented from by the Madras High Court in *Sabapathi* v. *Somasundaram* (5). The learned Judges held that "an alienation by a Hindu to a *bona fide* purchaser for value is liable to be set aside by a son who was in his mother's womb at the time of the alienation." In the recent case of *Datla Venkatasubba Raju Garu* v. *Gattem Venkatarayudu* (6) the same Court assumed that a son could contest an alienation made by his father at a time when the son was in his mother's womb. The same view appears to have been adopted by the Bombay High Court. (See West and Buhler's Hindu Law, page 803.) We agree with this view. Both on authority and on principle we are of opinion that a son subsequently born alive is competent to contest an alienation made by the father when the son was in the womb. The Court below was, therefore, wrong in dismissing the suit on the ground on which it dismissed it. We allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it under its original number in the register and dispose of the other questions which arise in the case. Costs here and hitherto will be costs in the cause. The costs in this Court will include fees on the higher scale.

Appeal allowed; Case remanded.

(1) 2 B. L. R. 103 (F. B.); 11 W. R. 11 (O. C.).
(2) 12 B. 105.
(3) 8 M. 89.
(4) (1864) W. R. 340.
(5) 16 M. 76; 2 M. L. J. 244.
(6) 26 Ind. Cas. 61; 16 M. L. T. 508; 27 M. L. J. 580.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 9 OF 1912-13 OF SULTANPUR DISTRICT.

May 22, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

Musammat SARUPA—DEFENDANT—APPELLANT

versus

KARAM ULLAH—PLAINTIFF AND THE DEPUTY COMMISSIONER OF SULTANPUR—DEFENDANT—RESPONDENTS.

Order, cancellation of—Court, one and same—Predecessor-in-office, order passed by—Successor-in-office not to go behind order passed by his predecessor.

So far as one and the same Court is concerned, a successor-in-office cannot go behind the order passed by his predecessor and cancel it as incorrect.

Appeal against the order of the Commissioner, Fyzabad, dated 9th May 1913, upholding the order of the Deputy Commissioner, Fyzabad, dated 26th November 1912, reversing that of the Assistant Collector, Sultanpur, dated 7th September 1912.

Mr. *Muhammad Hakimuddin*, for the Appellant.

Babu *Ram Gopal*, for Respondent No. 1.

JUDGMENT.

BAILLIE, S. M. (*April 8th*, 1914.)—The appellant is entered as the sole tenant of 8 *bighas* 11 *biswas* and the respondent as the sole tenant of 8 *bighas* 11 *biswas*. The total area 17 *bighas*, 2 *biswas*, had been up till 1910 recorded as a single holding. In 1910 there was an order of the Deputy Commissioner by which the present entry was made. The respondent now comes up and says that without his knowledge his holding had been divided up

and half of it entered in the appellant's name. The Court of first instance after receiving a report from the Tahsildar held that the current entries represented the facts properly, that Sarupa was in independent possession of the area in her name and that the respondent had no connection with that land. The application was, therefore, dismissed. The Deputy Commissioner allowed the appeal against this order on the ground that section 39, clause (2), of the Land Revenue Act forbade the record of a division of a holding unless the consent of all the tenants had been attested before a Revenue Court or a Kanungo. He, therefore, ordered that the holding should be entered in the name of the respondent and the appellant recorded as sub-tenant for half of it. This order was upheld by the Commissioner on appeal. It not only cancels the previous order of the Deputy Commissioner passed in 1910, but on the mere ground that section 39 forbade the record of the division of a holding it transferred the name of the appellant from the position it now has as a tenant-in-chief to that of a sub-tenant. If for a moment it be considered that section 39 warranted the orders previously passed being ignored, all that the Deputy Commissioner could have done as a consequence of the application of that section would be to order that the holding be recorded as one with the appellant and the respondent as joint tenants. It appears to me, however, that the order of the Deputy Commissioner was entirely *ultra vires*. The matter had been decided in 1910 by the order of the then Deputy Commissioner, and the present Deputy Commissioner was not entitled to go behind that order or to lay down that it was incorrect.

I would allow this appeal, cancel the orders of the Commissioner and the Deputy Commissioner and restore that of the Court of first instance upholding the entry ordered in 1910. Costs on the respondent throughout.

TWEEDY, J. M.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 694 OF 1913.

September 29, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

S. RAMASAWMY AIYAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

VANAMAMALAI AIYAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Test—Suit by son to set aside sale-deed executed by father, dismissal of—Death of father—Subsequent suit to set aside father's alienation of family property barred—Cause of action—Limitation Act (IX of 1908), Sch. I, Art. 126.

In order to determine whether a suit is barred by *res judicata*, the test to be applied is whether the issue was one on which the judgment of the previous suit was based, quite apart from the question whether the decision itself in the former suit would be affected by the matter being re-opened in the later suit or whether the decision in the former suit could not logically have been based on even a different finding.

Where the plaintiff's suit to set aside a sale-deed executed by his father in the defendants' favour in 1896 was dismissed, and on his father's death in 1910 the plaintiff again brought a suit in October 1911 to have the deed set aside and to recover possession of the plaint lands, alleging that a new cause of action arose on his father's death:

Held, (1) that a finding on the question of possession in the former suit was *res judicata* in this suit, the cause of action in both being the same;

(2) that the suit, being one by a Hindu governed by the law of *Mitakshara* to set aside his father's alienation of family property, was barred by Article 126 of the Limitation Act, as having been brought more than 12 years from the date when the alienee took possession.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Appeal Suit No. 343 of 1912, preferred against that of the District Munsif of Tinnevelly, in Original Suit No. 432 of 1911.

Mr. *T. Rangachariar*, for the Appellants.

Mr. *M. O. Parthasarathy Aiyangar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants are the appellants. The facts are a little complicated. It is necessary, however, to recite only the following to appreciate the questions of law which have to be decided in this second appeal.

The plaintiff's father who died in 1910 executed a sale-deed in favour of the 1st

defendant in 1896, conveying two houses and the plaint lands for Rs. 3,000. The 1st defendant got possession of the lands, according to the 1st defendant's case, in 1896 itself on the date of sale. The plaintiff first brought a suit in 1906 to set aside the sale-deed executed by his father and to recover possession of the plaint lands on the following allegations:

(*a*) That the sale-deed was executed colourably;

(*b*) that it was executed without any consideration;

(*c*) that it was never intended to be given effect to;

(*d*) that the recitals of consideration therein are all false and fictitious;

(*e*) that the 1st defendant had no right or necessity to execute the sale-deed; and

(*f*) that the said document is not valid and binding on the plaintiff.

That suit was dismissed with costs on the following findings of the lower Appellate Court:

(*a*1) that the sale-deed, Exhibit A, was not a colourable transaction;

(*a*2) that Rs. 1,995-8-0 of the Rs. 3,000, purchase-money, did pass as consideration for the sale and that that Rs. 1,995-8-0 went in discharge of debts binding on the plaintiff; and

(*a*3) that possession of the houses and lands at once passed to the 1st defendant.

Having failed in inducing the Court to set aside the sale-deed of 1896 in his previous suit of 1906 and having had those findings of fact, namely, (1) that the sale-deed of 1896 was a real transaction, (2) that nearly Rs. 2,000 of the purchase-money had been paid by the 1st defendant to the plaintiff's father for discharging antecedent debts, and (3) that possession had at once passed to the 1st defendant of the properties sold, given against him in the former suit, the plaintiff has brought the present suit in October 1911 praying in effect for the very same reliefs as in the former suit, namely, the setting aside of the sale-deed of 1896 and the recovery of the plaint lands from the defendants, and he relies in this suit on practically the very same allegations as in the former suit. There are, of course, some additions made in this suit both to the allegations made in the body of the plaint and to the reliefs prayed for at the end of the plaint. As regards the additional allegations in the plaint, the only material additional allegation is that even if there were antecedent debts to be paid out of the purchase-money as recited in the document, Exhibit A, such antecedent debts are not binding on the plaintiff's family. (See paragraph 5 of the plaint in this case.) As regards the additions made in the prayer portion, these additions consist of prayers for alternative reliefs, namely, that if the entire properties could not be delivered to the possession of the plaintiff, "such of the properties or portions thereof" as the Court thinks fit "may be delivered, either unconditionally or subject to conditions, to the plaintiff."

In the plaint in the present suit, the plaintiff has carefully avoided controverting the final finding of the Court in the former suit, that the possession of the plaint lands passed in 1896 itself to the 1st defendant. Not only did he not expressly controvert that finding, but he dates the cause of action for the present suit in 1896, though he gives that date, not on account of the fact that that date is the date of the taking of possession of the alienated properties by the 1st defendant, but because it is the date of the sale-deed. He further admits in paragraph 11 of the plaint in this case, as I understand that paragraph, that the present suit is *prima facie* barred by limitation. He, however, claims the benefit of section 14 of the Limitation Act, basing that claim upon the fact that the Suit of 1906 was finally disposed of only in 1911. He further wants to get out of the bar of limitation by contending that a new cause of action arose in his favour when his father died in 1910. He did not repeat in the plaint in this suit his allegation in the plaint in the former suit of 1906 that he was in possession till 1903. The lower Appellate Court's statement in paragraph 14 of its judgment, that according to the plaintiff the possession of the lands passed to the defendant only in March 1903, is not based on the pleadings in this case and it is in fact opposed to the inference to, be drawn from the deliberate omission of the plaintiff to repeat in the plaint in this suit that he lost possession in 1903 and that he is relying upon section 14 of the

Limitation Act to save himself from the bar of limitation.

The learned District Munsif dismissed the plaintiff's suit as barred by *res judicata* and as barred by limitation. The lower Appellate Court first remanded the case to the District Munsif for findings on three issues, the first of which was, "When did the defendants in Original Suit No. 432 of 1911 get possession of the *nanja* lands sued for ?" The learned Subordinate Judge gave no reasons for this order of remand except stating that "it appeared" to him "that for the right decision of the suit" those issues should be remitted for trial and findings. When the District Munsif submitted the finding that the defendants got possession of the *nanja* lands sued for in 1896 itself, the lower Appellate Court did not accept that finding and it decided on the fresh evidence (which was allowed to be adduced in the District Munsif's Court in pursuance of the remand order) that the plaintiff lost possession only in 1903, and that the defendants' possession became adverse to the plaintiff only in 1903, holding further that the finding in the former suit that possession had passed in 1896 itself was not *res judicata*. I might further add that among the 11 grounds of appeal to the lower Appellate Court by the plaintiff, there is not a single ground which says that the plaintiff lost possession only in 1903 and that, therefore, the suit is not barred by limitation. On the other hand, the 4th, 5th and 6th grounds in the appeal memorandum relied solely upon section 14 of the Limitation Act to save the bar of limitation. Not only this, the plaintiff did not let in evidence before the Munsif in the first instance on the question of the date when he lost possession and there is no allegation in the grounds of appeal to the lower Appellate Court that he was precluded from letting in any evidence, and yet the lower Appellate Court in its remand order permitted him to let in fresh evidence on the question of when he lost possession.

It is unnecessary to deal further with the point whether the lower Appellate Court was justified in remanding the case to the Court of the District Munsif to give a finding on the question of possession and whether it was justified in upsetting that finding on the new evidence taken on remand. I am clearly of opinion that a finding on this question of possession in the former Suit No. 111 of 1906 is *res judicata* in this case against the plaintiff. The fifth issue in the former suit was, whether the sale to the present 1st defendant by the father of the present plaintiff in 1896 was only a colourable transaction. One of the main questions to be considered in arriving at a finding whether a sale-deed is a colourable transaction or a real transaction, is whether or not possession of the property sold passed to the vendee from the vendor. The District Munsif who decided the former case found in paragraph 21 of his judgment that possession was not parted with by the plaintiff's father to the 1st defendant (vendee), though the *patta* and *kist* receipts began to stand in the vendee's name from the date of the sale-deed, 1896. (See Exhibit 13.) But, on appeal, the lower Appellate Court went into the same question elaborately in paragraphs 17 to 22 of its judgment (Exhibit F) and found that vendee got possession at once in 1896. Now, it seems to me under section 11 of the Civil Procedure Code, that the question when the 1st defendant got into possession under his sale-deed of 1896 was directly and substantially in issue in the former suit between the same parties litigating under the same title in a Court competent to try this subsequent suit and was heard and finally decided in the defendant's favour. The learned Subordinate Judge in this case tried to get over the bar of *res judicata* by the following argument. Though the question was tried and decided in the former suit, that question was only of relevant fact and not a fact in issue. That suit would have been dismissed even if the Court found that possession passed to the vendee only in 1903, as that Court could have found the sale to be a real transaction even if the possession passed only in 1903. The question of possession was not, therefore, essential to the decision of the former suit.

I am clear that the above reasoning is fallacious. The question of *res judicata* has to be decided, not on a consideration whether the decision of the controverted point was *essential* or *necessary* to the decision of the former suit, but upon the question whether

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it was *directly* and *substantially* in issue in the former suit. The word 'substantial' has not such a stringent signification as the word 'essential' or the word 'necessary'. In the Full Bench case reported in *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana* (1) Sundra Aiyar, J., has considered very elaborately the question of *res judicata*, and the test he lays down is whether the issue was one on which the judgment of the previous suit was based, quite apart from the question whether the decision itself in the former suit would be affected by the matter being re-opened in the later suit or whether the decision on the former suit could not logically have been based on even a different finding. There can be no doubt on a perusal of the judgment of the lower Appellate Court in the former case that the decision therein was clearly based on the finding on the question, when the possession of the alienated properties passed to the vendee. Of course, the decision on each one of several relevant facts on which a finding is based may not be *res judicata* unless that relevent fact can itself be considered a *substantial* question in issue. As to what is a substantial question and what is not a substantial question no invariable rule can be laid down except that if the parties by their conduct of the litigation clearly treated it as a substantial question and the Court also further treated it as a substantial question, it would be almost conclusive to show that that question was one substantially in issue.

Holding as I do that the decision on the question of possession in the former suit is *res judicata*, it is clear that under Article 126 of the Limitation Act the present suit, which is brought in effect to set aside the alienation made by the plaintiff's father in favour of the 1st defendant, is barred by limitation. The lower Appellate Court after remanding the case for the decision of the issue as to when possession passed, has considered (when the case was returned to it) the quite irrelevant question, namely, when the first defendant's possession became adverse to the plaintiff, and then applied Article 144 of the Limitation Act. Article 126 of the Limitation Act clearly applies to the facts and that Article says that a Hindu governed by the law of *Mitakshara* has got twelve years to set aside his father's alienation of family property, the time from which the period begins to run being the date *when the alienee takes possession of the property.* This suit, therefore, brought in 1911 is clearly barred by limitation.

I might further state that, in my opinion, not only is the question of possession *res judicata* by the decision in the former suit, but even the whole suit itself in the present case is barred by limitation by the decision in the former suit. The mere addition of a further useless allegation in the plaint in this suit that the plaintiff's father's antecedent debts, if true, are not binding, cannot make the present plaint to be based on a different cause of action from the cause of action set out in the former suit. It may be remarked that there is not even an allegation in the plaint that the antecedent debts are illegal or immoral. Nor can the addition of some alternative reliefs, which might and ought to have been claimed in the former suit, change the character of the suit. On this question, I shall only repeat the quotation which I made in the judgment of the above Full Bench case: "The same set of facts, which the mind at once grasps as jurally integral, ought not to be made the basis of repeated proceedings; the complaining party is allowed to frame his complaint in various ways, and the rule obtains that all the circumstances, which exist when the former of two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is substantially the same.....Under a freer system of procedure, such as that of the Equity Courts in England or of the Civil Courts in India, second suits are to be admitted more sparingly than when the plaintiff has to proceed by set forms of action. As he can bring forward his whole case, unfettered by artificial restraints, and seek all remedies that the Court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the

(1) 17 Ind. Cas. 445; 37 M. 70; 12 M. L. T. 500; 23 M. L. J. 543; (1913) M. W. N. 1.

Courts by repeated investigations of a set of facts which ought all to have been submitted for adjudication at once. His cause of action, into whatever Protean forms it may be moulded by the ingenuity of Pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference."

In the result, I would reverse the decision of the lower Appellate Court and restore that of the District Munsif, dismissing the suit with costs throughout in all Courts.

The memorandum of objections cannot be maintained, as it relates to a matter which ought to have been contested by an appeal from the District Munsif's decision to the Subordinate Judge and was not so appealed against.

NAPIER, J.—I concur.

Appeal allowed; Suit dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 36 OF 1913.

December 14, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

DINYAR D. HIRJI KHORSHED—APPELLANT

versus

MAUNG INN AND ANOTHER—RESPONDENTS.

Mortgagor and mortgagee—Agreement that mortgaged property shall be deemed sold if interest not paid on certain date—Failure of payment—Suit for specific performance—Interest after specified date, whether allowable to mortgagee.

Where a mortgagor agreed with his mortgagee that if he failed to pay all the interest due on the mortgage-money on a particular date, the mortgaged property shall be deemed to be sold to him for a certain amount and he should be paid the difference between that amount and the mortgage amount with interest due thereon; and on his failing to pay the interest on the specified date, the mortgagee sued for specific performance of this contract:

Held, that, as Equity regards as done what should have been done, the mortgagee became the owner of the property on the date the mortgagor failed to pay the interest and that he is not entitled to any further interest on the mortgage-money, but that he should pay to the mortgagor the difference between the purchase-money and the principal and interest due thereon up to the specified date.

Mr. *N. N. Burjorji*, for the Appellant.

Mr. *Ormiston*, for the Respondents.

JUDGMENT.

Fox, C. J.—One G. W. Davis mortgaged some land to Maung Shwe Goh, one of the respondents in this appeal, to secure the re-payment of Rs. 50,000 and interest. Being unable to re-pay the amount due on the mortgage, Davis wrote a letter in the following terms:—

"Rangoon, 4th April 1906."

"My dear Maung Shwe Goh,

"I write this to inform you that as I have not yet got the interest due on Rs. 50,000 ready now, I request you to give me three months more for payment to you or all interest due thereon. Should I fail to do so on or before the 6th July 1906 I agree to the whole land being sold to you for rupees one lakh (Rs. 1,00,000). After deducting out of this amount Rs. 50,000 already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally."

Davis did not pay the interest due on the 6th July 1906. Maung Shwe Goh called upon him to carry out the promise to sell the land contained in the above letter. Davis repudiated the letter. On the 17th August 1906, Maung Shwe Goh instituted a suit for specific performance of the contract. Litigation between the parties went on until July 1911, when His Majesty's order in Council on an appeal by Davis was passed. Davis had been ordered by an Appellate Bench of this Court to specifically perform the contract. His appeal against this decision was dismissed. Davis remained in possession of the property until the 24th March 1911, but paid no interest on the mortgage. In taking the account of what should be deducted out of the purchase-price of rupees one lakh, the Deputy Registrar allowed Maung Shwe Goh the principal, Rs. 50,000, and interest up to the 24th March 1911. Principal and interest amounted to Rs. 85,784-5-1. This calculation was confirmed by the Original Court. The appellant, who is a second mortgagee of the land, appeals against the order, contending that Maung Shwe Goh should only be allowed interest on the mortgage upto the 6th July 1906. The letter above set out appears to me to contemplate that the land should be Maung Shwe

Goh's if Davis did not pay the interest due on the mortgage before the 7th July 1906, and if Maung Shwe Goh paid Davis the difference between the amount due on the mortgage up to that date and a lakh of rupees. Both parties must have contemplated that Davis' liablility to pay interest on the mortgage after that date should cease. It may be noted that Maung Shwe Goh was anxious to get the land at the price and there can be no doubt of his intention to pay what he had to pay if Davis failed to pay the interest due. If the agreement had been carried out, the mortgage would in law have become merged in Maung Shwe Goh's ownership of the land. Under the circumstances the maxim that Equity regards as done what should have been done is applicable.

In *Birch* v. *Joy* (1) the Lord Chancellor St. Leonards made the following remarks upon the relationship between seller and purchaser when a contract for a sale of land is made: "From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase-money, and that purchase-money not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of Equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller has the estate vested in him; but they exchange characters in a Court of Equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate."

According to this, Maung Shwe Goh was entitled to the rents and profits of the land from the 7th July 1906 and Davis was entitled to receive from Maung Shwe Goh interest on the amount of money the latter should have paid on that date.

The fact that Maung Shwe Goh omitted to claim the rents and profits in his suit, cannot alter the position of the parties and enable him to continue his mortgage and so obtain subsequent interest after the date on which he in Equity became owner of the property.

The case of *Wallis* v. *Bastard* (2) relied on by the respondent's Advocate was a case in which a purchase by a mortgagee from her mortgagor was involved. I do not gather from the report that any different principle was adopted by the Court. The mortgagee obtained possession of the land a little more than three months after her purchase, but she did not pay the full purchase-money. Many years after sale, persons claiming through the mortgagor brought a suit for the balance of purchase-money due and claimed interest on it from the date on which the mortgagee had obtained possession after that date. No interest had been claimed or paid on the mortgage. The decision was that the amount due on the mortgage at the time when the mortgagee obtained posssession should be set off against the purchase-money, and the balance of such purchase-money after deducting the set-off should bear interest.

No doubt interest on the mortgage was allowed up to the time when possession was obtained by the mortgagee, but the case was one in which there had been no connection between the parties at the time, and the Lord Chancellor inferred, from the circumstances of possession having been taken in 1842 by the mortgagee and of no claim having been made for interest by either party, that there had been a perfectly understood agreement between them that one debt should wipe off a portion of the other debt.

In the case we have to deal with, there is nothing to indicate that there was a perfectly understood agreement that Davis should go on being liable for interest on the mortgage after the 6th July 1906, against which should be put interest on the amount due by Maung Shwe Goh up to the time the purchase-money was paid in full.

I would allow the appeal and setting aside the order appealed against, direct that an account be taken of what was due for principal and interest on the mortgage up to the 7th July 1906 and that Maung Shwe Goh be ordered to pay into Court the difference between that amount and one lakh of rupees. Maung Shwe

(1) (1851) 3 H. L. Cas. 565 at pp. 590, 591; 10 Eng. Rep. 222 at p. 233; 88 R. R. 212 at p. 224.

(2) (1853) 4 DeG. M. & G. 251; 17 Jur. 1107; 2 Eq. R. 508; 2 W. R. 47; 22 L. T. (o. s.) 162; 102 R. R. 115; 43 E. R. 503.

Goh should pay the costs of this appeal five gold *mohurs* being allowed as Advocate's fee.

PARLETT, J.—I concur.

Appeal allowed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 254 OF 1914.

December 15, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

Kunwar MAN SINGH—DECREE-HOLDER—APPELLANT

versus

AMANTAKA PRASAD—JUDGMENT-DEBTOR—RESPONDENT.

Transfer of Property Act (IV of 1882), *s.* 52—Lis pendens—*Purchaser in simple money-decree between decree* nisi *and decree absolute, liability of*—Pendente lite.

The purchaser of a property in execution of a simple money decree between the date of passing a preliminary decree for sale under Order XXXIV, rule 4, and a final decree under rule 5 of the Order in respect of the same property, is a purchaser *pendente lite* and is liable to the provisions of section 52 of the Transfer of Property Act, and his purchase cannot in any way affect the rights obtained by the decree-holder under the preliminary decree.

Execution first appeal from the decision of the Second Additional Subordinate Judge of Aligarh, dated 18th April 1914.

FACTS.—Kunwar Man Singh, the decree-holder, obtained a preliminary decree for sale under Order XXXIV, rule 4, Civil Procedure Code, on 31st of May 1913, against Jaikishore. Out of the many properties involved in the decree, one was sold in execution of a simple money-decree on 21st July 1913 and was purchased by the respondent, Amantaka Prasad. The final decree for sale under Order XXXIV, rule 5, Civil Procedure Code, was passed on 6th January 1914. The decree-holder applied for execution of the decree against Anantha Prasad as well and sought relief against him too. Amantaka Prasad objected to the execution of the decree, contending that he was wrongly impleaded in the execution proceedings and that his purchase was binding on the decree-holder. The lower Court allowed his objection and ordered his name to be struck off from the application.

The decree-holder appealed to the High Court.

Mr. *Gulzari Lal*, for the Appellants:—The respondent, Amantaka Prasad, purchased the mortgaged property during the pendency of the mortgage suit. He cannot have any right higher than that of the judgment-debtor. He purchased the property subject to the result of the suit and he is bound by the decree.

No doubt under Order XXII, rule 10, any person deriving title during the pendency of a suit may be brought on the record, but the rule is only an enabling provision and does not make it obligatory on the plaintiff or the decree-holder to make such a person a party to the suit or the proceedings. The mere fact of the respondent not having been impleaded as a party to the suit does not show that he is not bound by the decree.

Dr. *Satish Chandra Banerji*, for the Respondent:—I rely on *Kadir Buksh* v. *Jawala Prasad* (1). It was held that if a person who purchased the rights of the judgment-debtor was no party to the final decree, he was not bound by the decree.

[PIGGOTT, J.—Have your clients acquired any rights in view of section 52 of the Transfer of Property Act?]

This is not the question here. The question which has to be decided in this case is whether a decree to which the respondent was no party, could bind him. I submit that under the circumstances as exist in this case the decree is not binding on the transferee.

Mr. *Gulzari Lal*, in reply, referred to *Faiyaz Hussain Khan* v. *Prag Narain* (2).

JUDGMENT.—This is a first appeal by a decree-holder in an execution case. A preliminary decree for sale under Order XXXIV, rule 4, Civil Procedure Code, was obtained on the 31st of May 1913 against one Jai Kishore. Several properties were involved in this decree. One of these properties was put up for sale on the 21st July 1913 in execution of a simple money decree and was purchased by the respondent, Amantaka Prasad. The final decree for

(1) 1 A. L. J. 288 at p. 291.

(2) 29 A. 339; 11 C. W. N. 561; 4 A. L. J. 344; 5 C. L. J. 563; 17 M. L. J. 263; 9 Bom. L. R. 656; 2 M. L. T. 191; 10 O. C. 314; 34 I. A. 102 (P. C.).

sale under Order XXXIV, rule 5, Civil Procedure Code, was passed on the 6th of January 1914. In applying for execution of this decree the decree-holder named Amantaka Prasad as one of the persons against whom relief was sought and notice was issued to Amantaka Prasad accordingly. The latter appeared in Court, presenting a petition of objections, in the course of which he did not content himself with alleging that he had been wrongly impleaded in the execution proceedings but claimed further that, by reason of certain events, his purchase was in some way or other binding on the decree-holder, so that the property purchased by him ought not to have been put up for sale. In dealing with this matter the Court below has contented itself with saying that the decree-holder might have impleaded Amantaka Prasad in the interval between the preliminary decree for sale and the decree absolute. As he has not done so, he was not justified in trying to bring Amantaka Prasad on the record as the legal representative of the judgment-debtor in subsequent execution proceedings. The formal order which followed was to the effect that Amantaka Prasad's objection is allowed, and his name be struck off the application for execution and the execution proceedings. As it stands. this order appears to be one that the property in *Mouza* Yahiapur involved in Amantaka Prasad's objection should not be put up for sale in execution of the decree. If this be the effect of the order, it seems to us that it was clearly wrong; but we are informed that it has not been interpreted in this sense and the property has actually been sold. Whether this be so or not, we think it advisable to amend the formal order lest it should give rise to difficulty hereafter. In our view Amantaka Prasad was a purchaser *pendente lite* pure and simple. He was liable to the provisions of section 52 of the Transfer of Property Act (IV of 1882) and his purchase could not in any way affect the rights obtained by the present appellant under the preliminary decree for sale. A case in many respects similar to the present, though somewhat stronger, decided by their Lordships of the Privy Council, is that of *Faiyaz Husain Khan* v. *Prag Narain* (2). If the appellant now before us has made any mistake, it has been in seeking to implead Amantaka Prasad at all in the execution proceedings. He does not admit that Amantaka Prasad acquired any title under his auction-purchase, and consequently should not have attempted to treat him as the legal representative of the judgment-debtor. If Amantaka Prasad had chosen of his own accord to come into Court, as a person in possession of property which was in danger of being sold in execution of a decree, and asked the Court to adjudicate on the matter, he might have been entitled to a hearing. As the case stands, we think that that portion of the lower Court's order which simply directed the name of the appellant to be struck off the file of the execution proceedings was correct. We so far allow the appeal that we amend the formal order of the Court by directing that the first few words of that order shall run thus, namely, "that the objections be so far allowed that the name of Amantaka Prasad be struck off, et cetera, et cetera." In other respects the appeal is dismissed. We leave the parties in this Court to pay their own costs.

Appeal partly allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14 OF SAHARANPUR DISTRICT.

May 16, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Rai Bahadur Lala JOTI PRASAD AND OTHERS—APPLICANTS—APPELLANTS:

versus

Chaudhri BALWANT SINGH AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Mutation, ordinary practice in—Trustee, possession with, mutation in case of—Sale, mutation claimed on basis of—Possession to be shown in disputed cases—Vendor in possession and disputing vendee's claim to mutation—Vendee cannot claim mutation—U. P. Land Revenue Act (III of 1901), *ss.* 34, 35, 40.

Where possession is with a trustee, mutation is ordinarily effected in favour of persons on whose behalf the possession is held.

In no disputed case, whether of sale, mortgage or lease, can mutation be given unless it is shown that the applicant has possession or that possession is doubtful.

JOTI PRASAD *v.* BALWANT SINGH.

Where the vendor is in possession and disputes the vendee's claim to mutation, the latter cannot get mutation in his favour.

Appeal against the order of the Commissioner, Meerut, dated 27th February 1914.

Messrs. *W. Wallach* and *Abdulla Jan*, for the Appellants.

Mr. *S. P. Boys*, for the Respondent.

JUDGMENT.—Appellant's case has been placed before me at some length and as favourably to his claim as it could possibly have been done. The matter, however, appears to me to be so clear that no very lengthy judgment is required. Respondent must, I think, be held to be in possession and he has actually got *dakhil kharij*. He is held to be in possession, not because he collected certain odd sums from the tenants, but because on the 25th July the High Court directed that the Receiver, who was in possession under their orders, should make over charge of all the immoveable property concerned in Raja Balwant Singh's suit for possession to Raja Balwant Singh and because on the 7th August the Receiver, in accordance with these orders, delivered over possession by making over all the papers of the estate to Raja Balwant Singh.

The order of April 1913 giving *dakhil kharij* in favour of Raja Balwant Singh has been given slight consideration, but it was a valid and proper order passed without objection by the appellants. It is true that the actual possession at that time was that of the Receiver, but mutation is under ordinary practice effected in favour of persons on behalf of whom possession is held by a trustee.

Appellants claim record in accordance with a sale-deed executed on the 3rd March 1911. It was not, as the Commissioner says, a contract to sell; but an out and out sale in consideration of Rs. 1,50,000. This deed was executed while Raja Balwant Singh was suing the Rani for possession, and instead of the usual covenant for immediate possession, it contains a contract by Raja Balwant Singh that "*bad hasil ho jane apne qabze ke qabza waqai upar jaedad mubaiya ke mushtarian ka kara dunga,*" and that till such possession was given he would pay Rs. 5,000 profits annually. The validity of this sale-deed was confirmed by the result of a suit brought by Raja Balwant Singh, and decided on the 3rd November 1911, to have the deed set aside on the ground of fraud. In that suit, the plaintiff withdrew from his claim and acknowledged that he had received the consideration mentioned in the sale-deed of the 3rd March 1911, and a decree was given accordingly. Appellants have not got possession. The evidence they adduce on this subject is of no value whatsoever.

The position, therefore, appears to me to be the same as if the appellants were claiming under a sale-deed executed by Raja Balwant Singh while in possession, the validity of that sale-deed being rightly or wrongly contested by Raja Balwant Singh. Appellants have virtually asked the Revenue Courts to assume the functions of a Civil Court and give possession under the sale-deed.

It is urged that section 34 of the Land Revenue Act contemplates that mutation should be given immediately on the execution of a sale-deed without inquiry as to whether the vendee has actually obtained full possession. It is pointed out that sub-section 2 provides for mutation immediately after the transfer has taken place and that in sub-section 3 the cases of mortgage and lease are distinguished, in that the mortgagee or lessee can only obtain mutation after he has demonstrated that he has obtained actual possession. It is not, I must say, clear why the Legislature has distinguished between cases of mortgage and lease and cases of sale by contract; but reading section 34 and the connected sections 35 and 40 together, it is clear that in no disputed case can mutation be given unless it is shown that the applicant has possession or that possession is doubtful. In the present case, as I have already said, possession is not doubtful. The order of the High Court has, I take it, exactly the same effect as a decree in favour of Raja Balwant Singh would have, and has given him possession over the property in question.

For these reasons the appeal is dismissed with costs on appellants.

The maximum fee of Rs. 80 under the Board's rule is allowed.

Appeal dismissed.

YARAN *v.* GULRANG.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1263 OF 1911.

July 28, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Shah Din.

YARAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GULRANG AND OTHERS—DEFENDANTS—RESPONDENTS.

Declaratory suit—Pre-emption—Succession—Mortgage of ancestral land—Sale of equity of redemption, whether sale for purposes of pre-emption—Widow of donor still alive—Riwaj-i-am—*Sale of ancestral house—Ancestral and acquired property.*

A mortgaged his ancestral as well as acquired land to *B* and later on he gifted the mortgaged property and an ancestral house to *B* in lieu of the mortgage-money, *plus* past services and maintenance of *A's* widow till her death. *A* died leaving his widow. The reversioners of *A* brought a suit claiming

(1) immediate possession as heirs to *A*;

(2) pre-emptive rights in respect of the gift as if it was a sale;

(3) declaration protecting their reversionary rights:

Held, that the plaintiffs could not get possession of the land as heirs in the life-time of the widow.

Held, also, that as regards the area already mortgaged, the transaction should be treated as a valid gift of the equity of redemption in lieu of services and hence the plaintiffs could not get the land by pre-emption.

Held, further, that as the acquired property can be given to any one at the pleasure of the owner, the reversioners could not challenge the alienation of this property.

Held, lastly, that the reversioners were entitled to a declaratory decree only as regards the ancestral house, it not having been mortgaged before the gift of the equity of redemption took place.

Second appeal from the decree of the Divisional Judge, Attock, dated the 18th August 1911, reversing that of the District Judge, Mianwali, dated the 28th April 1911, decreeing the claim.

Mr. *N. C. Mehra*, for the Appellants.

Mr. *Bhagat Ram*, for the Respondents.

JUDGMENT.—On the 13th February 1905 Mehra, Awan, grandson of Khushiya by his second wife, mortgaged 170-10/20 *kanals* to defendants Nos. 1 and 2, Awans of the village but not related to him, for Rs. 200. Nearly half the land was uncultivated and the rest of very poor quality judging by the revenue assessment.

On the 29th August 1909, he gifted to the mortgagees his equity of redemption, together with a further area of 9-8/20 *kanals* and a house (valued at Rs. 100), in consideration of services past and future. Ten days later he died and he is now represented by his widow, *Musammat* Nuran, defendant No. 7.

The plaintiffs, descendants of Khushiya by his first wife, have come into Court with a somewhat multifarious suit, claiming (1) immediate possession as heirs of Mehra, (2) pre-emptive rights in respect of the gift as if it were a sale, and (3) a declaration protecting their rights as reversioners in respect of the alienation. The lower Appellate Court has dismissed the suit *in toto* and the case is before us on further appeal by the plaintiffs.

It is quite clear that plaintiffs' claim for immediate possession as heirs of Mehra must fail in the life-time of his widow, *Musammat* Nuran.

As regards the alleged right of pre-emption, we have heard a good deal of argument based on *Riwaj-i-am* entries and rulings, but we do not propose to discuss it as we are satisfied that the lower Appellate Court is right in declining to treat the 1909 transaction as one of sale giving rise to pre-emptive rights.

There remains, therefore, the question of plaintiffs' possible right to a declaration as reversioners, which has been overlooked in both the lower Courts. Here too we consider that plaintiffs' claim must fail except to a very small extent.

We think that as regards the area already mortgaged the 1909 transaction should be treated as a valid gift of the equity of redemption in lieu of services. The additional area of 9-8/20 *kanals* then gifted free of mortgage was land acquired by Mehra by purchase on the 20th November 1908, and being self-acquired property could be gifted by him at pleasure without reference to his reversioners. On all this portion of the property in dispute the plaintiffs' suit fails, though not exactly on the grounds stated by the Divisional Judge.

The house included in the gift is, however, admittedly ancestral property and we do not think that there is any sufficient reason why this should pass out of the family on the death of *Musammat* Nuran. The house had not been included in the previous mortgage and stands, therefore, on a different footing from the land.

To that small extent the plaintiffs' appeal is accepted. The decree of the

lower Appellate Court is modified in this respect only that while the remainder of plaintiffs' suit will stand dismissed, the plaintiffs are given a declaratory decree to the effect that the gift of 29th August 1909 will not on the death or re-marriage of *Musammat* Nuran, widow of Mehra, affect their rights as reversioners in the house property referred to in the deed. The parties will pay their own costs throughout.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 699 OF 1913.

October 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

K. P. RAMAKRISHNA PATTAR—DEFENDANT NO. 1—APPELLANT

versus

K. P. NARAYANA PATTER AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 2—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaration that valid personal contract subsits, whether title to legal character or right to property—Suit for declaration for right to subscribe to Kuri *fund, whether maintainable.*

A declaration that a valid personal contract still subsists between the parties is not a right to declare a title to a legal character or a title to right to property, and no suit under section 42 of the Specific Relief Act lies for the declaration of such a relationship.

Therefore, a suit for a declaration that the plaintiff is entitled to subscribe to a *Kuri* fund in place of another subscriber, does not lie under section 42 of the Specific Relief Act.

Kristaya v. *Kasipati*, 9 M. 55; *Robert Fischer* v. *Secretary of State for India*, 22 M. 270; 26 I. A. 16; 3 C. W. N. 161, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Palghat, in Appeal Suit No. 721 of 1912, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 360 of 1911.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *A. Narayana Sarma, K. P. Govinda Menon*, for Mr. *K. R. Subramania Sastri*, for the Respondents.

JUDGMENT.—The first defendant is the appellant. He is the Karaiswan (or proprietor) of a Kuri which he started in August 1906. There were 11 tickets in the Kuri and the 1st defendant induced other persons to enter into contracts with himself on certain terms, which included the payment of subscriptions by them to the Kuri at the rate of Rs. 250 yearly for each ticket-holder. The first defendant allowed also each ticket-holder to assign his rights under each contract to third persons subject to certain conditions.

The plaintiff became the assignee of half of a ticket from the 2nd defendant, who had entered into one of the several contracts with the 1st defendant. The sixth subscription to the Chit had to be paid on the 17th August 1911. The plaintiff had to send Rs. 125 to the 1st defendant as subscription towards the Chit due on that date. He sent the Rs. 125, but the 1st defendant refused to receive it. Hence the plaintiff brought the suit on the 31st August 1911 for two reliefs, namely, (*a*) that the 1st defendant be compelled "to receive the amount due by the plaintiff for the 6th drawing after declaring that the plaintiff has right to pay subscription for the said Kuri," (*b*) "that the 1st defendant do give the plaintiff the due receipt of the Kuri for the 6th drawing."

The District Munsif disbeleived the 1st defendant's story that the Rs. 125 was not tendered before noon on the 17th August 1911 and believed the plaintiff's evidence that the money was tendered in proper time, but following *Kristaya* v. *Kasipati* (1) he refused to give a decree compelling the 1st defendant to accept the Rs. 125. He, however, gave the plaintiff a decree declaring that the plaintiff is entitled to continue payment of subscriptions to the Kuri conducted by the 1st defendant, as the plaintiff was not a defaulter. His decree was confirmed by the learned Subordinate Judge.

The contentions, argued on behalf of the 1st defendant in second appeal, are found in the grounds 2 and 4 of the memorandum of second appeal. Those two grounds are as below :—

"(2) The plaint does not disclose any cause of action" and

"(4) the suit for a mere declaration is not maintainable according to the section 42

(1) 9 M. 55.

of the Specific Relief Act, the plaintiff having the right to claim consequential relief."

Though in the 4th ground, it is contended that section 42 of the Specific Relief Act bars the suit because the plaintiff had the right to claim consequential relief, the argument at the hearing was somewhat different. The contention was that only a person entitled to any "legal character" or to "any right to property" can institute a suit for a declaratory relief in respect of his title to such legal character or right to property and that the plaintiff's suit to declare that he has contractual rights as against the 1st defendant does not come within the class of suits to declare a right to a legal character or a right to property. We think that the contention must be upheld to this extent, namely, that section 42 of the Specific Relief Act does not contemplate a suit like the present. We take it that a man's "legal character" is the same thing as a man's status. "A man's status or 'legal character' is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general." "According to Holland, the chief varieties of status among natural persons may be referred to the following causes :—(1) sex, (2) minority, (3) '*patria potestas*' and '*manus*,' (4) coverture, (5) celibacy, (6) mental defect, (7) bodily defect, (8) rank, caste and official position, (9) slavery, (10) profession (11) civil death, (12) illegitimacy, (13) heresy, (14) foreign nationality and (15) hostile nationality." (See Banerjee's Lectures on Specific Relief.) We think that a declaration that a valid personal contract still subsists between the plaintiff and the 1st defendant is not a right to declare a title to a legal character or a title to right to property.

Section 42 of the Specific Relief Act is, no doubt, not intended to be exhaustive as regards the circumstances under which declaratory suits can be maintained. In *Robert Fischer* v. *Secretary of State for India* (2) the judgment of their Lordships of the Privy Council contains the following sentences on page 282, "Now, in the first place, it is at least open to doubt whether the present suit is within the purview of section 42 of the Specific Relief Act * *. It is, in substance, a suit to have the true construction of a Statute declared and to have an act done in contravention of the Statute, rightly understood, pronounced void and of no effect. *That is not the sort of declaratory decree which the framers of the Act had in their mind.*" This seems to show that declaratory decrees can be passed though they may not come under section 42 of the Specific Relief Act. In *Kristaya* v. *Kasipati* (1), the learned Judges say (at page 57): "It is suggested that a suit may be brought to obtain a declaration that the right has not been forfeited by default, and that it continues to subsist" (the right in question in that case was the right to pay a debt by instalments). "But the suit before us is not one of that kind, and it is not necessary for us to express an opinion on the question, *whether, under certain circumstances, a declaratory suit may not be brought.*" This only shows that the learned Judges were not prepared to say without hesitation that such a suit would not lie in exceptional cases. But we have not been referred to any case in which any of the High Courts in India has given a declaratory relief in respect of rights arising out of a contract which would affect only the pecuniary relationship between the parties to the contract, and we do not think that there are exceptional circumstances in this case to take it out of the ordinary rule.

In the result, we reverse the decrees of the lower Courts and dismiss the suit in its entirety. Under the circumstances, the parties will bear their respective costs throughout.

Appeal allowed.

(2) 22 M. 270; 26 I. A. 16; 3 C. W. N. 161

BOMBAY HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 586 OF 1912.

October 15, 1914.

Present:—Sir Basil Scott, Kt., Chief Justice, Mr. Justice Heaton, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Hayward.

CHANMALSWAMI RUDRASWAMI AND ANOTHER—DEFENDANTS Nos. 1 & 2—APPELLANTS

versus

GANGADHARAPPA BASLINGAPPA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 97—Descision on question of limitation, misjoinder or jurisdiction, whether preliminary decree—Appeal.

A decision as to misjoinder, limitation or jurisdiction does not amount to a preliminary decree within the meaning of section 97 of the Civil Procedure Code, 1908.

Therefore, a decision in favour of a plaintiff upon a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of Civil Courts, does not amount to a preliminary decree from which the unsuccessful party must at once appeal by reason of section 97 of the Code.

Second appeal from the decision of the District Judge of Dharwar, in Appeal No. 190 of 1911, dismissing an appeal from the decree passed by the Subordinate Judge at Hubli, in Civil Suit No. 106 of 1910.

FACTS appear from the following order of reference made by Beaman and Hayward, JJ., on 30th June 1914:—

BEAMAN, J.—We think that in the present state of the authorities, the general question, what is and what is not a preliminary decree, needs to be considered by a Full Bench. We are sensible of the difficulty of stating the question in a sufficiently clear-cut and definite form. But this Court appears to have held that decisions on various points are preliminary decrees, and we feel grave doubts, not only whether the particular decisions are right, but much more, whether the reason underlying them is not capable of extension so as to cover a trial Court's ruling upon every disputed point arising during the trial. I find for example that I was myself a party to a ruling of this Court in *Sidhanath* v. *Ganesh* (1), which certainly seems to have held that the finding of an original Court upon three points—(1) misjoinder, (2) limitation, (3) jurisdiction—was in each case a preliminary decree. Upon further reflection, a careful examination of the cases bearing on the point and the definition of decree in the Code, along with every section contained in the Code which can throw any light upon the subject, I am convinced that that decision is wrong, that it goes much too far, and that if such findings really are preliminary decrees, it would be virtually impossible to deny that any ruling as to whether a document tendered were admissible or not, or a question objected to, relevant, would also be a preliminary decree.

Scott, C. J., who delivered the judgment in *Sidhanath* v. *Ganesh* (1) subsequently held in *Rachappa* v. *Shidappa*, Civil Application No. 21 of 1913, decided on April 9th, 1914, (unreported), that a decision of this Court upon a question of jurisdiction was not a decree giving the parties aggrieved by it a right of appeal to the Privy Council. These decisions certainly appear to be in conflict with each other.

Havingregard to the definitions of a "decree" and "a preliminary decree" in the Code of Civil Procedure, I have formed a very strong opinion that no finding by a trial Court upon such points as limitation or jurisdiction where that finding is in favour of the plaintiff and permits the suit to proceed can, in any true sense, be a preliminary decree. It further seems that virtually every true preliminary decree is actually provided for in the Code itself. A comparison of these with the class of findings I have just mentioned brings out the radical distinction in principle between them with sufficient clearness. For my own part, I would go even further, notwithstanding the current of authority in this Court, and doubt, with all becoming respect, whether in suits under the Dekkhan Agriculturists' Relief Act a finding *in limine* that a party is or is not an agriculturist within the meaning of the Act, is a preliminary decree. That is a more difficult case requiring a finer analysis. But in every such suit the plaintiff claims some concrete relief he wants money or land, and a finding that he (or a defendant) is or is not an agriculturist does not conclusively determine any such right, but merely determines procedure, as a result of which the rights put in controversy will be settled and decreed. It is true that in many cases status alone may be decreed, and all such decrees are of course true decrees. But they are not preliminary. If the suit is for declaration of status, a decree conferring or refusing to confer that status concludes the suit, and leaves nothing more to be done.

(1) 17 Ind. Cas. 637; 14 Bom. L. R. 916 37 B. 60.

But in suits under the Dekkhan Agriculturists' Relief Act, a finding that a party is or is not an agriculturist, does not determine any of the substantial rights which the Court is asked to give or withhold. It is true that it is a matter in controversy in respect of which the rights must be determined. But so is every detail of procedure and rule of evidence more or less directly. As I understand the definition, it describes two things: (1) The legal rights of the parties which are to be decreed or not decreed. These are in a vast majority of cases concrete, as a sum of money or piece of land or house or some other form of real or personal property. (2) The said rights in respsct of any or all the matters in controversy. This means, as I understand it, everything which is necessary in law, during the course of a trial, to the establishment or refutation of the alleged right. Every fact which a plaintiff alleges and a defendant denies comes under this head, as well as all the rules of procedure and evidence which have to be enforced and followed during the trial. But these latter are means to an end, and the end is the right or rights claimed, and to be or not to be decreed. The far wider construction put upon the words in this Court is, in my opinion, uncalled-for and will lead in practice to the most disastrous consequences. The conduct of civil business is already slow enough, but how can it ever be finished if the trial Judge has to frame twenty preliminary "decrees" in the course of every trial and so open the door to twenty successive appeals before any decision on the merits has been given? Upon this subject I may be permitted to call attention to the weighty words of their Lordships of the Privy Council in *Maharajah Moheshur Sing* v. *The Bengal Government* (2). This is not a question of mere words, empty dialectic, but of great and far-reaching practical importance. I believe that this Court stands alone in the extension it has given to the meaning of the term "preliminary decree," and in view of the steadily increasing number of appeals from what are called preliminary decrees, and may fairly be said to have been held to be preliminary decrees by this Court, and the resultant delays, expenses and harassments to which suitors are being subjected, it is very desirable that the whole question should be fully considered and authoritatively settled by a Full Bench.

HAYWARD, J.—The plaintiffs sued defendants for an injunction in respect of certain religious ceremonies. The defendants raised a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of the Civil Courts. The original Court held that the matters were within the jurisdiction of the Civil Courts. The District Court held on first appeal that this decision was not appealable at that stage, as it did not amount to a preliminary decree within the meaning of section 2 of the Code of Civil Procedure. This Court has been asked to hold on second appeal that the decision was a preliminary decree and subject as such to appeal, relying on the cases of *Krishnaji* v. *Maruti*(3) and *Sidhanath* v. *Ganesh*(1), in which it was held respectively that the decision as to the defendant being an agriculturist and the decisions as to misjoinder, limitation and jurisdiction were preliminary decrees inasmuch as they determined the rights of the parties with regard to matters in controversy in the suit within the meaning of section 2, Civil Procedure Code.

It has, however, been conceded that these decisions, if pressed to their logical conclusion, would cover all interlocutory orders passed in the suit, a result strongly condemned by the Privy Council in the following terms: "We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay and on the other inflict upon his opponent similar calamities," in the case of *Maharajah Moheshur Sing* v. *The Bengal Government* (2) under the old Civil Procedure Code. It has been further pointed out that it was held

(2) 7 M. I. A. 283; 3 W. R. 45 (P. C.); 1 Suth P. C. J. 325; 1 Sar. P. C. J. 645; 10 E. R. 316.

(3) 7 Ind. Cas. 966; 12 Bom. L. R. 762.

in *Rachappa* v. *Shidappa*, Civil Application No. 21 of 1913, decided on April 9th, 1914, (unreported), under the present Civil Procedure Code, that a decision upon jurisdiction by the High Court had only the effect of regulating procedure and decided none of the rights of the parties for purposes of appeal to the Privy Council. It is necessary in all these circumstances to examine with particular care all the provisions relating to preliminary decrees contained in the present Civil Procedure Code, before coming to the conclusion that a result so strongly condemned by the Privy Council has been intended by the Legislature.

No doubt, such a result might be deduced from a literal interpretation of the words of the definition, "decree means the formal expression of an adjudication which...determines the rights of the parties with regard to all or any of the matters in controversy in the suit" and of the explanation, "a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit" in section 2 (2). But it would appear that a limited interpretation was contemplated and that the adjudication determining the rights of the parties was meant to be an adjudication after a complete hearing of the case, because it has been provided that only after such a hearing should judgment be pronounced and be followed by decree by section 33. This has been made still clearer by the rules relating to the hearing of the suit. It has been provided that preliminary issues of law should be tried if those issues would *dispose of the suit*, by Order XV, rule 2, and that if the finding should not be sufficient for the decision there should be a postponement of the hearing of the suit, but that if the finding should be *sufficient for the decision* judgment should be pronounced, even though the hearing should not have been fixed for *the final disposal of the suit* by Order XV, rule 3. It has been further provided that only after the case has been heard, should there be judgment and that there should be a finding on each issue, unless a finding on one or more issues should be *sufficient for the decision of the suit*, and that the judgment should be the basis of the decree and that the relief granted *or other determination of the suit* should be clearly specified in the decree, by Order XX, rules 1, 5 and 6. The limited interpretation contemplated has been indicated with sufficient precision by the following rules, which specify the cases in which preliminary decrees may or shall be passed in anticipation of the prescribed final decrees. The cases are administration suits, suits for dissolution of partnerships, account suits and suits for partition, dealt with in Order XX, rules 13, 15, 16 and 18. The only other preliminary and final decrees provided are those in mortgage suits under Order XXXIV. Special forms for these preliminary and final decrees have been prescribed in Appendix D, Nos. 3, 4 to 11, 17 to 20 and 22 of the first Schedule. It has then been provided that if a preliminary decree should not give satisfaction there must be an immediate appeal and that the questions thereby decided should not be open to dispute on appeal from the final decree by section 97. But it has been recognized that there well might be many interlocutory orders, not appealable as orders under section 104 and not amounting to decrees, which might seriously affect the final decision of the suit and it has been expressly provided that such orders should be open to consideration on appeal from the decrees, by section 105, Civil Procedure Code. It appears to me incontrovertible in view of all these provisions that the limited interpretation indicated has throughout been contemplated and that the only preliminary decrees sanctioned have been exhaustively enumerated, subject of course to extension by further rules lawfully framed, and that in all other cases the final determination of the suits has been required before preparation of the decrees. This limited interpretation has moreover, the merit of avoiding the evils so strongly condemned by the Privy Council, and there would be a strong general presumption against any other interpretation out of respect for the Legislature.

This matter is of far-reaching consequence to the administration of justice and should therefore, in my opinion, be referred for final decision by the Full Bench.

Mr. *D. A. Khare*, for the Appellants.

Mr. *Dhurandhar* (with him Mr. *G. S. Mulgaonkar*), for the Respondents.

JUDGMENT.—The question arising in the suit in which this reference has been made is whether, a decision in favour of the plaintiff upon a preliminary defence, that the matters in dispute were caste questions outside the jurisdiction of Civil Courts, amounts to a preliminary decree from which the unsuccessful party must at once appeal by reason of section 97 of the Code, and the referring judgments call attention to *Sidhanath* v. *Ganesh* (1), in which it was held that decisions as to misjoinder, limitation and jurisdiction are preliminary decrees. This Court is of opinion that the judgment in the last-mentioned case was wrong and that such decisions are not preliminary decrees, nor is the decision in the referred case a preliminary decree. We also think certain dicta in *Narayan Balkrishna Kulkarni* v. *Gopal Jiv Ghadi* (4), which are based upon *Sidhanath* v. *Ganesh* (1), go too far.

(4) 23 Ind. Cas. 889; 16 Bom. L. R. 206; 38 B. 392.

MADRAS HIGH COURT.
CIVIL APPEAL No. 143 OF 1912.
November 30, 1914.
Present:— Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.
Sri Sri BRINDAVANA CHANDRA HARISCHANDANA JAGADDEVU RAJAH BAHADUR GARU —PLAINTIFF No. 3—APPELLANT
versus
JAGANNADHA SINGI SANTO (DIED) AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), *s.* 6—*Addition to holding by encroachment—Possession for more than* 12 *years prior to commencement of Act*—Ryots—*Presumption—Ejectment.*

Tenants who have added to their holdings by encroachments and have been in possession of such encroachments for more than 12 years before 1st of July 1908 when the Madras Estates Land Act came into force, are deemed to be in possession of the whole of their holdings, including the encroachments, as *ryots* and to be entitled to occupancy rights under section 6 of the Act; but if their possession commenced within 12 years of the suit, they are liable to be ejected.

Appeal against the decree of the District Court of Ganjam at Berhampore, in Original Suit No. 32 of 1905, dated the 30th day of September 1911.

Dr. *S. Swaminadhan*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—We are not prepared to differ from the conclusions of the learned Judge as to the extent included in Exhibit I. We also agree with him that when tenants have added to their holdings by encroachment and have been in possession of such encroachments for more than twelve years before 1st of July 1908 when the Act came into force, they must be deemed to have been in possession of the whole of their holdings, including the encroachments, as *ryots* and so to be entitled to occupancy rights under section 6 of the Act. But according to the finding of the learned Judge in paragraph 4 read with paragraphs 1c and 1*d*, defendants Nos. 12, 13, 15, 16, 17, 18, 19 and 23 were not tenants but simple trespassers, and according to the evidence of plaintiff's witnesses Nos. 3, 5 and 7, which is uncontradicted, their possession commenced within twelve years of suit and it is, therefore, open to the plaintiff to eject them. These respondents have not appeared, the decree must be modified accordingly with costs throughout as against these respondents. Otherwise the appeal is dismissed with costs of defendants Nos. 9 and 10.

Decree modified.

MADRAS HIGH COURT.
FIRST CIVIL APPEAL No. 61 OF 1912.
October 26, 1914.
Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.
KALLEPALLI VENKATARAMA RAJU—PLAINTIFF—APPELLANT
versus
KALLEPALLI BAPAMMA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Consent of sapinda *—Grounds of refusal personal, whether proper—Adoption with consent of remoter* sapindas, *when valid.*

A *sapinda* who is called upon to give his consent to an adoption by a widow ought not to be guided by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family, especially that part of it which the widow represents.

Therefore, an adoption made with the consent of other *sapindas* is valid, where the nearest *sapinda* refuses on the ground of losing his right of inheritance.

VENKATARAMA RAJU v. BAPAMMA.

Venkatakrishnamma v. *Annapurnamma*, 23 M. 486; 10 M. L. J. 73; *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar*, 2 M. 270 (P. C.); 7 I. A. 173; 4 Sar. P. C. J. 149; 3 Suth. P. C. J. 740; 4 Ind. Jur. 360; *Parasara Bhattar* v. *Rangaraja Bhattar*, 2 M. 202 at p. 207; 4 Ind. Jur. 393; *Venkamma* v. *Subramaniam*, 30 M. 50 (P. C.); 4 A. L. J. 150; 9 Bom. L. R. 89; 5 C. L. J. 140; 11 C. W. N. 345; 17 M. L. J. 114; 2 M. L. T. 91; 34 I. A. 22, followed.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 12 of 1910.

Mr. *T. Prakasam*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

SPENCER, J.—This is a suit to set aside an adoption. Two questions arise for decision: (1) whether the alleged adoption of the 2nd defendant is true; and (2) whether the refusal of the plaintiff to give his consent to the adoption invalidated any adoption made by the 1st defendant as the widow of the deceased Lakshmipati Raju.

Although the adoptive mother, the 1st defendant, has in this suit taken the part of the plaintiff and denied the *factum* of the adoption, I have no doubt that the Subordinate Judge was correct in the finding that the 2nd defendant was adopted. All the documents produced in the case from 1906 onwards describe him as an adopted son. Exhibit III is a promissory note executed by the 1st defendant as guardian of her adopted son, the 2nd defendant, which purports to have been attested by the plaintiff. D. W. No. 5 proved the fact that the plaintiff attested this promissory note executed in his (witness's) favour. The plaintiff, in the witness-box, professed himself unable to say whether the signature in Exhibit III was his or not. The 1st defendant made several statements before the public authorities acknowledging that she had adopted the 2nd defendant, and when her attention was drawn to these statements in her examination she flatly denied having made the statements. It is unnecessary to refer to the oral evidence, as, in our opinion, there is overwhelming proof that the adoption is true.

On the second point, the plaintiff is the divided brother of the late Lakshmipati Raju, and as such is the nearest reversioner entitled to succeed to his properties after his death. He states that he was not asked by the first defendant to give his consent to the adoption of a boy. On the evidence of P. W. No. 5 and D. W. No. 4, I must take it that this denial is not true. D. W. No. 4 states that the plaintiff was asked to give his son in adoption and that he refused, as the son was his only son. P. W. No. 5 states that the reason for the plaintiff's refusing his consent was that he said that he would forfeit the right to property which he would otherwise get. The Subordinate Judge treats this as a refusal based on "an evil intention to usurp the property after the death of the 1st defendant." Without using such language to characterise the refusal, we may see whether the refusal was based on improper grounds.

In *Venkatakrishnamma* v. *Annapurnamma* (1) it was held that, if a *sapinda* refused to consent but withheld his grounds for such refusal, the refusal would not affect the adoption; and also if the assent was withheld from improper considerations, such dissent would be of no avail to the party relying on it. In *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (2) the Privy Council held that the consent of a *sapinda* given on the ground that by consenting he gained some material profit from the adoption was improper. On the same principle, it would appear that a refusal on similar grounds might equally be condemned as an improper refusal. In *Parasara Bhattar* v. *Rangaraja Bhattar* (3) the test applied was whether the refusal was "from interested or improper motives or without a fair exercise of discretion." The object of getting the consent of *sapindas* to adoption is declared in *Venkamma* v. *Subramaniam* (4) as being to get an independent judgment on the expediency of the proposed adoption. This being so, there can be no doubt that a *sapinda* who is called upon to exercise his discretion ought to be guided not by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family, especially that part of it which the widow represents. Applying such principles to the facts of this case, it is im-

(1) 23 M. 486; 10 M. L. J. 73.

(2) 2 M. 270 (P. C.); 7 I. A. 173; 4 Sar. P. C. J. 149; 3 Suth. P. C. J. 740; 4 Ind. Jur. 360.

(3) 2 M. 202 at p. 207; 4 Ind. Jur. 393.

(4) 30 M. 50 (P. C.); 17 M. L. J. 114; 2 M. L. T. 91; 11 C. W. N. 345; 5 C. L. J. 140; 9 Bom. L. R. 89; 4 A. L. J. 150; 34 I. A. 22.

material that the plaintiff did not give his consent to the adoption.

Other *sapindas* executed a document, Exhibit X, which fully authorized the 1st defendant to adopt the 2nd defendant. Only Chinna Bapi Raju was not a party to this document; his brother Peda Bapi Raju signed it ; and there are indications that these two brothers were undivided at the time, the elder, Peda Bapi Raju, being the natural father of the boy.

I am of opinion that the Subordinate Judge rightly found that the adoption set up by the 2nd defendant was valid. The appeal is dismissed with costs.

SANKARAN NAIR, J. I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1630 OF 1912.

August 14, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Richardson.

DINO NATH DAS—OBJECTOR—APPELLANT

versus

JOGENDRA NATH BHOUMICK—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *ss.* 141, 144 – *Execution proceedings—Decree-holder-auction-purchaser in possession—Auction sale set aside—Subsequent private sale by judgment-debtor—Application for mesne profits—Appeal—Limitation Act (IX of* 1908), *Sch. I, Art.* 109.

Section 141 of the Civil Procedure Code does not make section 144 applicable to execution proceedings.

Where a decree-holder purchased the property put up for sale in execution and remained in possession thereof for several years, and after the sale had been set aside the applicant purchased the property from the judgment-debtor together with the right to sue the decree-holder for mesne profits and applied for recovery of mesne profits:

Held, (1) that the application was not one authorized by the terms of section 144 of the Civil Procedure Code, as no restitution was sought in respect of any decree which had been varied or reversed;

(2) that inasmuch as the determination of a question under section 144 is a decree, an appeal lies from an order purporting to be made under that section.

A Court has no jurisdiction to award mesne profits for a longer period than three years as provided in Article 109 of the Limitation Act.

Second appeal from a decision of the Sub-Judge of Pabna and Bogra, dated 25th March 1912, affirming that of the Munsif, first Court, at Pabna, dated 10th May 1911.

Babus *D. N. Chuckerbutty* and *Romesh Chandra Sen*, for the Appellant.

Babus *Mohini Mohan Chuckerbutty* and *Shama Chandra Roy*, for the Respondent.

JUDGMENT.—It appears that a sale held in the year 1900 in execution of a decree, at which the decree-holder was the auction-purchaser, was afterwards set aside on the 29th June 1907. The decree-holder was in possession of the property sold from November 1900 to June 1908. On the 10th May 1909, the applicants in the present case purchased the property from the judgment-debtor together with the right to sue the decree-holder for mesne profits in respect of the period during which he had been in possession. On the 2nd April 1910, the applicant presented the application for mesne profits out of which this second appeal has arisen.

The Courts below have concurred in treating the application as an application under section 144 of the present Code of Civil Procedure and have accordingly given the applicant a decree for mesne profits to the amount of Rs. 1,350. The appellant before us is Dino Nath Das, the decree-holder-auction-purchaser.

Now, in the first instance, it is quite clear that whatever may have been the power of the Courts to entertain this application, it is not one authorized by the terms of section 144. Section 144 begins: "Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution....." But here no restitution was sought in respect of any decree which had been varied or reversed and section 141 of the Code does not make section 144 applicable to execution proceedings [*Beni Madho Singh* v. *Pran Singh* (1)]. Inasmuch, however, as the respondent obtained an order in his favour in the Courts below purporting to be made under section 144 of the Code, and inasmuch as a determination of a question arising under section 144 is a decree by force of the definition clause in section 2, the respondent cannot be heard to say that the present appeal is incompetent. The fact, therefore, that the Courts below had no jurisdiction under section 144 to enter-

(1) 14 Ind. Cas. 456; 15 C. L. J. 187.

tain the application does not help the respondent.

Before we deal with the ground of appeal on which the appellant principally took his stand, we may premise that the appellant did not press the objection that a right to sue for mesne profits is not transferable, and was willing to concede for the purposes of this case that a Court might have some inherent power to entertain an application of this kind. We are not concerned, therefore, to dispute the view taken upon the latter question in the case to which we have already referred. Nor is it necessary for us to consider whether the application is one which does or does not fall within the scope of section 47. Assuming that it falls within that section, it still remains that the relief sought is dependent upon the supposed inherent powers of the Court to grant relief of this kind by way of restitution in the course of execution proceedings.

Now the only objection that was insisted upon was the objection that in any view of the matter, the Courts below erred in awarding mesne profits for the whole of the period during which the appellant was in possession. The contention was put in this way: that if a suit had been instituted for mesne profits on the date on which the application was made, then under Article 109 of the Limitation Act, the applicant as plaintiff would have been debarred from recovering mesne profits for any period in excess of three years from that date, and no inherent power of the Court—assuming any inherent power to exist—can entitle him to mesne profits for a longer period. This reasoning is supported by the case of *Safaraddi* v. *Durga Prosad Sen* (2), and, in our opinion, ought to prevail.

Assuming, therefore, without deciding that the first Court had inherent jurisdiction to award mesne profits upon the application presented by the respondent, it either had no power, or it was an improper and unsound exercise of judicial discretion, to award mesne profits for a period in excess of the period for which mesne profits could have been obtained by suit.

The result is that the decree appealed from must be modified by declaring that the respondent is entitled to mesne profits only for the period between 2nd April 1907 and June 1908. The amount awarded by the Courts below will be diminished accordingly. The parties will receive and pay costs in this Court and the Court below in proportion to their success or failure.

Decree modified.

(2) 16 Ind Cas. 966; 16 C. L. J. 83.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1668 TO 1670 OF 1913.

November 4, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

THE RAJAH OF VIZAYANAGARAM, REPRESENTED BY J. C. H. FOWLER, ESQ., TRUSTEE OF THE VIZAYANAGARAM ESTATE, BY HIS *Muktyar* ANANTHA RAMAMURTHI—DEFENDANT—APPELEANT IN ALL

versus

IN NO. 1668 OF 1913

DOKARA PAIDAYYA—PLAINTIFF—RESPONDENT

IN NO. 1669 OF 1913

KANTUBUGATHA PAIDAYYA—PLAINTIFF—RESPONDENT

IN NO. 1670 OF 1913.

MADDILA GURAYYA—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 112—Landlord and tenant—Suit under s. 112—Burden of proof—Payment of rent into Court to avoid sale, effect of.

In a suit under section 112 of the Madras Estates Land Act the burden of proof is rightly imposed on the landlord to show that he is justified in claiming rent at an enhanced rate; the fact of the payment into Court in order to avoid the sale does not shift the onus on to the tenant.

Second appeals against the decrees of the District Court of Vizagapatam, in Appeal Suits Nos. 229, 230 and 231 of 1912, respectively, preferred against those of the Deputy Collector of Vizayanagaram, in E. L. A. S. Nos. 575, 579 and 578 of 1912, respectively.

Mr. *S. Srinivasa Aiyangar*, for the Appellant.

JUDGMENT.—These appeals are argued solely on the ground that the burden of proof was imposed wrongly on defendant,

Re BOMBAY GAS COMPANY AND BOMBAY ELECTRIC SUPPLY.

This is contended with reference to *Chunder Kant Mukerjee* v. *Hem Lal Mondal* (1), on the ground that "if plaintiff wanted the money back" which he had paid into Court, "it was for him to show that he had a right to get it."

In the present case the rent appears to have been paid into Court under section 129 or 195 of the Estates Land Act in order to prevent the sale, in connection with which plaintiffs are suing under section 112. Nothing in the Act indicates that the incidence of the burden of proof is affected by a payment into Court, nor have we been referred to any general principle authorising that view. On the other hand, the pleadings show that defendant was admittedly claiming rent at a higher rate than had been paid in the past; and the burden of proof that he was justified in doing so was rightly imposed on him, *vide* section 27.

The appeals fail and are dismissed. Plaintiffs have not appeared. There will be no order as to costs.

Appeals dismissed.

(1) 1 C. W. N. 463.

BOMBAY HIGH COURT.
ORIGINAL CIVIL JURISDICTION.
March 27, 1914.
Present:—Mr. Justice Davar and Mr. Justice Beaman.

Re THE ARBITRATION BETWEEN THE BOMBAY GAS COMPANY, LTD., AND THE BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LTD.

In re THE INDIAN ARBITRATION ACT.

Electricity Act (IX of 1910), ss. 14, 19—Damages, right of—Access to property cut off—Operator, whether can claim damages.

Where a Gas Company was cut off from reasonable access to its own property by acts done in the exercise of its powers by an Electric Supply Company, and those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be:

Held, (1) that upon a true construction of Act IX of 1910, the damage claimed to have been suffered by the Gas Company was the subject of compensation under section 19 of the Act;

(2) that section 14 did not apply and the Gas Company could not be deprived of its remedy in respect of the portion of the cables.

Obiter dictum.—An operator cannot claim damages for acts of his own or done on his behalf and at his expense by the owner.

Mr. *Strangman*, for the Bombay Electric Supply and Tramways Company.

Mr. *Binning*, for the Bombay Gas Company.

Mr. *Nicholson*, for the Arbitrators.

JUDGMENT.—In the special case submitted to us by the Arbitrators there are two questions for our consideration. In our opinion the first question referred must be answered in the affirmative. Large powers are conferred upon licensees under the Act, but these are accompanied by certain obligations. Thus under section 19 of the Act of 1910, the licensee is under the obligation of causing as little damage, detriment or inconvenience as may be in exercise of the powers conferred upon him "and shall make full compensation for *any* damage, detriment or inconvenience caused by him or by any one employed by him." The question is thus worded:—"Whether upon a true construction of Act IX of 1910 the damage claimed to have been suffered by the Gas Company is the subject of compensation under section 19 of the said Act?" Clearly it is. For the damage claimed to have been suffered lies in the Gas Company having been deprived of access to its own property by acts done by the Supply Company in the exercise of its power. The Supply Company's contention is that such damage could not be the subject of compensation under section 19, because it was not caused in the "exercise of the power" but was a mere consequence of what was otherwise in all respects rightly done by the Supply Company in the exercise of that power. This, in our opinion, is wrong. Whether there was in fact damage or not, what is alleged as damage was clearly caused once and for all in the exercise of the power conferred upon it by the Supply Company, when by laying its wires over the Gas Company's pipe, it cut the latter off from reasonable access to its own property. The case of *Swansea Corporation* v. *Harpur* (1), cited in support of this contention, is so different both in its facts and the principle upon which it is decided, that we think it

(1) (1912) 3 K. B. 493; 81 L. J. K. B. 1103; 107 L. T. 6; 76 J. P. 490; 10 L. G. R. 677.

unnecessary to discuss it. It is further contended on behalf of the Supply Company that if in the exercise of the powers conferred upon it, it has caused as little damage, detriment or inconvenience as may be, it cannot be liable in damages under section 19. Whether it has, in fact, caused as little damage as may be, is not a question of law but of fact, and must be answered by the Arbitrators. But assuming that that is the true construction of the sentence, notwithstanding the words immediately following, "make full compensation for *any* damage," it would still be a question of fact whether and to what extent that minimum damage had been exceeded, and, if exceeded even by one rupee, the licensee would be bound to pay that rupee. The point of the Gas Company's complaint is that more than this minimum of damage, detriment or inconvenience *was* caused by the Supply Company, and that is a question yet to be answered by the Arbitrators.

In our opinion, the second question must be answered in the negative. What the question really invites us to do, although it might perhaps have been more happily worded and the Hon'ble Advocate-General admits this, is to decide whether in this matter the Gas Company was bound to proceed under section 14 or, in other words, whether that section applies. For, if it does, there is an end of the Gas Company's case. There could be no claim for damages by the operator against the owner under that section of the nature of the damages now claimed by the Gas Company. All acts done under that section are done by the operator or by the owner at his request and expense. It is, therefore, perfectly clear that the operator could not claim damages for acts of his own or done on his behalf and at his expense by the owner. Here the claim is quite differently grounded. What in effect the Gas Company complains of is that it was cut off from access to its own property by acts done in the exercise of its power by the Supply Company and that those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be.

Costs of this reference to be dealt with by the Arbitrators.

Ordered accordingly

Attorneys for the Arbitrators: Messrs. *Little & Co.*

Attorneys for the Gas Co.: Messrs. *Crawford, Brown & Co.*

Attorneys for the Bombay Electric Supply and Tramways Company: Messrs. *Craigie, Blunt & Caroe.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1084 OF 1912.

May 21, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

MR. A. H. FORBES, EXECUTOR TO THE ESTATE OF LATE MR. A. J. FORBES —PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Income Tax Act (II of 1886), ss. 14, 15, 39—Liability of executor as such—Jurisdiction to determine a person to be chargeable—Suit to set aside assessment—Payment under coercion.

In order to succeed in a suit for a declaration that the Collector in realising certain sums from the plaintiff as income-tax acted without jurisdiction, and for a decree for the amount realised, it is incumbent on the plaintiff to show that the payment was made by him under coercion.

There is no personal exemption in the Income Tax Act of which an executor as such can take advantage.

Income accruing to an executor under the Will of a testator is income liable to be taxed within the meaning of the Income Tax Act, and the Collector acts within the limits of his jurisdiction in determining such person to be chargeable.

A suit for a declaration that the plaintiff as executor to the estate of a deceased is not liable to pay income-tax in respect of any income of the said estate is barred by section 39 of the Act.

Appeal against the decree of the District Judge, Purneah, dated 26th February 1912, affirming that of the Munsif, Purneah, dated 14th July 1911.

Babus *Mohendra Nath Roy* and *Jogendra Nath Mookerjee*, for the Appellant.

Mr. *S. P. Sinha*, Council, and Babu *Ram Charan Mitra*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This is a suit brought by Mr. A. H. Forbes, who is described as executor to the estate of the late A. J. Forbes, against the Secretary of State for India in Council, and the prayer of the plaint is for a declaration that as executor to the estate of the late A. J. Forbes the plaintiff is not

liable to pay income-tax in respect of any income of the said estate and that the said Collector in realizing the sums paid to him acted without jurisdiction, and for a decree for the sum of Rs. 912-3-3, being the amount realized, with interest. To succeed in this suit, it was incumbent on the plaintiff to show that the payment had been made by him under coercion. It is unfortunate that there was no direct issue on that point, nor has our attention been drawn to any finding of fact as to this, but it may be assumed for the purposes of this case that there was coercion within the meaning of section 72 of the Contract Act as interpreted by the Privy Council case in *Kanhaya Lal* v. *National Bank of India Ltd.* (1).

What then is the ground on which this declaration is sought? This has not been made clear to us in the course of the argument.

The case turns upon the Income Tax Act (II of 1886), which is described as "an Act for imposing a tax on income derived from sources other than agriculture." The preamble is in these terms: "Whereas it is expedient to impose a tax on income derived from sources other than agriculture; It is hereby enacted as follows." Then there is a definition of income, as being income and profits accruing and arising or received in British India, and includes, in the case of a British subject within the dominions of a Province or State in India in alliance with Her Majesty, any salary, annuity, pension or gratuity payable to that subject by the Government or by a local authority establishd in the exercise of the powers of the Governor-General in Council in that behalf." Chapter II of the Act deals with the liability to tax, and it commences with section 4 which provides that "subject to the exceptions mentioned in the next following section, these shall be paid, in the year beginning with the 1st day of April 1886, and in each subsequent year, to the credit of the Government of India, or as the Governor-General in Council directs, in repsect of the sources of income specified in the first column of the second Schedule to this Act, as tax at the rate specified in that behalf in the second column of that Schedule." Section 5 provides for certain exceptions and enacts that nothing in section 4 shall render liable to the tax the several sources of income there indicated. It is not suggested that the income with which we are now concerned comes within any one of those exceptions. But the argument would appear to be that though that which has been taxed is 'income,' still because the recipient is an executor, no tax is payable. There is no provision in the Act which authorizes such a view. There is an exemption provided in favour of those whose income does not reach a certain amount, but apart from that there is no personal exemption of which an executor as such could take advantage. Chapter II merely deals with the liability of the subject-matter to tax. Chapter III deals with assessment and collection, the natural sequel to the general liability imposed by Chapter II. It deals with income under four heads which correspond with the four sources of income set forth in the second Schedule to the Act. The first source of income is salaries and pensions, second, profits of companies, third, interest on securities and fourth and last, other sources of income. For the purpose of the argument before us it has been assumed that the income with which we have to deal comes under the last of these four heads. While it is provided with regard to the first three classes of income that the tax shall be deducted or be paid for as expressly indicated, the wider class of incomes coming under clause (*d*) was not capable of such simple treatment, and so we find it is provided by section 14 that "the Collector shall, from time to time, determine what persons are chargeable under Part IV, and the amount at which every person so chargeable shall be assessed." Apart from that, there is no indication, within or without the Act, of the person who is chargeable in respect of other sources of income, and it will be noticed that it is the Collector who shall determine what persons are chargeable in respect of these other sources of income. It may be that there is a limitation placed upon the Collector's decision by the words of section 15, which clearly indicate—as common-sense indeed would determine—that the person chargeable is the person to whom the income accrues. All that appears very simple, and in this case it has been observed by the Collector, who has come to the conclusion

(1) 18 Ind. Cas. 949; 40 I. A. 56; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 C. 598 (P. C.).

that the subject-matter with which he was dealing was income, as admittedly it was, and so was subject to tax. He further determined that the plaintiff, being the person to whom the income accrued, was the person chargeable under Part IV. In so determining he was exercising a jurisdiction that was clearly vested in him by the Act, and I cannot see how it can be said that he purported to exercise a jurisdiction which he did not possess and so did not make an assessment under the Act.

It has been argued before us that sections 20 to 23 throw a flood of light on the case favourable to the plaintiff. I fail to see it. They deal with a special class of cases, and principally of persons who by incapacity arising from some personal defect or non-residence are unable to be approached and dealt with directly, and the sections provide that trustees, guardians, committees, agents and so forth may be dealt with in their places. They further make a special provision for Receivers or Managers in whom no property vests, and also the Court of Wards, Administrators-General and Official Trustees. But if it be argued from this that it affords an indication that income accruing to an executor under the Will of a testator is not liable to be taxed, I am of opinion that the agrument has no value and no force. I have indicated my views to the effect that this is income which is liable to be taxed within the meaning of the Act. I have also shown that the Collector has determined that the plaintiff is a person chargeable and that in so doing he acted within the limits of his jurisdiction. That being so, it appears to be a case where according to section 39, it is right to say that the suit does not lie. It has, therefore, been rightly dismissed by the lower Court and we dismiss the appeal with costs.

N. CHATTERJEA, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 98 OF 1914.

November 16, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

NAND LAL—PLAINTIFF—APPELLANT

versus

KISHORI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Application to set aside order dismissing suit in default—Proper form of order to pass when Court of opinion to restore suit—Order to restore on payment of damages—Appeal—Damages, adequacy or excessiveness of, if to be gone into by Appellate Court.

If a Court decides to restore a suit dismissed for default on payment of damages by the plaintiff, the proper order to pass is to direct the plaintiff to deposit the amount of damages within a prescribed period and to reserve the passing of any final order until the prescribed period expired.

But if a Court orders restoration of a suit on condition of payment of damages within a prescribed period and at the same time directs that otherwise the application for restoration shall stand dismissed, the Court completely disposes of the application and after its order has produced its effect of dismissing the application, an appeal lies against the order, and the Appellate Court is entitled and, therefore, bound to consider whether the damages allowed by the Court below were adequate or grossly excessive.

First appeal from an order of the Subordinate Judge of Agra.

Mr. *Lalit Mohan Banerji* (with him Mr. *Shiam Krishna Dar*), for the Appellant.

Mr. *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*), for the Respondents.

JUDGMENT.—This is a plaintiff's appeal, which purports to be brought against an order rejecting his application to set aside the dismissal of his suit for non-appearance. It appears that the suit in question was set down for hearing on the 2nd of January 1914. The plaintiff had not appeared when the suit was called on, and it was accordingly dismissed. We may take it that the plaintiff presented himself in Court later on the same day. In applying under Order IX, rule 9, of the Code of Civil Procedure, for restoration of the suit, the plaintiff put in an affidavit explaining that he had been accidently delayed on his way to the Court. With reference to this affidavit the Subordinate Judge thinks that it does not afford sufficient reason for the plaintiff's failure to be present when the suit was called on for hearing. It appears

however, that there was some discussion before the Court, and that the defendants informed the Court that they would have no objection to the granting of the plaintiff's application, provided each set of the defendants were paid adequate damages on account of costs incurred to date. Upon this an order was passed directing the plaintiff to pay, within one week, the sum of Rs. 250 to each of the four sets of defendants and providing that in the event of his failing to do this, the application to have the suit restored should stand dismissed. A preliminary objection has been taken that no appeal lies. We have ourselves referred to a reported case of this Court, namely, that of *Jagarnath Sahi* v. *Kamta Prasad* (1). The facts of that case were not precisely on all fours with those now before us; but an opinion was expressed as to the proper form which an order in a case like the present should take. According to this view, the proper order for the Court below to have passed would have been one simply directing the plaintiff to deposit the sum of Rs. 1,000 in Court within a week, and reserving the passing of any final order on his application until the prescribed period had expired. Whether this be so or not, it is clear to us in the present case that the Court below proceeded to pass an order which was intended to, and did in fact, completely dispose of the application for restoration of suit. It provided that in a certain event the application should be allowed, and in a certain event it should stand dismissed. The present appeal has been brought admittedly after the second of these events had occurred, and consequently after the order passed by the Court below had produced its effect of dismissing the plaintiff's application. On this ground we hold that an appeal lies.

Having considered the case on the merits, we desire to point out that, if the learned Subordinate Judge was satisfied that the plaintiff had failed to show sufficient cause for his non-appearance, he might thereupon have dismissed his application, and it is probable in that case that we should not have interfered. As matters stand the Court passed an order, based in part on the admission of the defendants themselves that they were prepared to consent to the restoration of the suit on payment of adequate damages. We think we are entitled to consider in appeal, and it is therefore our duty to consider, whether the damages allowed by the Court below were adequate or grossly excessive. We should be prepared to allow a considerable margin of discretion to Subordinate Courts in a case like the present; but having looked into the matter it appears to us, *firstly*, that the sum ordered to be paid as damages was at least double the sum to which the defendants could make out any reasonable claim, and, *secondly*, that the period of seven days allowed for payment was exceedingly short. In fact the Court below seems to have taken away with one hand what it purported to give with the other. We, therefore, so far modify the order of the Court below that we substitute for it an order admitting the plaintiff's application for restoration of his suit, subject to his paying into the Court below by the 2nd of December 1914 the sum of Rs. 125 as costs on account of each of the four sets of defendants, that is to say, a total sum of Rs. 500. The costs of this appeal will be costs in the suit.

Order modified.

(1) 23 Ind. Cas. 138; 36 A. 77; 12 A. L. J. 38.

BOMBAY HIGH COURT.
CIVIL APPEAL No. 17 OF 1914.
CIVIL SUIT No. 1219 OF 1912.
August 27, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

R. D. SETHNA—APPELLANT

versus

JWALAPRASAD GAYAPRASAD—RESPONDENT.

Hundi—*Payment to endorsee—Railway receipt—Security—Forgery—Equity to recover—Endorsee, liability of, to refund—Notice—Lost or stolen hundi, genuineness of—Holder, liability of—Marwari custom.*

Where the plaintiff paid to the defendant the amount of a *hundi*, not as to a Shah, but as to an endorsee for collection of a *hundi* on the security of a Railway receipt, he has no equity to recover back the amount from the defendant if the security turns out to be a forgery.

In such a case the defendant is liable to re-

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fund the money or to trace the *hundi* to its source, provided notice is given within a reasonable time of the discovery of the forgery, that is, provided the plaintiff loses no time in making this communication and claiming the refund.

Obiter dicta.—In the case of a lost or stolen *hundi* the *hundi* is *ex hypothesi* genuine; and, therefore, the liability of a Shah who is paid does not rest on a guarantee of genuineness.

The liability of a holder who endorses a bill of exchange and passes it on under English Law is only that of a surety for the drawer and the acceptor, but his position does not involve any liability to the acceptor.

The rule of Marwari custom and the idea underlying therein discussed.

FACTS appear fully from the judgment of Macleod, J., reported in 25 Ind. Cas. 52.

Mr. *Setalvad* (with him Mr. *Desai*), for the Appellant.

Mr. *Kanga* (with him Mr. *Vakil*), for the Respondent.

JUDGMENT.—This is an appeal from a decree of Mr. Justice Macleod dismissing the suit.

The suit was filed by Bansidhar Lachminarayan, now an insolvent and represented by the Official Assignee, to recover from the defendants Rs. 3,000 with interest from the 10th June 1912 upon a plaint containing the following allegations.

On the 10th of June 1912, the plaintiff received a letter, addressed to his firm in Bombay, purporting to be from one Ramlal Ramprasad of Harpalpur in Alipur State in the Bundelkhand Agency. The letter enclosed what purproted to be a railway receipt for 300 bags of linseed stated to have been consigned by Ramlal from Ranipur Station, and the plaintiff was asked to sell the goods and meantime to accept and pay on presentment two *hundis* for Rs. 3,000 each, dated the 15th *Jeth Sudi* 1969, drawn by Ramlal in favour of the second defendant firm of Munalal Gayaprasad. On the same day one of the *hundis*, being a *Shah Jog Hundi* drawn on the plaintiff by Ramlal in favour of Munalal, was presented by the first defendant and on the same day the other *hundi* mentioned in the letter was presented by Gopaldas Vallabdas.

The first defendant's firm being respectable Shroffs and fulfilling the qualifications of a Shah, the plaintiff paid them the amount of the *hundi* on their responsibility according to the well-established custom in regard to *Shah Jog Hundis*. The plaintiff delivered the railway receipt to one Kilachand in fulfilment of a contract for sale of linseed and received from Kilachand Rs. 5,600. As the goods mentioned in the railway receipt never arrived, the plaintiff in August took back the railway receipt and refunded the amount paid by Kilachand. He was informed by the Railway Company on the 22nd of August that the railway receipt appeared to be a fabrication. The plaintiff also began inquiries on his own account, from which he had reason to believe that the second defendant firm belonged to Kamlaprasad Munalal, the Station Master of Harpalpur, that no such person or firm as Ramlal Ramprasad, by whom the *hundis* purported to be drawn, ever existed and that the *hundis* and the railway receipt were fabricated by the said Kamlaprasad Munalal or by some one at his instigation or in collusion with him for the purpose of defrauding the plaintiff. The plaintiff says that in accordance with the well-established custom among Shroffs and according to the rules of the Marwari Panch Shroff Association in respect of *hundis*, the Shah who obtains payment of a *Shah Jog Hundis* is, in the event of the *hundi* turning out to be a false, fraudulent, stolen or forged *hundi*, bound to refund the amount of the *hundi* with interest, unless he produces the actual drawer or the person who committed the fraud.

It was proved at the hearing that the above statement of facts as appearing in the plaint was not correct, in that the *hundi* was presented for payment to the plaintiff on the 10th June by the first defendant and payment was then refused and was only made on the 11th after the arrival that day of the railway receipt and after the payment by Kilachand of Rs. 5,600, being ninety per cent. of the price of the linseed supposed to be represented by the railway receipt. It was also proved that the Marwari custom referred to in the plaint as declared in the rules of the Marwari Association is that " in case of a *hundi* coming in any fraudulent way if the party receiving the amount of the *hundi* receives it as a Shah, he is absolved from liability if he traces the *hundi* to its source. But if he does not do so, he must re-pay the amount of the *hundi* with interest."

According to the statement in the plaint, the fraudulent way here referred to covers not only the case of a forged but also of a stolen or lost genuine *hundi*. To the same effect is the plaintiff's deposition. The first

issue raised was whether the *hundi* in question was paid on the responsibility of the first defendant as a Shah and in accordance with the custom alleged.

The plaintiff with reference to this issue deposed that he did not know the writer Ramlal or the firm of Munalal Gayaprasad and if he had not got the railway receipt, he would not have paid the *hundi*. He only paid on the *hundi* and another *hundi* presented by another firm of Shroffs up to ninety per cent. of the value of the goods. He paid the defendant's *hundi* in full and the other in part. He received Rs. 5,600 for the railway receipt from Kilachand before he paid the defendants. The learned Judge, however, disposed of the first issue by saying: "The Shah does not guarantee the solvency of the drawer, he guarantees the genuineness of the *hundi*. A drawee will not pay a *hundi* unless he has funds in his hands belonging to the drawer, or is willing to give him credit. And he will not pay on presentation of a *Shah Jog Hundi* to a Shah unless he is satisfied as to the respectability of the Shah, as he looks to him in case of anything afterwards going wrong with the *hundis*: see *Davlatram Shriram* v. *Bulakidas Khemchand* (1). Therefore this issue is somewhat meaningless." We are unable to accept this view, which was also pressed upon us by the appellant's Counsel. In the case decided by Sir Joseph Arnould it was common ground that if payment were made to a Shah as such on a *hundi* which afterwards turned out to be stolen or lost, the drawee who has paid is entitled to a refund from the Shah to whom it has been mistakenly paid (unless he otherwise discharges himself in the customary way). Sir Joseph Arnould says at page 29: "It seems to me that this evidence strongly tends to show that the drawee of the *hundi*, in accepting and paying it, looks very mainly to the Shah as responsible in case of anything afterwards going wrong with the *hundi* and that he relies on the solvency and respectability of the Shah as one of the principal grounds in inducing him to make payment without further inquiry."

But in the case of a lost or stolen *hundi*, the *hundi* is *ex hypothesi* genuine, therefore the liability of a Shah who is paid does not rest on a guarantee of genuineness. The liability of a holder who endorses a bill of exchange and passes it on under English Law is only that of a surety for the drawer and the acceptor, but his position does not involve any liability *to* the acceptor.

We find it difficult to say what is the idea underlying the Marwari custom. It is perhaps this: that of two innocent parties, the one nearest in the line of successive holders to the person who committed the fraud must find out the guilty party at the risk of otherwise having to recoup the innocent payer. In the present case, however, it appears to us that the first defendant was paid, not as a Shah, but as the indorsee for collection of a *hundi* purporting to be drawn against the security of a document representing 300 tons of linseed, for payment was in fact refused until the railway receipt came to hand and had been sold for cash and no more was paid to the holders of the *hundis* than the exact amount realised on the railway receipt. This is a state of affairs not dealt with or contemplated in *Davaltram Shriram* v. *Bulakidas Khemchand* (1). The rules of the Marwari Association, which have been put, in relate to cases where the party who receives the amount of the *hundi* receives it as a Shah. If the plaintiff simply paid on the security of the railway receipt he would have no equity to recover back the amount from the first defendant: see *Leather* v. *Simpson* (2) and *Baxter* v. *Chapman* (3).

Assuming, however, that there might be a liability imposed on the first defendant by reason of the payment to refund or to trace the *hundi* to its source, this would only be the case provided notice was given within a reasonable time of the discovery of the forgery, that is, provided the plaintiff lost no time in making this communication and claiming the refund: see *Dalvatram Shriram* v. *Bulakidas Khemchand* (1). The duty of the plaintiff cannot be put lower than this, although the Hindu Law merchant may not be so strict as to notice of dishonour as the English Law, as to which see *Megraj Jagannath* v. *Gokaldas*

(1) 6 B. H. C. R. O. C. J. 24 at p. 29.

(2) (1871) 11 Eq. 398; 40 L. J. C. 177; 1 Asp. M. C. 5; 24 L. T. 286; 19 W. R. 431.

(3) (1873) 29 L. T. 642; 2 Asp. M. C. 176.

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Mathuradas (4). It is, however, quite clear that the plaintiff knew long before the end of August that the *hundis* and the forged railway receipt were part of a fraudulent scheme of kite-flying perpetrated by Kamlaprasad, the Station Master of Harpalpur, the owner of the second defendant's firm, yet no notice was given till the demand of refund on the 25th September to the plaintiff, who in his ignorance had continued to deal with and give credit in account to the second defendant firm up to the end of the *Maru* year. It was upon this ground that the lower Court dismissed the suit and we agree that it was a sufficient ground.

We are also of opinion that the *hundi* had been "traced to its source" within the meaning of the Marwari Association Rules before the first defendant received intimation of the fraud and that the second defendant's firm was in the circumstances "the person from whom the forged *hundi* was bought" within the contemplation of Sir Joseph Arnould's judgment. The learned Judge thinks, not because the second defendant only sent the *hundi* for collection to the first defendant, but as he gave credit in account for the proceeds he was in effect the buyer of the *hundi*: see *Mulchand Joharimal* v. *Suganchand Shivdas* (5).

If the first defendant was only the holder for collection of a *hundi* handed to him by the second defendant's firm who were the actual payee (and as it appears also the drawer), the second defendant's firm would be the proper defendants to proceed against: see *London and River Plate Bank* v. *Bank of Liverpool* (6).

We affirm the decree and dismiss the appeal with costs throughout, excluding however the costs of cross-objections other than that as to costs.

Appeal dismissed

Attorneys for the Appellants: Messrs. *Malvi, Hira Lal, Mody & Co.*

Attorneys for the Respondent: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

(4) 7 B. H. C. R. O. C. J. 137 at p. 142.
(5) 1 B. 23.
(6) (1896) 1 Q. B. 7 at p. 12; 65 L. J. Q. B. 80; 73 L. T. 473.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 564 OF 1911.

December 8, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

GADIAN CHETTI (DIED) AND OTHERS—DEFENDANTS Nos. 2 AND 3—APPELLANTS

versus

VEERAPPA CHETTI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Evidence Act (I of 1872), ss. 2, 17, 21, 114—Consideration—Recital of consideration in document, evidentiary value of—Burden of proof, shifting of.

A recital of payment of consideration in a mortgage document is an admission by the mortgagor within the meaning of sections 17 and 21 of the Evidence Act and may be proved against a person claiming under him, though not a party to the document.

Brajeshwere Peshakar v. *Budhanuddi*, 6 C. 268 at p. 277; 7 C. L. R. 6; *Manohar Singh* v. *Sumirta Kuar*, 17 A. 428 at p. 430; A. W. N. (1895) 93; *Ghurphekni* v. *Parmeshar Dayal Dubey*, 5 C. L. J. 653; *Bisheswar Dayal* v. *Hurbans Sahay*, 6 C. L. J. 659; 3 M. L. T. 38, referred to.

Whether a specific piece of evidence is enough for discharging the burden of proof is a question primarily concerned with the weight to be given to that piece of evidence and is not a question of law.

Where each party has adduced evidence tending respectively to prove and disprove a fact in issue, the importance of burden of proof disappears almost entirely.

Hall v. *Venkatakrishna*, 13 M. 394; *Chaudhri Mahommad Mehdi Husan Khan* v. *Sri Mandir Das*, 17 Ind. Cas. 396; 17 C. W. N. 49; 12 M. L. T. 392; 15 O. C. 278; (1912) M. W. N. 1052; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 16 C. L. J. 629; 23 M. L. J. 741; 39 I. A. 68 (P. C.), *Krishnama Chariar* v. *Veeravelli Krishnama Chariar*, 19 Ind. Cas. 452; 13 M L. T. 385; (1913) M. W. N. 355; 24 M. L. J. 517, followed.

The mere proof of acknowledgment of receipt of consideration does not necessarily shift the burden of proof, or must not necessarily be taken as insufficient to shift the burden of proof.

Second appeal against the decree of the Court of the Subordinate Judge of Nagapatam, in Appeal Suit No. 933 of 1909, preferred against that of the District Munsif of Pattukotta, in Original Suit No. 41 of 1909.

Mr. *T. Rangachariar*, for the Appellants.

Dr. *S. Swaminadhan*, for the Respondents.

This appeal coming on for hearing on the 19th September 1913 and on the 7th and 8th December 1914, the Court delivered the following

JUDGMENT.—The only question involved in this appeal is whether the mortgage of the 9th August 1889 (Exhibit C in the case) in favour of the plaintiff is supported by consideration. Both the lower Courts

have found that issue in the affirmative. But it has been argued before us on behalf of the appellants that the decisions of the lower Courts are erroneous in law.

Mr. Rangachariar argued, in the first instance, that the lower Courts erred in permitting the plaintiff to prove and rely upon the acknowledgment of receipt of consideration contained in Exhibit C, to which document the 2nd defendant was not a party. He relied upon *Brajeshware Peshakar* v. *Budhanuddi* (1); *Manohar Singh* v. *Sumirta Kuar* (2) *Ghurphekni* v. *Purmeshar Dayal Dubey* (3) and *Bisheswar Dayal* v. *Harbans Sahay* (4) which decisions, he contended, laid down that a recital of payment, though it may bind a party to the document containing the recital, will not be evidence against the appellant, because he was not a party to the document. We cannot accede to this argument. Sections 17 and 21 of the Evidence Act seem to us to provide for the point in question. An acknowledgment of receipt of consideration is, under the circumstances we are considering, clearly such a statement as is defined as an admission in section 17; and section 21 provides that an admission so defined is relevant and may be proved, not only as against the person who makes it, but also his representative-in-interest. Mr. Rangachariar could not deny that the appellant was a representative-in-interest of the person who made the admission. We, therefore, think that the lower Courts were right in permitting the acknowledgment to be proved as against the appellant.

The next point taken was that the lower Courts erred in shifting the burden of showing want of consideration on to the second defendant, after the acknowledgment of receipt of consideration contained in Exhibit C had been proved. Reliance was placed on *Saluk Singh* v. *Ajudhya Pershad* (5), where it is stated as follows:—"The burden of proof in such a case is primarily on the plaintiffs to establish payment of consideration, and as against the transferee who was no party to the bond and had no sufficient knowledge of the circumstances under which it was executed, that admission is of very little value, and, in our opinion, is insufficient to shift the burden of proof on to the defendant transferee." Did the learned Judges who decided that case intend to lay it down as a proposition of law that the burden of proving consideration can in no case be discharged and shifted merely by proof of the acknowledgment of receipt of consideration? We are not prepared to say that they intended to do so. But if they did, we must with deference express dissent from that proposition.

It seems to us that it is impossible to lay down in broad terms as a proposition of law that, after a person on whom the burden of proof lies has adduced any specific piece of evidence,—such as an acknowledgment of the receipt of consideration—the burden of proof is not shifted from him. Whether a specific piece of evidence is enough for discharging the burden of proof is a question primarily concerned with the weight to be given to that piece of evidence, and is not a question of law. In this connection it may not be out of place to point out, what has often been pointed out before, that where each party has adduced evidence tending respectively to prove and disprove a fact in issue, in such cases the importance of the incidence of the burden of proof disappears almost entirely. See *Hall* v. *Venkatakrishna* (6); *Chaudhri Mohammad Mehdi Hasan Khan* v *Sri Mandir Das* (7) cited in *Kuram Krishnama Chariar* v. *Veeravelli Krishnama Chariar* (8). It must seldom happen, especially in view of section 114 of the Evidence Act, that the acknowledgment of payment is the only matter which the Court can consider in coming to a conclusion whether or not consideration passed. Even if the proof of the recital is the only formal evidence adduced, the circumstances surrounding the transaction in question, the relationship of the parties to the suit and various other matters would affect the weight to be given to the acknowledgment. Hence, it may be that in

(1) 6 C. 268 at p. 277; 7 C. L. R. 6.
(2) 17 A. 428 at p. 430; A. W. N. (1895) 93.
(3) 5 C. L. J. 653.
(4) 6 C. L. J. 659; 3 M. L. T. 38.
(5) 15 Ind. Cas. 121; 10 A. L. J. 108.

(6) 13 M. 394 at p. 398.
(7) 17 Ind. Cas. 396; 17 C. W. N. 49; 12 M. L. T. 392; 15 O. C. 278; (1912) M. W. N. 1052; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 16 C. L. J. 629; 23 M. L. J. 741; 39 I. A. 68 (P. C.).
(8) 19 Ind. Cas. 452; 13 M. L. T. 385; (1913) M. W. N. 355; 24 M. L. J. 517.

some cases not only would proof of acknowledgment be sufficient to shift the burden, but would be held sufficient to counterbalance a great deal of other evidence produced against the contention that consideration passed, if such evidence does not favourably impress the Judge before whom it is tendered. On the other hand, the circumstances may be such as to make the Judge disinclined to attach any weight to the acknowledgment. It seems to us material in this connection to advert to section 3 of the Evidence Act, where it is stated when a fact should be said to be proved, disproved, or not proved, respectively :—

"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

"A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

"A fact is said not to be proved when it is neither proved nor disproved."

It is impossible, therefore, in our opinion, to state broadly either that the mere proof of acknowledgment or receipt of consideration must necessarily shift the burden of proof or must, if taken by itself, always necessarily be insufficient to so shift the burden of proof.

The second point taken on behalf of the appellants was that apart from the question of the burden of proof and even assuming that it rested on the defendants, on the facts found by the learned Subordinate Judge, the irresistible legal inference was that no consideration had passed.

In order to consider this second point it is necessary to state the main facts connected with the transaction which is the subject-matter of the appeal. One Dorasami Thevan was at one time indebted to a firm which consisted apparently of three partners :—

(1) The 2nd defendant.

(2) One Chidambaram Chetty, who was the father-in-law of the plaintiff and who for the purposes of the present question may be considered to be identified in interest with the plaintiff.

(3) One Raman Chetty, with whom we are not directly concerned.

Exhibit C is a mortgage dated 9th August 1889 from Dorasami, the debtor of the firm, and purports to be executed for a consideration of Rs. 510, which sum is divided into two portions :—

(1) Rupees 35 thereof were purported to be paid in cash.

(2) Rupees 475 were stated to be outstanding from Dorasami to Chidambaram Chetty and the plaintiff agreed to pay off that sum.

Mr. Rangachariar attacked the existence of the latter portion of the consideration and argued

(1) that there were no debts due to Chidambaram Chetty at the time that Exhibit C was executed;

(2) that prior to the execution of Exhibit C the only debts due from Dorasami (the executant of Exhibit C) to any members of the firm were evidenced by Exhibits III, IV and V;

(3) that the debts under the said Exhibits had been paid off at the time when Exhibit C was executed and were found to be so paid off by the Subordinate Judge;

(4) that the 2nd defendant purchased whatever interest Chidambaram Chetty had in the said debts (see page 16, lines 35 to 37), so that as between Chidambaram Chetty (or the plaintiff) and the 2nd defendant there could not be any consideration for Exhibit C.

Shortly stated, therefore, Mr. Rangachariar's argument is that the only debts that could have formed the consideration for Exhibit C were, and have been found to be, non-existent and, therefore, there is no consideration for Exhibit C.

We think that so far as the debts evidenced by Exhibits III, IV and V are concerned, this contention is right. It remains to consider whether those were the only debts proved or alleged to be existing. It is argued that they were and that that fact is established because,

(1) according to the case of both parties there was a settlement of accounts not many months before Exhibit C was executed, and in this account all the debts due from Dorasami must have been included and consolidated.

(2) Exhibit VIII, which was executed in favour of the 2nd defendant after the settlement of accounts but before Exhibit C, was in consideration of the shares due both to the 2nd defendant and to Chidambaram Chetty out of the debts outstanding against Dorasami. Exhibit VIII is the only document in favour of 2nd defendant. If there had been debts other than those referred to in Exhibit VIII for payment off of the 2nd defendant's share in those debts, there would have been a document in favour of the 2nd defendant corresponding to the document Exhibit C, which is in favour of the plaintiff.

(3) Exhibit C following Exhibit VIII purports to be in consideration of Chidambaram Chetty's share in the debts which very share was the consideration for Exhibit C.

(4) Exhibit VIII specifically mentions Exhibits III, IV, V as being evidence of the debts due from Dorasami, but Exhibit C does not particularise any debts.

It is clear, however, that Dorasami Thevan was deeply indebted to the firm of which the 2nd defendant was a partner and also that the documents he was willing to pass are not necessarily in exact accordance with the facts. It would not be safe to say that because these debts evidenced by Exhibits III, IV and V were non-existent, there were no other debts which could have been the consideration for Exhibit C.

Hence it was open to the lower Courts to find one of these sets of circumstances :—

(*a*) that as a matter of fact there were other debts which might have been the consideration for Exhibit C ;

(*b*) that the plaintiff paid consideration for Exhibit C and that as between him and Chidambaram there being consideration, the 2nd defendant could not urge that Exhibit C was without consideration ; and

(*c*) that the plaintiff by his conduct had either

(i) estopped himself from questioning the fact that there was consideration for Exhibit C, or

(ii) at least furnished evidence on which there might be a finding against him.

The Subordinate Judge refers to some of these matters in paragraphs 8 and 9 of his judgment. They are, however, not quite easy to follow. He certainly seems to have misappreciated the significance of the prior events. For so far as the partnership suit, Original Suit No. 16 of 1890, is concerned, the plaintiff was not a party to it. The proceedings in that suit could not avail the plaintiff, unless it had been found that at that time the appellant before us had obtained a decree against Chidambaram on the basis of Exhibit C being for consideration, and that the amount that Chidambaram was ordered to pay to the 2nd defendant in that suit was on this basis. There is no finding to that effect.

Secondly, as to the *novatio* to which the Subordinate Judge refers, it is difficult to understand his meaning.

Finally, as to the execution proceedings referred to in paragraph 9 of his judgment, the fact that the appellant attached Exhibit C as if it were an asset does not amount to an admission, still less estoppel, as regards the validity or enforceability of the transaction referred to.

Mr. Rangachariar, therefore, asks us to send the case down for a finding on the point whether as a matter of fact the plaintiff made any payment to Chidambaram, his father-in-law, in consideration of Exhibit C. The Munsif has found that there was such payment. The Subordinate Judge has not dealt with this point. We have thought it better to hear Mr. Rangachariar on the question and to find on it ourselves instead of calling for a finding.

The evidence on the point is that of the plaintiff himself, who was called as defendants' witness No. 1. His examination-in-chief is, therefore, in the nature of cross-examination. In spite of this the Munsif who heard him give evidence believed his evidence, and in the circumstances of this case it seems to us that it would not be justifiable for us to arrive at a different conclusion. It may be added that with reference to part of the consideration for

Exhibit C, consisting of Rs. 35 paid in cash, Mr. Rangachariar concedes that a decree might and ought to be passed against him.

Taking all the circumstances together, it seems to us that the lower Courts were right in proceeding on the basis that there was consideration for Exhibit C and in passing a decree on that footing.

The second appeal will be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1884 OF 1912.

May 20, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

MUKUNDA LAL CHUCKERBUTTY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MANMOHINI DEBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Sonless widowed daughter, right of—Possession adverse to deceased agnate—Limitation.

According to Hindu Law a sonless widowed daughter is not an heiress of her father.

Where, therefore, a sonless widowed daughter remained in possession of her deceased father's property for over 30 years and it was not shown that she had re-married:

Held, that she was in possession of the properties adversely to the agnates of her deceased father and that their suit was barred by limitation.

Appeal against the decree of the District Judge Birbhoom, dated 30th March 1912, affirming that of the Munsif, first Court, at Bolpur, dated 31st March 1911.

Babu *Sushil Madhab Mallik*, for the Appellants, attempted to make out a case under section 5 of the Hindu Widows' Re-marriage Act (XV of 1856).

Babus *Hemendra Nath Sen* and *Sajani Kant Sinha*, for the Respondents, referred to section 4 of the Act and pointed out that at the time the succession opened to her, Sri Sundari was already a sonless widow.

JUDGMENT.

FLETCHER, J.—This is an appeal from a judgment of the learned District Judge of Birbhum, dated the 30th March 1910, dismissing an appeal from the judgment of the Munsif, dated 31st March 1911. The suit was brought to recover possession of certain moveable and immoveable properties by the agnates of one Shiban Chuckerbutty, who died many many years ago, leaving his widow and a daughter who, for the purposes of this case we must assume, was a widowed daughter who was also sonless. On the facts as found by the learned Judge of the lower Appellate Court, after the death of the widow, the daughter succeeded to the properties and the only question that we have got to consider in this case is, whether the plaintiff's suit is barred by limitation. The determination of that question depends on the question as to whether the daughter of Shiban Chuckerbutty, that is Sri Sundari, took the properties as the heiress of her father or whether she was in possession of them adversely against the heirs. The point has been argued with considerable force by the learned Vakil for the appellants and, notwithstanding these arguments, I remain unconvinced that, according to the Hindu Law, a sonless widow is an heir. The arguments put forward by the learned Vakil are rather for the reformer than for the Law Courts. The matter can be based chiefly on the construction of the Hindu Widows' Re-marriage Act XV of 1856. Section 4 of the Act may be of some importance, because it expressly excepts a widow marrying again from succeeding to any property which before the passing of the Act she would have been incapable of inheriting by reason of her being a childless widow. It is quite true that Sri Sundari was not childless but only sonless. There is nothing, however, to show that Sri Sundari ever did marry again and if she has not married again, she is governed by the rules applicable to the other Hindus. It cannot be suggested, notwithstanding the statements in the text-books, that in an ordinary case of Hindu succession a sonless widow is an heir. In my opinion, the present appeal fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1913-14 OF BARA BANKI DISTRICT.

April 28, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

SURAJ BALI—PLAINTIFF—APPELLANT

versus

Musammat GOVINDA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Oudh Rent Act (XXII of 1886), s. 127—Civil Court decree for possession—Decree-holder not in possession—Possession, actual, with tenants from whom judgment-debtor realised rents.

A person got against a *lambardar* a Civil Court decree for possession of a *patti* and was referred to the Revenue Courts as regards mesne profits, but even after the decree was passed, the *lambardar* continued to collect rent from the tenants in actual possession of the land comprised in the *patti*. Subsequently the decree-holder, treating the *lambardar* as a tenant under section 127 of the Oudh Rent Act, issued against him a notice of ejectment:

Held, that section 127 of the Oudh Rent Act was not applicable to the case and that the notice ought to be cancelled.

Held, further, that the remedy of the decree-holder lay in the Civil Court.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 1st August 1913, upholding that of the Assistant Commissioner, Bara Banki, dated 27th March 1913.

Babu *Pratap Chandra Gupta*, for the Appellant.

Mr. *K. Darabjee*, for the Respondents.

JUDGMENT.

BAILLIE, S. M. (*April 16th*, 1914).—The appellant in this case is the *lambardar* of the *mahal*. He was sued in the Civil Courts by the respondent for possession of a 9-anna 8-pie *patti* and in 1911 a decree for possession was given against him, but it was stated as regards mesne profits that respondent should proceed by way of suit against the *lambardar* in the Revenue Court. Subsequently to this decision the *lambardar*, appellant, continued to collect the rents in the land of which possession had been given to the respondent by the Civil Court decree, and on the 1st August 1912 he got a decree in his favour for arrears of rent due from certain tenants. The Commissioner states that appellant retained cultivating possession after the Civil Court decree. There appears to be on record nothing whatsoever to support this finding. Appellant is not himself in possession but he collects the rent from the tenants who are in possession. The case appears to me to be one in which section 127 is entirely inapplicable. Respondents' remedy is in the Civil Courts.

I would allow this appeal, cancel the notice of ejectment, but in the circumstances, as appellant appears to be adopting a position in defiance of the Civil Court's finding, I allow costs in any proceedings in this case.

TWEEDY, J. M.—I concur. The findings of the lower Courts seem to me most extraordinary.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1067 OF 1912.

November 17, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

SINNASAMI GOUNDEN *alias* PALANI GOUNDEN AND OTHERS—DEFENDANTS Nos. 2 TO 4—APPELLANTS

versus

SUBBANA GOUNDEN AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Hindu Law—Joint family—Co-parcener, exclusion of—Purchaser from co-parcener out of possession—Onus—Limitation Act (IX of 1908), Sch. I, Arts. 136, 144.

Where a member of a joint Hindu family was refused partition of his share and remained out of possession and received no profits for over 12 years and was denied even maintenance:

Held, that he not merely did not participate in, but was excluded from, the joint family property.

Jaganatha v. *Ramabhadra*, 11 M. 380 at p. 392, followed.

Where a person purchases a property from a member of a joint Hindu family who was out of possession, the onus lies on him to show that his vendor was excluded within 12 years of the suit.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in Appeal Suit No. 59 of 1911, preferred against that of the District Munsif of Tiruppur, in Original Suit No. 76 of 1910.

Mr. *L. Venkataraghava Aiyar*, for Mr. *L. A. Govindaraghava Aiyar*, for the Appellants.

Mr. *S. Desikachariar*, for Mr. *S. Srinivasu Aiyangar*, for the Respondents.

SINNASAMI GOUNDEN v. SUBBANA GOUNDEN.

JUDGMENT.—The defendants in the suit form which this second appeal arises form an undivided Hindu family, the 4th defendant being the father and defendants Nos. 1 to 3 his sons. The plaintiff, as purchaser under a registered sale-deed of the share of the 1st defendant in the moveable and immoveable properties belonging to the joint family, sued for partition and delivery of the 1st defendant's share therein with mesne profits. The suit was dismissed by the District Munsif, but succeeded on appeal to the Subordinate Judge. The defendants Nos. 2, 3 and 4 are the appellants before us.

It is common ground that the 1st defendant executed to his father (the 4th defendant) the agreement Exhibit I, dated 10th November 1894, by which in consideration of the fact that 13½ acres of land were assigned to the 1st defendant by his father for maintenance without powers of alienation as well as cattle, sheep and other moveables absolutely for his share, the 1st defendant agreed not to demand partition of the family properties, except as regards the moveables already given to him, during the life-time of his father and of his step-mother, that is, the mother of defendants Nos. 2 and 3. It is found by the District Munsif (and the Subordinate Judge adopts the findings) that the 1st defendant only enjoyed the property assigned to him by Exhibit I for one year and that then, having squandered all the moveable property he got by Exhibit I, he demanded a share in the family property but was refused by the 4th defendant, his father, who drove him out of the family and thereafter refused to give him any maintenance whatever. This was in 1895. From that time onwards (a period of over 13 years before the suit was brought) the 1st defendant has lived away from his family maintaining himself by keeping a *pial* school and doing cooly work, and has not enjoyed or been maintained out of any of the family property. The 4th defendant appears to have recovered possession even of the land assigned to the 1st defendant by Exhibit I in 1895. The plaintiff, who is the cousin of the 1st defendant, admits that the 1st defendant demanded a share in the family property but was refused. He, however, tried to show that this occurred in 1903, but the lower Courts have not accepted that version.

The sale-deed upon which the suit is based is dated 30th September 1908. As the plaintiff's father and brother had attested Exhibit I and plaintiff is the 1st defendant's cousin, the District Munsif held that the plaintiff was fully aware of the existence of Exhibit I. In view of this and upon the construction of Exhibit I, he concluded that the agreement was binding both on the 1st defendant and the plaintiff and that, therefore, the suit was not maintainable during the life-time of the 4th defendant and his wife, having regard to the terms of the document. The District Munsif further held that the refusal of the 4th defendant to grant the 1st defendant's request for partition in 1895 and the subsequent facts amounted to an exclusion of the 1st defendant from possession of the joint family property to the knowledge of the 1st defendant and that, therefore, the suit was barred by limitation, having been brought more than twelve years from the date of exclusion. The Subordinate Judge, on the other hand, held that Exhibit I, being devoid of consideration, was not binding either on the 1st defendant or the plaintiff and that the 4th defendant's refusal of partition was not meant to exclude the 1st defendant from a share, but merely to prevent him squandering it and that, therefore, there was no bar by limitation on the ground of the 1st defendant's exclusion. The appellants attack these conclusions of the Subordinate Judge. It is, however, unnecessary to deal with the contentions of the appellants upon the first point, namely, as to the validity and binding effect of Exhibit I, as we are clear that upon the second point the conclusion of the Subordinate Judge cannot be upheld. The finding is that the 1st defendant was not only refused partition in 1895 but also that from that date he has not been in possession nor received any of the proceeds of the joint family property. The 1st defendant was thus excluded from the joint property [see *Jaganatha* v. *Ramabhadra* (1)]. It was not

(1) 11 M. 380 at p. 392.

merely a case of non-participation, as it is found that the 4th defendant refused the 1st defendant even maintenance subsequently. The view of the Subordinate Judge that the refusal of the 4th defendant was not meant to exclude the 1st defendant from his share but merely to prevent his squandering it, is not based on any evidence. On the other hand, the facts that the 4th defendant took back the piece of land assigned to the 1st defendant and subsequently refused to allow the 1st defendant any maintenance whatever tend to show that exclusion was intended. The defendants have nowhere conceded (as the Subordinate Judge erroneously observes) that the 1st defendant has not lost his right to a share. The Subordinate Judge relies on Exhibit I as containing an admission of the 1st defendant's right to a share, but Exhibit I does not prevent the defendants Nos. 2 to 4 from proving, as they have done, that the 1st defendant was subsequently excluded.

In these circumstances, it lay upon the plaintiff who bought the 1st defendant's share when the 1st defendant was out of possession, to show that he brought the suit within 12 years from the date on which the 1st defendant was excluded from the joint family property, whether the Article applicable is Article 136 or 144 of the Limitation Act [see *Ram Lakhi* v. *Durga Charan Sen* (2)] As to this the lower Courts have rejected plaintiff's version that the 1st defendant was refused partition only in 1903, and have found that the exclusion of the 1st defendant dated from 1895. The suit is, therefore, barred by limitation.

The decree of the Subordinate Judge is reversed and that of the District Munsif restored with costs here and in the lower Appellate Court.

Appeal allowed; *Suit dismissed.*

(2) 11 C. 680

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 29 OF 1914.

September 19, 1914.

Present:—Mr. Justice Macleod.

AMIRBIBI—PLAINTIFF

versus

AZIZABIBI AND OTHERS—DEFENDANTS.

Mussalmans Wakf Validating Act (VI of 1913), retrospective effect of.

The Mussalman Wakf Validating Act, 1913, refers solely to *wakfs* created after the Act and has no retrospective effect.

Messrs. *Mulla* and *Mirza*, for the Plaintiff and defendants Nos. 1 and 2.

Mr. *Jardine*, Acting Advocate-General, for Defendant No. 3.

JUDGMENT.—One Shaik Abdulla *bin* Shaik Ebrahim, a Sunni Muhammadan, died at Bombay on or about the 14th of August 1906, leaving him surviving as his only heirs according to Muhammadan Law two daughters, Amirbibi and Azizabibi. By a deed-poll dated the 23rd March 1901 the said Shaik Abdulla declared in effect that he held certain property belonging to him in Huzaria Street in *wakf* as a *mutawali* or trustee upon the trusts following, *viz.* :—

"(*a*) Out of the net rents of the said property to feed five *Fakirs* every Friday night, to pay for reading the Koran every month and for Fatiha ceremonies in the months of Muharram, Rabiulakhar, Rajab and Ramzan and for offering every month oil two and a half seers for lighting the Masjid situated in Huzaria Street.

"(*b*) To pay the balance of the said rents to his daughters and any other child that might thereafter be born to the settlor in equal shares for their maintenance and the maintenance of their children therein named, and after the death of his daughters to pay the same to the second defendant and the said Yakubkhan and Dawoodkhan and their descendants generation after generation as well as the settlor's descendants, male or female, generation after generation.

"(*c*) On failure of descendants to use the balance of the said rents for the benefit of the settlor's community or for meritorious acts or for the use of the said Masjid as

the trustee for the time being might think proper."

The annual gross income of the property is said to be Rs. 960 and the annual net income about Rs. 800. The amount required for the purposes set forth in sub-clause (*a*) of paragraph 2 of the plaint is said to be about Rs. 64.

The plaintiff as one of the daughters of the deceased, has filed this suit against her sister and her sister's son and the Advocate-General, praying that it may be declared that the said deed-poll is void and of no effect and that the plaintiff and the first defendant as the sole heirs of the said Shaik Abdulla are absolutely entitled to the said immoveable property.

The deceased had executed a similar deed-poll in respect of another property on the same day and that deed-poll was the subject-matter of Suit No. 857 of 1911, in which a decree was passed on the 13th February 1912 by Mr. Justice Beaman, by which it was declared that the deed of settlement mentioned in the plaint was null and void except as regards the charities mentioned in Exhibit B to the plaint. The decree further ordered that plaintiff and the first defendant should invest a certain sum to provide for those charitable purposes, and declared that when they had so done they would be absolutely entitled to the immoveable property mentioned in the deed.

It cannot be doubted that under the decisions of the Privy Council, the deed in this suit would have to be declared to be void except as regards the charities mentioned in sub-clause (*a*) of paragraph 2 of the plaint. But it has been contended that those decisions no longer apply now that the Mussalmans Wakf Validating Act, VI of 1913. has been passed. It is argued that the effect of that Act is retrospective and that all deeds of *wakfs* hitherto created which might be declared void and of no effect, if brought before the Courts, are now made good, and there is some ground for that argument in the preamble of the Act. But there is a distinct conflict between the preamble of the Act and the Act itself. The preamble runs as follows :—

"Whereas doubts have arisen regarding the validity of *wakfs* created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted—"

A preamble sets forth the reason for the particular Act of the Legislature and foreshadows what is intended to be effected by the Act. But to see what has been actually effected by the Act, one must look to the Act itself; and the Act seems to have failed entirely to produce the effect which, it might be gathered from the preamble, was intended, that is to say, intended according to the construction put upon it by the Advocate-General. The word "created" in the preamble might be read as including, not only *wakfs* to be created in the future, but also *wakfs* already created in the past. It may have been the intention to validate all *wakfs* which could be set aside under the previous decisions of the Privy Council when they came before the Courts, or it may have been intended that if such *wakfs* were created in future, they would under the Act be held good. These are the alternative constructions which can be applied to the preamble. Then turning to the Act itself, it curiously enough does not provide, as is usually the case, for the date on which the Act shall come into force. Therefore I presume the Act came into force on the day it received the assent of the Governor-General in Council. The Act refers solely to *wakfs* which shall be created in the future. Section 3 says: "It shall be lawful for any person professing the Mussalman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussalman Law, for the following among other purposes:—"

There is nothing in the Act about *wakfs* which are already in existence when the Act was passed, and there is nothing in the Act which enables me to hold that the provisions of the Act shall apply to such *wakfs*; and, therefore, in my opinion whatever the intention of the Legislature

may have been, it has by this Act only enabled Muhammadans in future to create *wakfs* by deeds which, under the previous decisions, would be liable to be set aside as contrary to the provisions of Mussalman law, and, therefore, as regards this *wakf* which was created in March 1901, the old law applies. As the deed is clearly intended to effect a permanent settlement of the property on the settlor's descendants and the ultimate gift to charity is purely illusory, the deed must be set aside except as regards the charities referred to above which can be given effect to.

It has been arranged between the Advocate-General on the one hand and the plaintiff and the defendants on the other hand that Government promissory notes of the nominal value of Rs. 2,400 should be purchased and should be settled in trust to provide for those charitable purposes. After that has been done, the property will be declared the absolute property of the plaintiff and the first defendant.

Costs will come out of the settled property, those of the third defendant as between attorney and client.

Deed set aside.

Attorneys for the Plaintiff : Messrs. *Sabnis and Goregaonkar.*

Attorneys for the Respondent : Messrs. *Little & Co.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 767 OF 1912.

June 5, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

BALABHADRA PRISTE AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAGANNATH MAHAPRABHOO, THROUGH SUPERINTENDENT, *Raja* MAKUNDA DEB—PLAINTIFF—RESPONDENT.

Enhancement of rent, suit for—Rent unvaried for 20 years before suit—Bengal Rent Act (X of 1859), s. 16—Presumption, how displaced—Tenure appertaining to endowment—Government sanction, whether necessary for suit for enhancement of rent.

Where it is found as a fact that a tenure, though held at a rent which has not been varied for a period of 20 years before suit, came into existence for the first time long after the date of the Permanent Settlement, the presumption provided for in section 16 of Act X of 1859 is displaced and the tenure is liable to an enhancement of rent.

The mere fact that the tenure appertains to a public endowment of which the beneficiary is a *Thakur*, does not make Government sanction necessary for maintaining a suit for alteration of rent.

Appeal against the decree of the District Judge, Cuttack, dated 9th January 1912, affirming that of the Deputy Collector, Puri, dated 22nd April 1911.

Babus *Pravas Chandra Mitra* and *Susil Madhab Mallik*, for the Appellants.

Babus *Bepin Behary Ghose* and *Suresh Chandra Chakravarty*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This is an appeal from the decree of the District Judge of Cuttack who has affirmed the decision of the Deputy Collector of Puri.

The purpose of the suit is to obtain an enhancement of rent. The defendants, who are tenure-holders, resist the claim, and their resistence is mainly based upon the presumption for which provision is made in section 16 of Act X 1859. It is provided by that section that "whenever in any suit under the Act it shall be proved that the rent at which a *talook* or other tenure is held in the Provinces of Bengal, Behar, Orissa and Benares has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that such *talook* or tenure has been held at that rent from the time of Permanent Settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period." The importance of the presumption is that it brings into play section 15 of the Act, which provides that no person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the *raiyat* who holds his *talook* or tenure at a fixed rent which has not been changed from the time of the Permament Settlement, shall be liable to any enhancement of such rent. It is proved in this case that the rent at which the tenure is held has not been changed for a period of twenty years before the commencement of the suit. Therefore, it is argued, it is not liable to enhancement.

Both Courts have decided against the defendants.

The judgment of the Court of first

instance placed the matter beyond the possibility of argument, if it is correct, because it holds there was a variation of rent.

The lower Appellate Court, notwithstanding the antiquity of the documents on which the Judge in the first Court based that conclusion, was not satisfied with this evidence, but he came to the same conclusion as to the rent being liable to enhancement, on the ground that it had been shown that the tenure was not held from the time of the Permanent Settlement at the rent now payable. The date of the Permanent Settlement for this purpose is 1793, and the finding of the lower Appellate Court is on the facts of this case—and the finding must of necessity be limited to the facts of this case—that the predecessors of the defendants had not any interest in the land prior to 1848, and that before that they were mere rent-collectors. This is to my mind the only interpretation to be placed on the relevant passages of the judgment of the District Judge. Though that judgment may be open to the verbal criticism which has been directed against them, I think we should not be giving fair effect to it if we do not come to the conclusion that the learned Judge held, as a matter of fact, that the tenure with which he was concerned in this case was one which came into existence for the first time long after 1793. If that be a correct conclusion, then the presumption of section 16 of Act X of 1859 is displaced.

We have been pressed with the fact that the defendants in this case are described not only as *Sarbarakars* but as *Padhani Sarbarakars*. An early judgment which has been brought to our notice seems to express some doubt as to how the qualification *Padhani* came to be added. But, however that may be, we have only to deal with the particular tenure in this case, and anything that we say can in no way affect *Padhani* tenures generally. All we lay down is that the final Judge of fact in this case has come to a conclusion of fact, binding on us, that the particular tenure with which we are here concerned came into existence at a time which negatives the presumption for which section 16 makes provision. And it is on that and that ground alone that we affirm the decision of that learned Judge. In so saying I do not overlook the arguement placed upon the alleged settlement of rent under Chapter X of the Bengal Tenancy Act. But the appellants' own grounds of appeal show that the amount of rent was not called in question, and it is impossible for us to say that this suit is barred by anything that occurred in the proceedings under Chapter X. Nor do I think that there is any real force in the argument that the rent cannot be altered without Government sanction, because we have here a finding that the *Thakur* is in fact the *zemindar*. The findings of fact which are conclusive on us appear to me to require a determination of this appeal adverse to the appellant, and we must confirm the decree with costs.

N. CHATTERJEA, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 103 OF 1914.

November 11, 1914.

Present:—Justice Sir P. C. Banerji, KT.

SARJU PANDEY AND OTHERS—DEFENDANTS—APPELLANTS

versus

MULLOO CHAUDHRY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Jurisdiction—Small Cause Court—Suit to recover amount paid by purchaser for incumbrance on property represented free from incumbrance—Compensation—Contribution.

A suit to recover an amount which the plaintiff had to pay in respect of a property purchased by him from the defendant in consequence of the latter having falsely represented the property to be free from the incumbrance which the plaintiffs had to discharge, is a suit for compensation and not one for contribution and is, therefore, cognizable in a Court of Small Causes.

Civil revision from an order of the Judge of the Court of Small Causes of Basti.

Mr. *Sheo Dihal Sinha*, for the Appellants.

Mr. *Pearey Lal Banerji*, for the Respondents.

JUDGMENT.—This is an application praying that the decree of the Court of Small Causes at Basti be set aside, on the ground that the Court had no jurisdiction to entertain the suit. It is urged that the suit was one for contribution and not for damages, as held by the Court below. I think that the view taken by that Court is right. The facts are these. The predecessors-in-title of the applicants, who were defendants in the Court below, sold

to the predecessor-in-title of the plaintiffs, opposite party, certain property, and in the sale-deed they specified certain incumbrances on the property and stated that there were no other incumbrances. The sale-deed contained an indemnity clause in the event of other incumbrances being discovered. As a matter of fact the property sold and some other property of the vendor were subject to a mortgage, which the mortgagee sought to enforce by suit. He obtained a decree. In order to avoid a sale of the property purchased by the plaintiffs, they discharged the decree, and they brought the suit, out of which this application arises, to be reimbursed the amount which they had to pay in respect of the property purchased by them. This was clearly not a suit for contribution. If they had paid the amount for which the other property not sold to them was rateably liable in excess of the amount for which the property purchased by them was liable, they could have sued for contribution; and if they had brought such a suit, that would have been a suit which could not be maintained in a Court of Small Causes; but the present suit was not of that description. The plaintiffs sought to recover from the defendants the amount which they had to pay in respect of the property purchased by them in consequence of the defendants having falsely represented the property to be free from the incumbrance which the plaintiffs had to discharge. It was clearly a suit for compensation and not one for contribution and was, therefore, cognizable in a Court of Small Causes. I dismiss the application with costs.

Application dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1560 OF 1912.

December 17, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

DIWAN CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JIWAN MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Son—Co-parcener by birth—Will by father without son's consent invalid—Gift by widow.

Directly a son is born to a Hindu in possession of an ancestral house, he becomes a co-parcener in the house, and the father cannot make a Will declaring who is to succeed to the property after the son's death without the consent of the latter.

A Hindu widow has merely a life-interest in the property left by her husband and, therefore, cannot make a valid gift of it without the consent of her reversioners.

Second appeal from the decree of the Divisional Judge, Rawalpindi, dated the 27th May 1912, reversing that of the District Judge, Jhelum, dated the 8th February 1912, dismissing the claim.

Rai Bahadur Pandit *Sheo Narain* and Mehta *Bahadur Chand*, for the Hon'ble Mr. *Shadi Lal*, R. B., for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for all the Respondents save Jiwan Mal, who is represented by Bhagat *Gobind Das*.

JUDGMENT.—The suit out of which this appeal arises was brought by the plaintiffs-respondents, reversioners of Ralla Ram, deceased, for a declaration that an alleged gift of a residential house made in favour of *Hakim* Diwan Chand shall not affect their rights. The allegation on behalf of the defendants was that the gift was by way of *sankalp* and was made during the life-time of Hari Ram, minor son of Ralla Ram, for his spiritual benefit, the donee being a *Brahmin*. The first Court found that the alleged *sankalp* was not proved, but that there was an oral gift of the house by *Musammat* Parmeshri, widow of Ralla Ram, after the death of Hari Ram; that under a Will executed by Ralla Ram *Musammat* Parmeshri had full power to dispose of the house as she pleased and that the plaintiffs could not control her alienations. It, therefore, dismissed the suit. The lower Appellate Court agreed with the first Court that there had been no *sankalp*, and that as Hari Ram was born during the life-time of his father, he immediately on his birth acquired an interest in the house which was joint family property, that Ralla Ram had no power to dispose of it by Will to his prejdudice, that *Musammat* Parmeshri, therefore, could not rely upon the Will as giving her an absolute power of alienation, and that the gift made by her to Diwan Chand was invalid. It, therefore, gave the plaintiffs the decree claimed.

The defendants have filed a further appeal to this Court. Gopal Das, one of the plaintiffs-respondents, has died and no application has been made to bring his legal

representatives on to the record. It is, however, admitted that he left no heirs except his co-plaintiffs who are already on the record, so no application is necessary. The first point urged by Pandit Sheo Narain on behalf of the appellants was that no issue was framed as to the date of birth of Hari Ram, who was alleged to be a posthumous son of Ralla Ram, and he asks that a further inquiry should be made into this point. We do not see any necessity for ordering further inquiry inasmuch as *Musammat* Parmeshri, mother of Hari Ram, herself admitted that the boy was five years old at the time of his father's death. She is siding with the defendants and there is no reason to disbelieve her statement on this point.

Pandit Sheo Narain next urges that the Will read as a whole shows that it was the intention of the testator that his property should in no case go to his reversioners, the plaintiffs, but should go to his son, if he had one, and after him to his mother and after her to his widow. We have carefully read the Will and are clearly of opinion that whatever may have been the intention of Ralla Ram, he did not in the Will declare that in the event of his son dying without heirs the property should pass to his mother. The property was only to go to Ralla Ram's mother in case no son was born to Ralla Ram. Further, the lower Appellate Court is perfectly right in holding that directly Hari Ram was born, he became a co-parcener in the house in dispute and his father could not make a Will declaring who was to succeed to the property after Hari Ram's death without the consent of the latter. Even then if the Will can be read as meaning that the property was to pass to any one else after Hari Ram's death, it would be invalid to that extent.

Hari Ram having died without issue the property came into *Musammat* Parmeshri's hands and she, as a Hindu widow, had merely a life-interest in it and could not make a valid gift of it without the consent of her reversioners, the plaintiffs.

We, therefore, agree with the finding of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 141 OF 1911.

August 4, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

M. P. CHIDAMBARAM CHETTI AND OTHERS—DEFENDANTS—APPELLANTS

versus

S. R. M. A. R. RAMASWAMI CHETTIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agreement—Debt to be discharged in particular manner, whether waiver of other remedies—Family partnership—Nattukotta Chetties—Usage—Family property as trading assets—Signature—Limitation Act (IX of 1908), *s.* 19—*Acknowledgment*

An agreement that the debt may be discharged in a certain manner does not show that the creditor has waived any other remedy which he may have.

Nattukottai Chetties are a trading community and they usually treat the family property as assets, making no distinction between their family property and their trade assets.

Therefore, in the absence of any evidence to the contrary their family properties should be treated as trade assets.

Where it is proved that the Nattukottai Chetties in writing their private letters do not usually sign their names, but only write words invoking the help of the family deity, a letter thus signed may be taken as signed by the writer for the purposes of section 19 of the Limitation Act.

A letter signed by the managing member of a family acknowledging a debt is binding on the family.

Appeal from the decree of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 168 of 1910.

Mr. *S. Srinivasa Aiyangar*, for the Appellants.

Messrs. *T. Rangachariar*, *V. Narasimha Aiyangar* and *M. Narayanasami Aiyar*, for the Respondents.

JUDGMENT.—The suit was brought by the plaintiffs, the members of S. R. M. A. R. firm, against the defendants, members of the M. P. M. R. firm, for the recovery of Rs. 24,036-0-6 due to the plaintiffs on account of dealings between them. Both of them are money-lenders. The Subordinate Judge has passed a decree in favour of the plaintiffs. Against this decree the defendants Nos. 1, 3 and 4 appeal. The first objection taken is that on the facts set out in the plaint the suit is not maintainable. There is an allegation in the plaint that any amount payable by the defendants should be made good out of the money deposited by

R.M.R. M. firm with the plaintiffs through and to the order of one Chokkalingam Chetti, who was a member both of the defendants' firm and that of said R. M. R. M. firm. As to this, it is sufficient to say that no discharge is either allowed by the plaintiffs or by the defendants. An agreement that the debt due may be discharged in a certain manner does not show that the plaintiffs waived any other remedy which they might have. The plaintiff's case is that he has not been able to realize the debt in accordance with the agreement. On the other hand, Chokkalingam Chetti himself has fraudulently taken steps to deprive him of that money. The defendants do not allege that the plaintiff has been guilty of any bad faith, and it is found in Original Suit No. 157 which was heard about the same time that no such agreement had been proved. We, therefore, disallow this contention.

It is then argued that the plaintiff has failed to prove the debt. The plaintiff's account books show that the debt claimed is due. The second witness swears that the entries in the account books A to C are true entries of the transactions that really took place. They open with a debit entry of Rs. 45,154-7-3 against the defendants. It is argued that there is no evidence that this amount is really due, as the accounts which give the details as to how this sum was made up have not been filed. But the same witness proves that it was the 6th defendant, one of the managing partners of the defendants' firm, who directed him to debit this amount as due by the defendants' firm.

We hold, therefore, that the plaintiffs' accounts are corroborated and their claim is proved. It is next argued that defendants Nos. 2 to 5 are not partners and that the decree that has been passed in favour of the plaintiff to recover the sum due from the second defendant personally along with others and from the family properties of the defendants is wrong, because it is only their share in the assets of the firm of M. P. M. R. that should have been made liable. Though no doubt the witnesses do not state in so may terms that the sons of the 1st defendant are partners, their evidence is clear that the firm M. P. M. R. was a money-lending business carried on by the 1st defendant's family of which the defendants Nos. 3, 4 and 5 are members and another family represented by the 6th to 8th defendants. It was not alleged by the plaintiffs in the lower Court that it was only a certain portion of the property belonging to the 1st defendant's family that was set apart for this business.

There is no issue raising that question and looking to the usual course of practice in such cases, we have no doubt that in the case of these Nattukottai Chetties their family properties should be treated as trade assets. They are a trading community and they usually treat the family property as assets, making no distinction between their family property and their trade assets. In the absence of any evidence to the contrary, we accept the finding of the Subordinate Judge which is also supported by the evidence of the witnesses.

The next contention is that the suit is barred by limitation. It is argued that the Exhibits E and E2, which acknowledge the defendants' liability, are not proved or signed by the 1st defendant and it is also argued that the 1st defendant is not a person authorised by the others to acknowledge the liability of the firm. The letter purports to be written by Chidambaram (1st defendant) and it ends with the words "Murugan Thunai".

The genuineness of these letters was not denied in the written statement, though it is not expressly admitted. The plaintiffs' 2nd witness swears that they are the 1st defendant's letters. The 1st defendant did not go into the witness box to deny them. We accordingly accept them as genuine. It is in evidence that the Nattukottai Chetties in writting their private letters do not usually sign their names, but only write words similar to those given above which are words invoking the help of a deity. The particular deity whose name is given indicates the family, as it is the family god that is always invoked. At the top of the letter the writer's own name is given. In these circumstances we accept the evidence that these words at the end of the letter are intended for the signature of the writer. We, therefore, hold that these letters are signed by the 1st defendant.

Whether these letters by the 1st defendant as a partner will bind the other partners is a question which is unnecessary to determine in this case; because he is the managing

member of the family to which the appellants belong and his acknowledgment is, therefore, binding on them.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1302 OF 1912.

December 22, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

KISHEN CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SOHAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Consideration, receipt of—Admission before Sub-Registrar—Burden of proof—Mortgage with possession—Lease by one of two mortgagors only—Mortgage-deed mentioning liability of both mortgagors for rent—Agreement without consideration—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4.

Where a mortgagor disputes the receipt of a portion of the mortgage-money, which he has, however, admitted before the Sub-Registrar to have been due by him on book account, the onus lies upon him to show that the consideration did not pass in full.

A and *B* mortgaged certain properties with possession and on the same day that the mortgage-deed was executed, *A* took the mortgaged properties on lease from the mortgagee under a registered lease. The mortgage-deed made the rent a charge upon the mortgaged properties:

Held, that the agreement by *B* in the mortgage-deed to pay the rent was without consideration, and hence *B* was not liable to pay it, nor was his property under mortgage liable for any sums beyond the principal mortgage-money.

In framing mortgage decrees, Order XXXIV, rule 4 of the Civil Procedure Code should not be overlooked.

First appeal from the decree of the Additional District Judge, Delhi, dated the 22nd of April 1912, decreeing plaintiffs' claim.

Mr. *H. Beechey*, for the Appellants.

Messrs. *Raj Narain*, *Santanam* and Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought by the plaintiffs for recovery of Rs. 69,346-8-0, on the basis of a mortgage-deed purporting to be executed on the 3rd of May 1903 by Kishen Chand, defendant No. 1, and his deceased mother, *Musammat* Bibi Sundar, for Rs. 50,000. The District Judge decreed the plaintiffs' claim in full and defendants, namely, Kishen Chand and *Musammat* Chambeli, wife of Kishen Chand, have appealed.

The facts of the case have been very clearly and fully set forth in the judgment of the Court below and it is unnecessary for us to repeat them. *Musammat* Chambeli derives her interest in part of the property mortgaged under a Will executed by *Musammat* Bibi Sundar on the 14th November 1904. The affairs of Kishen Chand's family and the question of this Will have been fully discussed in the judgment of this Court, dated the 31s of January 1911, in Civil Appeal No. 505 of 1910 [*Musammat Chembeli* v. *National Bank of India Ld.* (1)]. The final result of that case was the decision that *Musammat* Chambeli was entitled to three properties bought by Kishen Chand in the name of his mother by deed dated the 29th of August 1898 and left to *Musammat* Chambeli by *Musammat* Bibi Sundar in her Will. The main point urged by Mr. Beechey in arguing the case for the appellants was that *Musammat* Bibi Sundar received no consideration for the mortgage and did not execute the deed after understanding its contents and that *Musammat* Chambeli is, therefore, not bound by the terms of the deed so far as the property bequeathed to her, which was bought on the 29th of August 1898, is concerned. Mr. Beechey urges that *Musammat* Bibi Sundar having been a *pardah-nashin* lady, it was necessary for the plaintiffs to prove very strictly that she understood the contents of the mortgage-deed and voluntarily executed it. Evidence has been produced to show that the deceased lady executed a general power-of-attorney (Exhibit P2), dated the 24th January 1903, in favour of her son, Kishen Chand, under which he had full power to raise money by alienating her property. Evidence has also been tendered to show that both Kishen Chand and *Musammat* Bibi Sundar executed the mortgage-deed and that Kishen Chand admitted execution at the time of registration. On referring to this evidence, we find that though *Musammat* Chambeli was represented by Counsel no attempt was made to shake the evidence of the witnesses on the question of the execution by *Musammat* Bibi Sundar either of the mortgage-deed or of the power-of-attorney. No questions were put to the witnesses with the object of showing that

(1) 10 Ind. Cas. 647; 62 P. L. R. 1911.

Musammat Bibi Sundar did not understand the nature of the document which she was executing, and we find from the judgment of the lower Court that no arguments were advanced by the defendants' Counsel to the effect that the mortgage-deed had not been actually executed (see page 74, line 31, of the paper-book). The execution of the power-of-attorney is very clearly proved by the evidence of Ranjit Singh (P. W. No. 1) and Pandit Har Narain, Registration *Moharrir* (P. W. No. 2). The evidence is to the effect that the Registering Officer went to the house of *Musammat* Bibi Sundar and registered the document there. We see no reason whatever for disbelieving this evidence. Kishen Chand had, by deeds of the 29th August 1898 and 9th January 1902, purchased properties for the sum of Rs. 30,000 in the name of his mother. This Court in the previous case held that the purchase of 1898 was a *bona fide* one intended as a settlement in favour of the mother of Kishen Chand, whereas that of 1902 was made to defraud creditors. It is clear, however, that Kishen Chand was on the best of terms with his mother and there was, therefore, no reason why she should not execute a power-of-attorney in his favour. We hold, therefore, that the power-of-attorney (Exhibit P 2) was duly executed by the deceased lady. As regards the mortgage-deed sued upon, we have the evidence of Ranjit Singh (P. W. No. 1) which shows that *Musammat* Bibi Sundar's mark was obtained upon the deed. His evidence does not clearly show that she put her mark upon the deed in his presence, but we think he clearly meant to say this. He was not cross-examined on the point and the deed clearly shows that he was an attesting witness to it. He has also identified the signatures of Chuni Lal and Mul Chand deceased, who were attesting witnesses. Sohan Lal, plaintiff, has himself gone into the witness-box and has deposed that the lady duly executed the deed. We see no reason to doubt that she did execute it. It was never pleaded by *Musammat* Chambeli that Kishen Chand used undue influence or defrauded his mother by getting her to sign the deed under some false pretext. Under the power-of-attorney (Exhibit P 2) Kishen Chand had the power to execute the deed on behalf of his mother without getting her to attest it at all. There was, therefore, no necessity for him to concoct false evidence with the object of showing that she had herself personally executed it. We, therefore, agree with the lower Court that the execution of the deed of mortgage by both Kishen Chand and *Musammat* Bibi Sundar is duly proved.

In regard to consideration, the only item disputed before us is that of Rs. 3,565 out of a debt previously due to the plaintiffs. Having regard to the fact that Kishen Chand received the rest of the consideration in cash and admitted before the Sub-Registrar that this sum was due on book account, we hold that the onus was upon the defendants to show that the consideration did not pass in full. This they have not discharged. The lower Court has dealt with this item in detail and we agree with its conclusions.

The next point urged by Mr. Beechey is that plaintiffs are not entitled to charge interest upon the property mortgaged. The mortgage was with possession, but on the same day that the mortgage-deed was executed Kishen Chand took the mortgaged property on lease from the mortgagees under the registered lease (Exhibit P 3, page 21 *et seq*). Under this he agreed to pay Rs. 1,125 per quarter as rent. The mortgage-deed makes this rent a charge upon the property mortgaged. Reading the mortgage-deed by itself it appears that both the mortgagors agreed to pay this sum of rent or interest, but having regard to the fact that Kishen Chand was the sole lessee we are unable to agree with Mr. Raj Narain, Counsel for the respondents, that *Musammat* Bibi Sundar was liable to pay this sum. The agreement by her in the mortgagee-deed to pay it is without consideration. Mr. Raj Narain says that it was clearly the intention of the parties that both the mortgagors will be liable to pay this sum, but having regard to the clear terms of the lease, which is in the name of Kishen Chand alone, we are unable to agree with him. It is, therefore, clear that any property of *Musammat* Bibi Sundar which is included in the mortgage, is not liable for any sum beyond the principal mortgage-money.

Part of the property mortgaged (No. 8 is the list attached to the plaint) has been attached and sold in execution of decree proceedings and Rs. 20,670 has been paid

to the plaintiffs' mortgagees. A calculation has shown that more than this amount was at the time due on account of interest or rent and there is no reason why the plaintiffs should not credit it to the interest.

Mr. Beechey has raised an objection as to the form of the decree. He points out that under Order XXXIV, rule 4, Civil Procedure Code, time should have been allowed to the defendants to pay the amount decreed into Court and that only on their failure to pay should the property be sold. Mr. Raj Narain has no objection to the decree being modified to this extent.

To sum up then, we find that the mortgage-deed was duly executed; that the amount claimed is due; and that Kishen Chand's property is liable for the whole sum claimed; but that the property mortgaged by *Musammat* Bibi Sundar, which has now come into the hands of *Musammat* Chambeli, defendant, is only liable to the extent of the principal sum of Rs. 15,000.

We, therefore, accept the appeal and modify the decree of the lower Court so far as to declare that *Musammat* Chambeli's property inherited by her from *Musammat* Bibi Sundar shall only be liable to the extent of the principal sum of Rs. 15,000 and costs in proportion. The decree will also be drawn up as laid down in Order XXXIV, rule 4, Civil Procedure Code, the period of six months being allowed for payment. In other respects the decree of the Court below is maintained. As appellants have only succeeded to a very limited extent, they must bear the plaintiffs-respondents' costs in this Court.

Counsel are not agreed as to which are the properties of *Musammat* Chambeli inherited from *Musammat* Bibi Sundar, and this question will have to be decided by the executing Court.

Appeal accepted.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 18, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

KARMALI ABDULLA ALLARKHIA—PLAINTIFF—APPELLANT

versus

BORA KARIMJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Partnership—Joint adventure—Dealing by individual—Firm, liability of—Bill, drawer of, discounting acceptance when acceptor owes nothing to him—Liability.

Where goods are purchased or money raised for a joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, etc., purchased on the credit of an individual adventurer previously to the contract, though afterwards brought into the joint stock as his contribution.

When a drawer of a bill discounts an acceptance given at a time when the acceptor owes no money to the drawer, the drawer does avail himself of the acceptor's credit.

Appeal from a judgment and decree of the High Court of Judicature at Bombay, dated the 17th of January 1910, reversing those of Mr. Justice Russell, dated the 13th of April 1909, of the same Court.

FACTS.—The action was brought by the appellant to recover a sum of Rs. 1,11,819-8-9 for moneys lent and advanced by him to the first and second respondents by means of acceptances by the appellant of certain *hundis* (or bills of exchange) drawn upon the appellant by the first and second respondents respectively and for commission, costs, charges and expenses due to the appellant from the said first and second respondents particulars whereof were annexed to the plaint. The third respondent was the Official Assignee in Bankruptcy and as such the assignee of the estate and effects of the second respondent's firm which had become bankrupt prior to the commencement of the action. The second and third respondents did not defend the action. The action was tried before Mr. Justise Russell who substantially gave judgment in favour of the appellant, but on appeal a Divisional Bench (Sir B. Scott, C. J., and Batchelor, J.) reversed the judgment appealed from. The appellant thereupon appealed to His Majesty in Council. The agreement which was in Gujarati between

the first and second respondents, dated the 25th July 1906, and was referred to in their Lordships' judgment, was in terms the following:--

"To Wit:—We, the undersigned, Bora Karimji Jivanji and Co. and Khoja Rashid Alidina & Co. at present residing at Bombay, for the purpose of doing business in partnership in red (brown) Mauritius sugar, from Mauritius for China-Hong Kong, agree with each other, to act, according to the underwritten conditions. The particulars of the said, conditions, are as follows:—

"1. The people of Bora Ka. Ji. and Co. and the people of Ra. A. & Co. are jointly to purchase at Mauritius red (brown)sugar suitable for China-Hong Kong demand after consulting each other and paying (proper) attention to the intelligence, that may be sent, by us from Bombay. As to the quantity that may be purchased from time to time, each one of the two parties is to send to the other party, delivery order, on the Dock, in respect of the half (of that quantity) that is to say, the people of Bora Ka. Ji. and Co. are to send to Ra. A. & Co., delivery, (order) on the Dock in respect of exactly half the number of *bastas* (packages) which they may have purchased; and in the same manner the people of Ra. A. & Co. are to send to Bora Ka. Ji. & Co., delivery order, on the Dock in respect of exactly half the number of *bastas* (packages) which they may purchase. Neither of the two parties is to give (allow) a share to any person whatever in such sugar purchased on (the) partnership account.

"2. Both the parties are to buy the said red (brown) sugar. When a quantity sufficient to load a vessel with the consignment thereof is purchased, then both the parties, after consulting each other and also according to the intelligence (?) (received) from the Bombay (firms), are to charter any steamer whatever and having loaded thereon the sugar so purchased on the partnership (account) half and half (by each party), they, are to cause that steamber to sail for Hong Kong.

"3. Both the aforesaid parties are to ship the said red (brown) sugar without gunny bags, and also (they) are to ship (the packages thereof) without putting any mark on them. Each of the (two) parties is to prepare an invoice of the purchase (price) and charges, also including the expenses incurred, in respect of such number of *bastas* (packages) as (each party) may ship on board (the) steamer, and the representative, of Ra. A. & Co. is to send his invoice to its Bombay firm and, the representative, of Ka. Ji. & Co. is to send his invoice to its Bombay firm.

"4. As to the sugar which the above-mentioned (both the) parties may consign for Hong Kong per chartered steamer, against the vouchers thereof they are to write 'draw' Bombay *hundi* documents: (the representative) of Khoja R. A. & Co. is to write, draw *hundis*, on its Bombay firm; so also, the representative, of Bora Ka. Ji. & Co. is to write, draw *hundis*, on its Bombay firm. 'For the present so long as Bora Ka: Ji: & Co. have not opened their firm in Bombay so long' the said, Ka. Ji. & Co., are to write, draw documents, on our Hong Kong Agents, Khoja Karmali Abdulla & Co.'s Bombay firm, which is carried on in the name of Khoja Abdulla Alarkhia & Co. in respect of the sugar consigned through the said, firm. As to the Bombay, documents, *hundis*' against the steamer carrying sugar direct from Mauritius to Hong Kong, if the Banks of that place should refuse to receive ?accept those *hundis*, then we are to be informed of the same by wire, in Bombay. And immediately, after the receipt of such information, the people of Rashid Alidina & Co. and the people of Bora Karamji Jiwanji & Co. are to make arrangement here, with our Hong Kong Agent's firm and inform, the people at, Maurititus, about that arrangement, or are to send from Banks, ?letters of, 'credit' or having received half the amount from the firm of this place, *viz.*, Bombay, of the Hong Kong firm, they, are to remit the same by wire. This subject has already been talked about personally with the representative of the local firm of the Hong-Kong Agents.

"5. On the steamer carrying red (brown) sugar from Mauritius arriving at Hong Kong as to the offers with regard to sales of, those, goods which may be received from that place, Khoja Ra. A. & Co. and Bora Ka. Ji. & Co. of this place are to consult amongst themselves about them: and as to whatever, instructions, they may communicate by wire, through their Agents at this place about causing the sales to be effected, the sales are to be effected according to those, instructions. Accounts of sales should come from Hong Kong, separately, in the names of the two parties, *i. e.*, in respect of half and half, the quantity for each

party. On the cargo carried by one, particular, steamer being entirely sold, and, so soon as the account-sales in respect of the entire consignment are received, the amounts of the invoices received, from, Mauritius from both the parties are to be added up, and, the net surplus of the account-sale, is to be ascertained, *i. e.*, on, the one item, being deducted, from the other, as to whatever surplus, or, deficit may be found, the same is to be divided and received, or paid, forthwith by both the parties amongst themselves. In this manner accounts in respect of each of the steamers are to be settled, immediately, after the accounts, sale etc., of the entire, cargo thereof, are received.

"6. As to the steamers which may be chartered at Mauritius for the purpose of the aforementioned business in red (brown) sugar, the same are to be chartered in the name or names of any one or both of the two parties, and as to whatever commission on the freight thereof may be received at Mauritius, or if the freight has to be paid in Hong Kong, then, as to the commission which may be received there, out of that, commission, the sundry expenses and presents etc., made, to Captains being deducted, the net, amount of, commission which, may remain over and, may be received is to be divided and taken in equal half shares, by both the parties.

"7. For the purposes of the aforesaid business in red (brown) sugar the steamers are to be chartered at Mauritius, or at times we people are to charter, steamers, at Bombay and inform, the people, at Mauritius. In those, steamers, red (brown) sugar or other goods, *viz.*, white, ? refined, sugar or molasses belonging to the partnership account of Bora Ka. Ji. & Co., and Ra. A. & Co. are to be shipped; goods belonging to any other person are not to be shipped. In case it be found necessary to give, (issue) orders to some, other people, or if such a time should come when the goods to be shipped on, the joint, account of us both be small in quantity, and, therefore, it be, necessary to give, (?issue) orders, to other people, in the town, then in that case, such orders are not to be given, issued, without, obtaining, the permission of the people at Bombay. They are, first, to apply for permission from Bombay, people,; if, they give permission, the Mauritius, people, are to issue orders; people there, at Mauritius, are not to exercise their, own, authority, for the same.

"8. If on some occassion the said purchases of red (brown) sugar made at Mauritius be small, *i. e.*, if the quantity of the goods be not sufficient to load the whole, steamer for consignment, or if a steamer cannot be secured for shipping such goods as may have been, purchased, then (in that case) the people of that place, *i. e.*, Mauritius, after having taken permission of the people at Bombay or after consulting each other, are to consign those goods for Hong Kong half and half, in each party's name, as stated above by any steamer whatever on the partnership account. The invoices of those, goods, also should come (?should be sent) to us at Bombay as stated above; also the account-sale thereof, should as stated above come to us both, should be sent to us both, from Hong Kong, *i.e.*, in respect of half, the quantity of the goods to each. And as to whatever surplus, or, deficit, (?profit or loss), there may be, found, therein, the same is to be divided and received or paid forthwith half and half.

"9. If at any time there may not be demand at profit in Hong Kong of red (brown) sugar purchased on the partnership account or there being a demand at profit, if any buyer in Mauritius should offer to purchase the same at a profit from our people, there, then in that case also, the people at Mauritius, should take instructions of people at Bombay. If they get permission from Bombay from both of us to effect the sales then, they, both of them are to sell the same on partnership account.

As to whatever profit may be made by such, sales, both the parties in Mauritius are to divide and take the same in equal half shares.

"10. Both of our representatives at Mauritius after consigning sugar, as mentioned above for Hong Kong, will draw *hundis* payable at Bombay, and, will send here invoices enclosed under cover. In doing so if, they, should draw" documents, *hundis*, for sums, larger or, smaller than, the amounts of, the invoices, then they are to give or take credit (in the account) for interest thereon,? on the difference at the rate of Re. $\frac{3}{4}$, per cent. per month. (They) themselves are to bear the additional discount paid in respect of the *hundis* which

are drawn in excess. As regards the partnership account, they, are only, to give or receive credit, therein, for the interest at the rate of Re. $\frac{3}{4}$, per cent. per month.

"11. This agreement for the partnership business begins,? comes in force, from the 25th day of July the current year. We bind ourselves on our true religious faith properly to continue the same, in force, for one year."

The appellant contemporaneously endorsed the said agreement as follows:—

"As stated in clause fourth of the above agreement if the Banks at Mauritius should owing to any reason whatever not take the Bombay *hundis* of,? drawn by, the Mauritius firms of Khoja Rashidbhai Aladina and Co. and Bora Karimji Jiwanji & Co. against the goods shipped and consigned to our Hong Kong firm, then we bind ourselves by this agreement to send 'credit' from this place or to remit by wire half the amount, of the price, of the goods to the aforesaid firms at Mauritius."

Messrs. *De Gruyther*, *K. C.*, and *Henry O'Hagan*, for the Appellant, contended that the Indian Contract Act, 1872, governed the appeal as regards the law applicable thereto, and English cases which might be dealing with similar facts had no bearing on the appeal. The agreement of the 25th July 1906 came within the definition of a partnership in section 239 of the Act and it was a partnership for a joint adventure; see Illustration *(a)* of the section. The debt or obligation was incurred by Rashid on behalf of the partnership in the usual course of business. What he did was necessary and done to carry on the partnership business, and the first respondent was liable therefor. See sections 249 and 251 of the Act. The agreement of the 25th July 1906 was neither annulled nor amended as required by section 252 of the Act, and consequently the rights and obligations of the parties must be determined under that agreement. On the construction of the Act they referred to *Bank of England* v. *Vagliano* (1) and *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2).

Messrs. *Clauson*, *K. C.*, and *Lowndes*, for the first respondent, contended that the agreement in question did not in law constitute a partnership between the first and second respondents in the ordinary sense, but only a joint venture between them, the limitations of the authority of each of them with respect thereto being known to the appellant. On a proper construction of the agreement, which was made with the privity of the appellant, each of the first two respondents was to be responsible only for his own moiety of the joint shipments, and the *hundis* drawn by the second respondent were drawn in his own name and for his own purpose, and there was no agreement by the first respondent to be responsible for the same. They relied upon *Heap* v. *Dobson* (3) and *Gibson* v. *Lupton* (4), see Lindley on the Law of Partnership, 8th Edition page 247, where *Heap* v. *Dobson* (3) is discussed), and submitted that the appeal should be dismissed.

Mr. *DeGruyther*, *K. C.*, replied referring to *Gouthwaite* v. *Duckworth* (5).

JUDGMENT.

LORD DUNEDIN—This action arises out of transactions connected with a venture in brown sugar entered into by the first and second respondents. The second respondent is now bankrupt and the third respondent is his Official Assignee: and neither of them defended the action or took part in the proceedings under appeal.

The first respondent, Karimji, and second respondent, Rashid, were both merchants carrying on business in Mauritius and had for some time been rivals in the sugar trade.

Rashid had all along also had a Bombay house, and Karim was in the act of setting one up, but it was not at the date to be presently mentioned yet open.

The appellant, Karmali, is a merchant carrying on business in Bombay and Hong Kong.

Karim and Rashid resolved to have a joint speculation in brown sugar to be shipped from Mauritius to Hong Kong. The

(1) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R 657; 55 J. P. 676.

(2) 23 I. A. 18 at p. 26; 23 C. 563.

(3) (1863) 15 C. B. (N. S.) 460; 143 E. R. 864; 137 R. R. 602.

(4) (1832) 9 Bing. 297; 2 M. & Sc. 371; 2 L. J. C. P. 4; 131 E. R. 626.

(5) (1810) 12 East 421; 104 E. R. 164.

terms of the arrangement they made between themselves were on 25th July 1906 embodied in a stamped agreement. The document is too long to quote, but may be summarised thus—It begins with a preamble that the parties for "the purpose of doing business in partnership in brown sugar from Mauritius to Hong Kong agree to act as follows." Then follow the terms. Purchases were to be made "jointly" at Mauritius. These purchases were to be made by both firms after consultation with each other, and after taking advice from the Bombay houses. No limit as to purchase is imposed on either firm; but as soon as either firm buys, that firm is to give a delivery order on the Dock warehouse for half the quantity of the parcel to the other firm. When sufficient sugar to load a ship has been purchased, then a ship is, after consultation, to be chartered, and loaded with the purchased sugar and despatched to Hong Kong. Invoices of the sugar, made out separately as half and half, were to be sent respectively to each of the Bombay firms. At the same time Rashid was to draw bills to the value of the sugar on his Bombay house, and Karim on his Bombay house, when it cam to be opened. But until that time came he was to draw bills on Karmali. If the Banks at Mauritius refused to discount the bills on the Rashid or Karim house, the Bombay firms were to be informed by wire, in which case it was said that Karmali would come to the rescue by interposing credit according to arrangement made with him. On the ship arriving at Hong Kong the arrangements as to sale of the sugar were to be carried through by the Bombay houses. Account sales were to come from Hong Kong made up separately half and half to each. Then the invoices were to be added together and the surplus or deficit on the entire transaction was to be divided equally. Chartering was to be done in either one or both names; but all commissions were to be equally divided. In the event of the Hong Kong market being bad and there being an opportunity of a profit by re-selling at Mauritius, this was to be done after permission got from Bombay: and such profit on all sales was to be equally divided. The agreement was to remain good for a year from date of signing. There is then an addendum to the agreement written and signed by the plaintiff, in which he binds himself to come to the assistance of the partners if the Mauritius Banks refuse to discount the bills drawn by the Mauritius firms of the two defendants on their own Bombay firms respectively.

Following on this agreement a venture was commenced, and the terms of the agreement were literally carried out, except in one particular. That is to say, sugar was bought, about 36,000 bags by Karim, and about 4,000 by Rashid. Delivery orders were then given by each to each for half of the sugar purchased by him, and the sugar so divided on shipment was consigned to the Hong Kong firm of the plaintiff. The one particular in which the agreement was not literally complied with was that the bills were not drawn by Rashid and Karim at Mauritius on Rashid and Karim in the first instance and then, on refusal of the Banks to discount, recourse had to the assistance of the plaintiff; but they were at once drawn on and accepted by the plaintiff's firm at Bombay. The bills were drawn by Rashid and Karim respectively for sums approximately representing the value of the sugar shipped upon the separate invoices of each, *i.e.*, about half and half—an exact half being unattainable on account of the packages in which the sugar was put up.

The sugar arrived at Hong Kong, and was sold by the plaintiff to whom it was consigned. The venture, however, turned out a failure instead of a success; the prices realised not being sufficient to give a profit after payment of the price of the sugar, the freight and other expenses.

The plaintiff accordingly raised this action, which is truly an action of accounting against both Rashid and Karim. Now, when the bills drawn by the two defendants had become due, and were payable to the Banks who held them, Karim had retired the bills of which he was the drawer, but Rashid, who had by this time become insolvent, had not retired the bills of which he was the drawer, with the result that the plaintiff whose name was on these bills as acceptor had to retire them. This necessarily brought out a considerable balance on the whole transaction as due to

the plaintiff. The bankrupt respondent, Rashid, and his Official Assignee did not oppose judgment being entered against them; but the solvent partner, Karim, opposed judgment upon the ground that he had paid all sums due on bills signed by himself, and that he was not liable in respect of any moneys raised on bills to which he was no party.

The case depended before Russell, J. in the High Court at Bombay, who after trial found in favour of the plaintiff. The material ground of his judgment may be effectively summarised by quoting two of his findings on the issues which he incorporated with his udgment, which were as follows:—

"I find (1) There was a partnership between first and second defendants' firms . . . (4) The plaintiff paid and advanced moneys on the *hundis* (bills) for and on account and for the credit of the said partnership."

The Court of Appeal reversed that judgment. The gist of their judgment may be taken from the concluding paragraph thereof, which is as follows:—

'Treating the question as purely a question of liability between the parties to the bills of exchange, it is manifest that the plaintiff cannot succeed in charging the first defendant with liability of bills of the second defendant, and having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which one shipper agreed to be liable for the default of the other in not taking up the bills of exchange *drawn* by him on the plaintiff.' "

Their Lordships are of opinion that it is erroneous to treat the question as purely a question of liability on the bills. In other words, they think the issue proposed by the learned trial Judge to himself was right. The case of *Adansonia Fiber Co., In re Mile's Claim* (6) seems to have been much pressed on the Court by the learned Pleader. But the very first sentence of the judgment of James, L. J., shows that in that case the only question was whether in a winding up proof could be made on the bills alone; and that all questions of ultimate liability were left undecided.

No one doubts that there was here a partnership. It is stated to be a partnership in the agreement, and it amply falls within the definition of a partnership given by the Indian Contract Act, which rules parties in this case. It is, however, a partnership of a limited character, and consequently liability to be enforced against one partner when there is no document of debt, which on its face binds him, can only be justified if it was shown that what he did was within the operations natural to the partnership and for the partnership.

Their Lordships think that the law on these matters is accurately stated in the well-known judgment of Lord Ellenborough in *Gouthwaite* v. *Duckworth* (5). In saying "the law," it would perhaps be more accurate to say, a statement of the criterion which is to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction. In that case it was sought to make Duckworth liable for goods purchased by Brown and Powell, and Lord Ellenborough says this: " There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods: the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorised, he says, to purchase on the joint account of the three; yet, if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and, therefore, all are liable for the value of them." He distinguishes the case of *Saville* v. *Robertson* (7) thus: "The case of *Saville* v. *Robertson* (7) does indeed approach very near to this; but the distinction between the cases is, that there each party bought his separate parcel of goods; which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise." And Bayley, J., after describing *Saville* v. *Robertson* (7) in the same way says: " but here as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement."

Mr. George Joseph Bell, in his celebrated Commentaries on the Principles of Mercantile

(6) 9 Ch. 635; 43 L. J. Ch. 732; 31 L. T. 9; 22 W. R. 889.

(7) (1792) 4 Term. Rep. 720; 100 E. R. 1264.

Jurisprudence, after stating that the law of Scotland is the same as the law of England in this matter, quotes the judgment of Lord Ellenborough as correctly laying down the law, citing, *inter alia*, a case of Kinnear, on the same lines as Gouthwaite, which was affirmed in the House of Lords in 1765, and the whole matter is comprehensively expressed in his Principles, section 385, in words which their Lordships think accurately give the result of the cases both old and modern: "Where goods are purchased or money raised for the joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibilty for goods, etc., purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution . . . . . ."

It may be and often is a difficult matter to say on which side of the line thus indicated the facts of a particular case fall, and cases will be found illustrating both results. To the cases already cited may be added the case of *Heap* v. *Dobson* (3), while in the Scottish Courts may be taken as on the lines of *Gouthwaite's* case (5) the case of *British Linen Co.* v. *Alexander* (8) (where the facts are strikingly similar to the present case) and on the lines of *Saville* (7) and *Heaps'* cases, (3) *White* v. *McIntyre* (9).

Their Lordships are aware that Lord Lindley, in his capacity as an author but not as a Judge, expressed some doubts as to whether the case of *Goutwhaite* (5) could be supported. They are of opinion that, whether that doubt is sound or not, it is not a criticism on the criterion of law indicated by Lord Ellenborough and the other Judges; but is only an indiciation that a different view might have been taken of the facts of that particular case.

Turning then to the present case, their Lordships have come to the conclusion that the judgment of the trial Judge was correct. The considerations which lead them to that sult are as follows:

It is clear from the terms of the agreement that either of the two partners by the mere fact of purchase (after consultation as to price) could subject any sugar independently of the action of the other to becoming partnership sugar. A purchase of sugar therefore becomes a purchase for the partnership, and any one who sold the sugar, or advanced money by which the sugar was bought, was crediting the partnership with goods or money. This is further accentuated by the provision as to possible re-sale in Mauritius itself. If either party in the case bought sugar, and then came to re-sell it in terms of that article, he could not refuse his co-adventurer a share of the profit he made. These considerations make it impossible to say, as was said effectively in *Saville's* case (7) or *Heap's* case (3), that the joint adventure only began when the goods were shipped, as it is clear that the joint adventure began as regards each parcel from the moment that parcel was bought. The learned Judges of the Court of Appeal are impressed with the view that the agreement is "elaborately drawn for the purpose of keeping the interests of the two shippers distinct . . . . except in so far as a combination between them was desirable for the purpose of securing joint shipment and a sale of the sugar at Hong Kong." Their Lordships cannot take this view. It ignores the fact that notwithstanding the separate shipment and consignation documents, the sugar was admittedly to be accounted for as partnership sugar. Supposing that the particular parcels consigned by one had in some way been deteriorated, either by perils of the sea, without insurance, or by the development of some intrinsic fault, it is perfectly clear that the other party would have had to bear his share of the loss resulting in the whole cargo. No doubt the anxious arrangements for shipping and consignation in separate names were peculiar. But the reason for them is amply explained by the fact that the parties desired secrecy, being afraid at Mauritius of the hostile action in breaking prices of a rival whose astuteness they deploringly acknowledged.

Moreover, it is clear not only that the facts as to the terms of a partnership in the sugar shipped are as have been stated, but that the plaintiff knew the whole terms and conditions of the agreement. He knew, therefore, he was helping by advance of credit the partnership in its purchase of sugar. The

(8) (1853) 15 D. 277.
(9) (1841) 3 D. 334.

learned Appeal Judges say that the respondent Karim did not avail himself of the plaintiff's credit. That that credit was not interposed in the precise way originally contemplated by the 4th article of the agreement is true. But that they did not in fact avail themselves of the plaintiff's credit is obviously an error. The bills speak for themselves. When a drawer discounts an acceptance, which acceptance is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit; and if anything more was wanted it is to be found in the evidence of Karim himself, who admits in cross-examination: "For the purchase of all that sugar neither I nor Rashid paid a rupee; it was all paid for by *hundis* accepted by the plaintiff."

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the judgment of the trial Judge restored: the defendant Karim paying costs in the Courts below and before this Board.

Appeal allowed.

Solicitors for the Appellants: - Messrs. *Ashurst Moris, Crisp & Co.*

Solicitors for the 1st Respondent:—Messrs. *Latheys & Hart.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1514 OF 1913.

December 16, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

AHMAD RAZA KHAN—PLAINTIFF—APPELLANT

versus

RAM LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Co-owner—Possession by one co-owner—Presumption—Burden of proof—Limitation.

There is a presumption that the possession of one co-owner is the possession of the other, and the burden lies on the co-owner setting up title by adverse possession to prove that he or his predecessor had set up an adverse title to the other co-owner's share, to the knowledge of the latter, more than twelve years before the institution of the suit.

Corea v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836, followed.

Jafar Husain v. *Mashuq Ali*, 14 A. 193; A. W. N. (1892) 55; *Jogendra Nath* v *Baladeb Das*, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735, *Deba* v. *Rohtagi Mal*, 28 A. 479; 3 A. L J. 334. A. W. N. (1906) 95; *Chiranji Mal* v. *Nathia*, 4 A. L. J. 473; A. W. N. (1907) 195, referred to.

Second appeal from the decision of the Second Additional Judge of Aligarh, dated 11th June 1913.

Mr. *S. K. Dar*, for the Appellant.

Mr. *D. C. Banerji* (with him Mr. *Lachmi Narain*), for the Respondents.

JUDGMENT.—This was a suit for possession, by partition, of a half share in a small property, described as *Ihata* Nidhan Singh, in the city of Koil, and consisting apparently of some waste land and the sites of a few houses.

The property belonged formerly to two brothers, Nihal Singh and Bhawani Singh. The rights of the former passed to his three grandsons who in May 1909, alleging that they were owners of the whole property, sold the whole to the appellant. The appellant admits, however, that by his purchase he acquired only a half share in the property. The rights of Bhawani Singh in the other half passed to his son, Mathura Prasad, and later in execution of a decree against Mathura Prasad were sold to two persons who in August 1909 transferred them to the respondents.

The appellant's case is that he was in possession of his half share till March 1911 when the respondents denied his title. The defence was that the appellant or the persons through whom he claims have not been in possession of the share within twelve years of this suit, and that the respondents have been in adverse possession of the same for more than that period.

The Munsif found that as the appellant had failed to prove possession within twelve years the suit failed, although the respondents had failed to prove adverse possession by them for more than a very short time. On appeal the Additional District Judge agreed with the Munsif that the appellant had failed to prove possession within limitation, and, therefore, held that the suit had been rightly dismissed. He went on to hold that as the possession of one of two co-owners could not be regarded as the possession of the other co-owner, the possession of the respondents must be held to have been adverse to the appellant.

AHMAD RAZA KHAN v. RAM LAL.

In second appeal the learned Vakil for the appellant did not dispute the correctness of the rule laid down in *Jafar Husain* v. *Mashuq Ali* (1), that where a suit for possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of possession within twelve years of the suit; but he contended that as the appellant and the respondents are, as their predecessors were, co-owners, or as English lawyers would say tenants-in-common, of the property, the possession of the respondents was in law that of their co-owner, the appellant, and, therefore, the suit must be held to have been brought within time as the respondents have not proved ouster or anything equivalent to ouster of the appellant. Many cases were cited in support of this contention including that of *Jogendra Nath* v. *Baladeb Das* (2), which seems to go the whole length of this contention.

The learned Vakil for the respondents referred us to a number of cases. including two decided by single Judges of this Court, namely, *Deba* v. *Rohtagi Mal* (3) and *Chiranji Mal* v. *Nathia* (4), which are not distinguishable in principle from the case now before us and certainly support the contention advanced on behalf of the respondents.

We are relieved from the necessity of discussing these cases, for it seems to us that the question is covered by the decision of their Lordships of the Privy Council in a Ceylon case to which our attention was drawn after the conclusion of the arguments, namely, that of *Corea* v. *Appuhamy* (5). The plaintiff in the suit had acquired the rights of Balohamy, a daughte of a man named Elias, who died in 1878 leaving as his heirs Balohamy, two other daughters, and a son named Iseris, the principal defendant to the suit. Iseris was in jail when his father died. He came out in December 1878 and took possession of the whole of the property belonging to himself and his sisters. Balohamy sued for possession in 1908 and Iseris pleaded adverse possession for more than the prescribed period. The plaintiff tried to prove an acknowledgment of her title by Iseris but failed. Iseris proved only long continued possession on his part of the whole property. The Ceylon Courts decided in favour of the defendant, but their decisions were reversed by the Privy Council. It appears to us that the ground upon which their Lordships decided in favour of the plaintiff has no reference to the special terms of the Ceylon Ordinance. It was that the possession of Iseris was in law the possession of his co-owners and that nothing short of ouster or something equivalent to ouster could put an end to that possession. Even the fact that Iseris had for years pretended that he was sole heir of his father and had sworn that the plaintiff was not his sister at all, was not considered to justify a presumption of ouster.

The case before the Privy Council was a much stronger case than the one now before us. Here there is nothing to show that the respondents denied the appellant's title till shortly before the suit was brought, and there is nothing to show that the respondents' predecessors-in-title ever laid claim to more than a half share in the property. On the contrary they did not attempt to transfer to the respondents more than a half share. In these circumstances it must be presumed that when the respondents took possession of the whole property they did so for themselves and their co-owner.

The judgment of their Lordships recognizes that there may be cases of an exceptional nature in which ouster may be presumed, but we can discover no grounds whatever for treating this case as falling in that category. On the contrary, as already pointed out, the respondents' vendors seem to have laid claim to no more than a half share in the property though they may have been in possession of the whole.

In our opinion the appellant was entitled to rely upon the presumption that possession was held by the respondents and

(1) 14 A 193; A. W. N. (1892) 55.
(2) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.
(3) 28 A. 479; 3 A. L. J. 334; A. W. N. (1906) 95.
(4) 4 A. L. J. 473; A. W. N. (1907) 195.
(5) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

their predecessors-in-title on his behalf and it lay upon the respondents to prove that they or their predecessors had set up an adverse title to the appellant's share to the knowledge of the appellant more than twelve years before the suit. This they failed to do.

We allow this appeal, set aside the decree of the lower Appellate Court and remand the case to that Court for decision on the merits. Costs of this appeal will be costs in the cause.

Appeal allowed; Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE JUDICIAL COMMISSIONER'S COURT, CENTRAL PROVINCES.

October 22, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Seth RAMLAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NARSINGDAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Contribution—Mortgage by one partner of whole partnership property—Mortgage disputed by other partner—Compromise—Disputing partner undertaking to pay part of mortgage debt—Mortgage subsequently declared not binding on disputing partner's share—Mortgage-debt realized from partner executing deed—Suit by mortgagor for contribution in terms of compromise—Other partner, liability of.

B, one of the two partners in a firm, granted a mortgage purporting to mortgage the whole of the partnership property. *L*, the other partner, disputed the right of *B* to subject the whole of the partnership property to the mortgage and contended that *B* was in fact only able to burden his own share thereof. Subsequently *L* brought against *B* a partition suit in which the Court made a decree giving effect to a compromise which the parties themselves had effected. One of the terms of the compromise was that *L* should pay the mortgagee a certain amount and that *B* should free *L*'s portion of the property from the mortgage. The mortgagee thereafter brought a suit on his mortgage, and in that suit it was found eventually by the Privy Council that truly the mortgage only bound *B*'s share and not the whole partnership property. The mortgagee realized the whole of the mortgage-debt from *B*, who then sued *L* for the amount payable under the compromise as contribution. *L* contended that such payment was conditional upon *B* freeing his share from the mortgage, and as his share was not freed by *B* but by the Privy Council decision, the suit must fail:

Held, that *L* was bound by the compromise, which remained unaffected by the Privy Council decision, and that he was liable to contribute.

Appeal from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces, dated the 30th April 1908, affirming those of the Court of the District Judge, Chindwara, dated the 12th July 1907.

FACTS.—Bhajanlal and Lakhmichand were the two partners in a firm. On the 5th August 1892 Bhajanlal executed in favour of one Narsingdas a mortgage on the whole of the partnership property. Subsequently Lakhmichand, who disputed the mortgage, brought a suit for the dissolution of the partnership. The suit was compromised and a decree was drawn up giving effect to the compromise, one of the terms of which was as follows:—

"Plaintiff to pay Rs. 8,200 (to Narsingdas) and defendant should obtain redemption from mortgage of any property which by his division has fallen to plaintiff's share and which he (defendant) may have mortgaged with the said Narsingdas."

In 1897 Narsingdas put his mortgage in suit. In that suit it was eventually decided by the Privy Council that the mortgage bound only Bhajanlal's share of the property and not Lakhmichand's share. The mortgagee realized the whole of the mortgage-debt from Bhajanlal's heirs, who brought the present suit against the appellants, who represented Lakhmichand, for the payment of the amount stated in the said compromise decree as contribution. Both Courts in India decreed the suit, and the appellants thereupon appealed to His Majesty in Council.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Appellants, contended that the payment to be made under the compromise was conditional on Bhajanlal redeeming Lakhmichand's share, and as Bhajanlal never redeemed that share, the appellants were under no obligation to make the said payment.

[Lord Shaw referred to *White* v. *Victoria Lumber and Manufacturing Co., Ltd.* (1) and remarked that the case now put was not the case put before the Courts below and that it was not now open to the appellants to put a new case here.]

(1) (1910) A. C. 606 at p. 610; 80 L. J. P. C. 38; 103 L. T. 323.

The case depended on the true construction of the compromise decree, and as the construction of a document was a question of law, the parties were entitled to properly construe it at any stage of the proceedings when there was no question of fact involved in determining the point raised.

Sir H. Erle Richards, K. C., and Mr. *Lowndes*, for the Respondents, were not called upon.

JUDGMENT.

LORD DUNEDIN.—The claim in the present suit arises out of the following circumstances:—

Two parties were interested in property which they held in partnership, and one of them, called Lakhmichand, brought a partition suit against his partner Bhajanlal, following on a dissolution of the partnership, in which the Court gave effect to a compromise which the two parties themselves had effected. The judgment which was pronounced by the Court in that case is to be found at page 29 of the record. There had been a mortgage granted by Bhajanlal in favour of a person called Narsingdas, and that mortgage purported to convey, as security for the debt which was thereby constituted, the whole of the partnership property.

It was a moot point, however, between the partners as to whether the partner who executed that mortgage had in truth any right to subject the whole of the partnership property to the debt, or whether he was not in fact only able to burden his own share. This being so, one of the terms of the arrangement which was made binding between the parties in the judgment pronounced was that the plaintiff, who is now represented by the present defendants and appellants, should pay to Narsingdas, that is in other words, to the mortgagee, Rs. 8,200, and that the defendant Bhajanlal, who is now represented by the present plaintiffs and respondents, should free the other parties' portion of the property from the mortgage.

It is admitted that the defendants, that is to say, the present appellants, never did pay the Rs. 8,200, except to the small extent of Rs. 200, to Narsingdas. Narsingdas thereafter brought a suit to make good his mortgage, and in the course of that suit it was found eventually by the highest Court, by this Board, that truly the mortgage only bound Bhajanlal's share and not the whole partnership property.

Payment to the mortgagee, Narsingdas, was effected by the sale under that suit of Bhajanlal's property, and the result, of course, was that he had to pay the whole of Narsingdas' debt. Inasmuch as the present appellants had never paid the Rs. 8,200 to Narsingdas, it is quite evident that Bhajanlal had to pay Rs. 8,000 more to Narsingdas than he should have paid. Accordingly the present respondents sue for contribution.

The defence really comes to this, that the payment which is stipulated for in the judgment which was the result of the compromise, is a payment which is conditional upon the other party doing his share. It is said that Bhajanlal never did free the other part of the property from the mortgage because that was freed not by anything done by him, but by the judgment of the Privy Council in the suit which has already been mentioned.

Their Lordships are of opinion that the case is quite correctly put by the learned Judicial Commissioner from whose judgment the present appeal lies. Speaking of the mortgage-debt due to Narsingdas, he says: "It was a disputed point as to whether Bhajanlal should pay all or only half of it, and that dispute was compromised by an agreement which necessarily admitted that it was a partnership debt whereof the defendants (in this suit) on that date were liable to pay Rs. 8,200. From that moment the Rs. 8,200 became a debt due by the defendants to Narsingdas for the purpose of adjustment between the ex-partners of the dissolved partnership."

Their Lordships think that that is the true key to the case, and that it is out of the question now for the present appellants to try to get out of the compromise by saying that if the Privy Council case had been then decided, they would have found themselves free of the liability without entering into the undertaking to pay Rs. 8,200. They are bound by that compromise, however foolish it may have been. They might have paid the money direct to Narsingdas: they did not pay it,

and the respondents had in consequence to pay it to him. Accordingly, to make good the terms of the compromise, the appellants must now pay it to the respondents.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the Appellants:—Mr. *Edward Dalgado.*

Solicitors for the Respondents :—Messrs. *Downer* and *Johnson.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 52 OF 1914.

November 9, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

BANSIDHAR—PETITIONER—APPELLANT

versus

KHARAGJIT—OPPOSITE PARTY—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 18—Insolvent's property in possession of third person—Receiver—Power of Court to put Receiver in possession of such property.

Section 18 of the Provincial Insolvency Act empowers the Court, where it appoints a Receiver, to remove any person, in whose possession or custody any property of the insolvent is, from the possession or custody thereof, provided the insolvent has a right to remove him.

First appeal from an order of the District Judge of Mainpuri.

Mr. *Pearey Lal Banerji* (with him Mr. *M. L. Agarwala*), for the Appellant.

Mr. *Girdhari Lal Agarwala*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Mainpuri, passed in proceedings arising out of the insolvency of one Gur Narain. All the facts have not been properly ascertained, but for the purposes of this order they may be assumed to be as follows:—

In 1905 the insolvent's father, Girwar Dhari, instituted three suits on mortgages. Either before or shortly after bringing these suits he transferred, or purported to transfer, all his rights in the mortgages to one Ratan Lal, who was made plaintiff in the suits. Decrees were obtained and one of them is said to have been satisfied. The other two were on March 23rd, 1910, transferred to Bansidhar, the present appellant, who took out execution, brought the property to sale and purchased some of it himself. Meanwhile Girwar Dhari had died, and on July 2nd, 1909, Gur Narain had been adjudicated an insolvent. On August 13th, 1909, the respondent was appointed Receiver of the insolvent's property. On January 13th, 1910, he put in a petition saying that certain persons who had been called upon to hand over property of the insolvent's had not put in an appearance and praying that he, the Receiver, might be put into possession at once. After considerable delay an order was passed that two of the deeds transferring the decrees to Ratan Lal should be made over to the Receiver at once. Ratan Lal seems to have appeared in Court and said that the transfers in his favour were fictitious and that the transfers by him to Bansidhar were also fictitious. The District Judge then issued notice to Bansidhar and eventually passed the order now under appeal in which, after referring to various proceedings, including an order of the Subordinate Judge of Mainpuri to the effect that the transfers to Ratan Lal were fictitious and an order of the Subordinate Judge of Aligarh holding that the transfers were valid, he has held that the property belongs to the insolvent and that the Receiver is entitled to take possession of it at once. The meaning of the order is not clear. It is not possible to say whether the learned Judge means that the Receiver should take over the decrees, or that he should take over the property purchased by Bansidhar.

Section 36 of the Provincial Insolvency Act certainly has no bearing on the case, for there was no transfer by the insolvent within two years before the adjudication. It follows that Bansidhar has no right of appeal under section 46 (2) of the Act. But along with his petition of appeal he presented a petition praying for leave to appeal under section 46 (3). We think that leave to appeal should be granted in this case, and we accordingly give the appellant leave to appeal *nunc pro tunc*. The respondent does not object to leave being given if the Court is of opinion that the proceedings in the Court below are not satisfactory, but he maintains that the Court below was com-

petent to inquire and decide whether the property in question belongs to the insolvent, and that if after proper inquiry it is found that it belongs to the insolvent, the Court should remove the appellant from the possession thereof and make it over to the Receiver.

The learned Vakil for the appellant contends that, if the case does not come within section 36 of the Act, the Receiver should be left to bring a separate suit. We cannot accept this contention. It is true that the Indian Provincial Insolvency Act contains no such provision as section 102 of the English Bankruptcy Act, which expressly empowers the Bankruptcy Court to decide "all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice and making a complete distribution of property in any such case," but it is the duty of a Receiver appointed under the Indian Act, and of the Court itself where no Receiver is appointed, to take possession of the property of the insolvent, and section 18 of the Act empowers the Court, where it appoints a Receiver, to remove any person, in whose possession or custody any property of the insolvent is, from the possession or custody thereof, provided, of course, that the insolvent had a right to remove him.

We have no doubt that the Court had power in the present case to inquire whether the disputed property in possession of the appellant was the property of the insolvent and on finding that it was the property of the insolvent, to take steps to have it handed over to the Receiver. But in proceedings under the Act the Court is required to follow the procedure of a Civil Court in a civil suit. The Receiver and the appellant should have been required to state their respective cases in writing, and having ascertained the points in dispute the Court should have fixed issues and given the parties an opportunity of producing evidence. In simple cases it may be unnecessary to fix issues, but care should always be taken that the parties understand what the questions at issue between them are.

In the present case the proceedings of the Court were of far too summary a nature. Even now it is difficult to say what allegations of fact by either party are admitted or denied by the other, and the parties do not seem to have been given any proper opportunity of producing evidence.

We accordingly set aside the order under appeal and direct that the record be returned to the Court below, that the parties be required to state their respective cases in writing, and that the Court do then proceed to try the questions in issue according to the procedure prescribed for the trial for an original civil case. Costs of this appeal will be costs in the proceedings to be dealt with by the Court below.

Appeal decreed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 218 OF 1910.

November 3, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

NARAYANASWAMI AIYAR—PLAINTIFF—APPELLANT

versus

KRISHNAMURTI AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, rr. 5, 7, 17 and O. VIII, r. 9—Amendment of pleadings—Practice of Subordinate Courts trying preliminary issues and not giving opportunity to amend condemned.

In a suit for partition against defendants Nos. 1 to 4, co-parceners, and seventy-four other persons alleged to have come into possession of various items of the suit property during plaintiff's minority, the plaint contained no specification of the titles under which the seventy-four defendants above referred to were in possession or the defects in them and no prayer for the avoidance of the partition, the decrees and other transactions by which their titles were constituted. The attention of the parties and the Court was drawn to the defects only during the trial of the suit in the course of the examination of witnesses. The plaintiff then applied for leave to amend, arguments were heard on his application and on certain preliminary issues which had been framed, and leave to amend was refused and the preliminary issues were decided against the plaintiff. The plaint was subsequently rejected two days later for want of a cause of action:

Held, that the dismissal of the petition for leave to amend could not be sustained and that the plaint ought not to have been rejected until opportunity had been given to amend.

Krishnaji v. *Wamnaji*, 18 B. 144; *Sevugan Chetty* v. *Krishna Aiyangar*; 13 Ind. Cas. 268, 36 M. 378; 10 M. L. T. 557; 29 M. L. J. 139, referred to.

Per *Tyabji, J.*—Different procedure and sanctions apply to (1) amending pleadings, (2) furnishing particulars and (3) presenting a pleading subsequent to the written statement; though it may be that on an order to do any of them being disobeyed, the same result—an adverse decision in the suit—may directly or indirectly follow.

Appeal against the decree of the Subordinate Judge of Mayavaram, in Original Suit No. 5 of 1907.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar*, *T. Natesa Aiyar*, *T. R. Venkatarama Sastri*, *T. V. Gopalaswami Mudaliar* and *G. S. Ramachandra Aiyar*, for the Respondents.

This appeal coming on for hearing, the Court (Chief Justice and Tyabji, J.) made on 7th March 1913 the following

ORDER.—In order to deal with the objection that this appeal is out of time, we think it desirable that there should be an inquiry on oral evidence and a finding thereon as to whether Kuppuswami Aiyar promised to deliver the copies in question and "colluding with some or all of the defendants, finally about the 11th April refused to give the plaintiff the same", as alleged in paragraph 7 of the affidavit of the plaintiff dated July 18th, 1910.

We accordingly ask the Subordinate Judge to return a finding on these questions.

The finding should be submitted in six weeks and seven days will be allowed for filing objections.

In compliance with the above order the Subordinate Judge of Mayavaram submitted the following

FINDING.— * * * * I am inclined to hold that Kuppuswami Aiyar obtained the copies for filing the appeal, that he was interesting himself about the same till at the last moment he joined hands with the 6th defendant, his brother-in-law, and gave up the plaintiff's cause.

9. I find that the plaintiff's case on the issue sent down is substantially true.

This appeal coming or for final hearing after the return of the finding from the lower Court upon the questions referred to it for trial, and the case having stood over for consideration, the Court delivered the following

JUDGMENT.

OLDFIELD, J.—The order under appeal is one rejecting the plaint in a suit, which had been pending for almost three years. It was passed in the following circumstances :—

The suit was for partition against defendants Nos. 1 to 4, co-parceners, and seventy-four other persons, alleged to have come into possession of various items of the suit property during plaintiff's minority. Issues were framed after it had been pending ten months. It was taken up for trial on 16th November 1909, when it had been pending for two years and ten months, and four witnesses were examined wholly or in part. During their examination the objections taken to certain questions drew the attention of the parties and the Court to the fact that the plaint contained no specification of the titles under which the seventy-four defendants above referred to were in possession, or the defects in them and no prayer for the avoidance of the partition, the decrees and other transactions, by which these titles were constituted. Plaintiff then applied for leave to amend; and arguments were heard on his application and on certain preliminary issues, which had been framed. The decision was against him on both; and after dismissal of the petition on the 27th November 1909, the plaint was rejected on 29th November 1909.

In these issues, Nos. 3, 7 and 14, the questions were in effect those raised by the objection just referred to. In the amendment petition the additions to the plaint proposed were, it is contended, such as would meet it, since they included (1) an enumeration in paragraphs 1 to 14 of the connected affidavit of the defects in some (if not all) of the titles in question and of the acts of negligence and fraud by 1st defendant and 5th defendant, plaintiff's guardians, which were pleaded as vitiating them and (2) a prayer for a declaration that the transactions were not binding on him. Though the lower Court has referred specifically to the preliminary issues only in the diary and not in the

judgment, it is clear that they and the amendment petition were argued together and that the whole of the questions raised are open for determination in this appeal.

Now it may be conceded that the conclusion of the lower Court, so far as it dealt with these issues and the plaint as presented, was correct and that plaintiff would not have been entitled to proceed, unless and until he had prayed for a declaration or other relief in respect of the transactions on which defendants relied and had made properly specific averments as to fraud and negligence in order to obtain it; and, if it had been the case that after reasonable opportunity given he had persisted in refusing to comply with the Court's requirements in the matter, he would have had only himself to thank for an adverse result. This requires no support from agrument or authority. The course of the proceedings however, as appears from the account already given, was different. Defendants having embodied their objections in the issues above mentioned, which were clearly of a preliminary nature, acquiesced (apparently without complaint) in the examination of witnesses being begun, before they had been disposed of. They were in fact disposed of only in the final order of rejection, which made it impossible for plaintiff to repair the mistake he was held to have committed. The omission to try preliminary issues as such and to allow opportunity for amendment is no doubt frequent in subordinate Courts. But it calls for the strongest reprehension, since the plaintiff falls into a trap by submitting to it, when he is first given to understand that the question of amendment is open pending adjudication on it and he is told eventually that the amendment is indispensable but cannot be asked for at that stage or, as in the present case, has been asked far too late.

This description of the result of the lower Court's decision sufficiently condemns it. The arguments by which it has been supported may be noticed shortly. For those only which relate to the refusal of leave to amend need be referred to, since it has conceded and plaintiff has by his application for leave impliedly admitted that amendment was necessary. Some of them also, those in which the validity of plaintiff's objections to his guardian's conduct is impugned on the facts, may be disregarded, since they will properly be considered at the trial which will have to be held. The first of those which remain, is that the amendment petition was presented after delay and at too late a stage in the case; and it has been supported by reference to *Krishnaji* v. *Wamnaji* (1). In that case, however, as in others cited, no principle of general application was laid down; and the decision inevitably turned on the special circumstances, which differed materially from those now in question. For there was no amendment petition by plaintiff in the Court of first instance and it may be doubted whether the conclusion would have been the same if section 153 and Order VI, rule 17, of the present Code had been in force instead of section 53 of the former. It is no doubt said by the learned Judges that the plaintiff, whether he knew of the case open to him and did not state it or did not know of it and sued speculatively, is entitled to no consideration. But with all due respect it may be doubted whether in the latter alternative he might not fairly expect the defendants to disclose the titles they had acquired during his minority before he ascertained or disclosed the grounds on which he would attack them. That was the position of plaintiff in the present case, when he sued. When his opponents during the examination of witnesses insisted on particulars, he asked leave to supply them; he also proposed to add a prayer for further relief, before his objection to do so had been adjudicated on in connection with the preliminary issues. It is not possible to hold that he took this action too late.

It is urged next that the allegations of fraud and negligence in paragraphs 6, 7, 11 and 12 of the plaint were unduly general, and that (1) the affidavit with the amendment petition did not make them appreciably more specific, (2) they could not be made more specific without substituting a new cause of action for that already relied on. The answer as regards (1) is, *firstly*, that the objections in the affidavit appear reasonably specific as regards the majority of the points raised and, *secondly*,

(1) 18 B. 144.

that, if further particulars as regards any were essential, it would be open either to defendants to obtain them by interrogatories or the Court to grant leave to amend only conditionally on the necessary additional particulars being given. As regards (2) it has not been shown how the addition of particulars to the general statement of the cause of action already made could make that cause of action a new one, or how the addition of an explicit prayer for declaration in respect of defendants' titles could alter the character of the suit, if that were material under the law at present in force.

The last point taken is that the amendment would operate to defendants' prejudice, since the suit, if brought on the date of the amendment petition, would have been out of time. The lower Court has recognised that this would not necessarily make the grant of leave to amend improper, but has held that no special circumstances are available to justify it in the present case. Its discussion of the latter point is vitiated by its mistaken assumption, already referreds to, that the amendment would have introduced a new cause of action and its references to authorities are, therefore, not in point. In the present case the reasons for allowing amendment are at least as strong as they were in *Sevugan Chetty* v. *Krishna Aiyangar* (2), limitation being in question there also. The amendment petition, therefore, should not have been dismissed on this ground.

In these circumstances the dismissal of the petition cannot be sustained; and the plaint ought not to have been rejected, until opportunity had been given to amend. The orders dismissing the petition and rejecting the plaint must, therefore, be set aside, the suit restored and the petition again taken up for disposal in the light of the foregoing. Costs to date in the lower Court and here will be costs in the case.

TYABJI, J.—The question in this appeal is, whether the Subordinate Judge was right in rejecting the plaint as disclosing no cause of action and in disallowing the plaintiff's application to amend the plaint.

The plaintiff's suit is ostensibly for partition and was instituted in January 1906. Defendants Nos. 6 to 75 are in the plaint stated to be in possession of the properties which the plaintiff sues to have partitioned, and it is alleged that the said defendants claim to hold the properties by virtue of certain transactions which, it is the plaintiff's case, took place when he was a minor and under circumstances that do not bind him.

I will assume that the defences set up in some of the written statements are such that the plaintiff would have no answer unless fraud or some such matter as is referred to in Order VI, rule 4, is made out by the plaintiff; that the plaint, as it stands, does not to give any such particulars as are required by the rule ; and that the important issues depend upon the existence or non-existence of such matters.

Thirty-one issues were framed on 5th November 1906, 1st October 1907, 4th September 1909, or 27th October 1909. It is not denied that these issues raise " the real questions in controversy between the parties, " nor that if a decision were given on them in favour of the plaintiff, the facts so found would furnish a cause of action.

The final hearing of the suit commenced on the 16th and continued on the 17th and 18th November 1909. "Objection was taken to the plaintiff being allowed to put any questions impugning the partition-deed and Court sales, etc." (these and *interim* decrees being the transactions above referred to). On this the plaintiff put in an application for permission to amend the plaint, "the object" of which according to the Subordinate Judge was " to supply the said defects," by which is meant the setting out of " the circumstances * * * tending to invalidate" the said transactions. The Subordinate Judge held that the plaintiff had made out no case to amend and unless amended, the plaint disclosed no cause of action. He, therefore, " rejected the plaint with costs."

It seems to me that the Subordinate Judge fell into two errors.

First, he failed to notice that the plaintiff's application, though it was for permission to amend the plaint, did not relate to matters which can be brought on the record only by amending an existing pleading (Order VI, rule 7). What the plaintiff desired to do was partly

(2) 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

(*a*) to furnish particulars of what had already been alleged, although possibly in a vague manner and merely for the purpose of Order VII, rule 5; partly

(*b*) to put in a "pleading subsequent to the written statement" in reply to allegations contained in the written statements (Order VIII, rule 9); and partly

(*c*) to make up for what he does not seem to have been responsible, *viz.*, the absence of a record of the examination at the first hearing under Order X, rule 3, referring to the matters in question (I asked learned Pleaders about this and was informed that there was no such record).

Secondly, in holding that the plaint disclosed no cause of action, the learned Subordinate Judge apparently considered not only the allegations in the plaint, but also some of those contained in the written statements. He did not address himself to the question whether if all that is alleged in the plaint were true and there were no other facts before him (except facts of which he could take judicial notice), then the plaintiff would obtain a decree for partition. But he considered the question before him to be :—

(*a*) Whether the plaint disclosed any answer to certain allegations contained in the written statements—allegations which for the purposes of this appeal may be assumed to have been admitted when made, and

(*b*) Whether, if any such answer were disclosed, it was given with the particularity which Order VI, rule 4, requires.

These errors are connected with each other. They arise from a misapprehension of the system of pleading contemplated in the Civil Procedure Code and the functions respectively assigned to the parties and the Court in the various steps in procedure (whether by way of pleading or otherwise), which lead up to the point when the issues become part of the record.

The Code contemplates only a plaint and a written statement by way of pleading: Order VIII, rule 9. It may, therefore, happen (when, *e. g.*, a written statement consists of confession and avoidance) that there is no pleading by the plaintiff as to the real points in controversy—nothing by way of pleading to indicate what (if any) is the plaintiff's answer to the facts stated in the defendants' written statement.

But the rules prescribe that at the time of the examination referred to in Order X, its effect shall be recorded by the Court: such a record may take the place of the plaintiff's "reply" to the "defence" in other systems of pleading; and make any "pleading subsequent to written statement" unnecessary (Order VIII, rule 9).

It is true that Order VII, rule 5, requires the plaintiff to anticipate the defence in some degree; and plaints do as a matter of practice frequently give in anticipation the plaintiff's replication to the defence that the plaintiff expects will be contained in the defendant's written statement. But this course, though it may in a great number of cases be convenient and satisfactory, is not the only course open to the plaintiff. In some cases he may be unable to anticipate the defence intelligently or sufficiently: in the others he may prefer to see the defendant state his own case before endeavouring to meet it: and this he is entitled to do.

The defendant is, however, not dependent solely on Order X, rule 3, for being informed of the case that he must be prepared to meet. He can apply for particulars or for a written statement to be put in by the plaintiff, or for permission to interrogate the plaintiff.

Different procedure and sanctions apply to (1) amending pleadings, (2) furnishing particulars and (3) presenting a pleading subsequent to the written statement; though it may be that on an order to do any of them being disobeyed the same result—an adverse decision in the suit—may directly or indirectly follow.

1. Amendment is necessary and is the only course open in cases referred to in Order VI, rule 7, and Order VI, rule 17, *viz* :—

(*a*) for raising a new ground of claim; or

(*b*) for making an allegation of fact inconsistent with the previous pleading of the party pleading the same; or

(*c*) in case the Court orders amendment (Order VI, rule 17).

In the first two cases, (*a*) the party seeking to amend applies to the Court and the granting of the application is in the judicial discretion of the Court. In cases however, other than these two, amendment may, as a matter of form, be the most

convenient course, though it may not be the only course available: the rules for the exercise of discretion in regard to amendments falling within Order VI, rule 7, may not be applicable on every occasion when there is an application before the Court for permission to amend, still less when the Court has to consider whether it should of its own motion order amendment. The sanction contained in Order VI, rule 18, is operative only when the Court has ordered or permitted amendment.

(2) As regards furnishing particulars of what has already been pleaded but insufficiently or vaguely—this is not a discretionary matter at all. It is ordering one of the parties to give the other his due, for it is the duty of each party to furnish his opponent with " a statement in a concise form of the material facts...but not the evidence " on which he himself relies: Order VI, rule 2. This duty falls in part on the Court under Order X. What this " statement " is to contain is exemplified in the forms (first Schedule, Appendix A, to the Code of Civil Procedure) and prescribed in Order VI, rules 4, 6, 8 to 13, Order VII, rules 1 to 9, Order VIII, rules 2 to 4 and 7, which lay down the decree of particularity required as regards specified classes of allegations : in other words, when the "material facts" consist of any of the classes mentioned in the said rules, there are specific directions as to what "stating them in a concise form" means. How the necessary degree of particularity may be enforced in cases where the rules are not voluntarily followed, is indicated by Order VI, rule 5: further and better particulars may be ordered. If an order to furnish particulars is not obeyed, the sanction (Order VI, rules 16 to 18) seems to be that the vague statements (particulars of which have been ordered and not furnished) may be struck off and thus the plaint may be rendered nugatory; in some cases this may result in the plaint not disclosing any cause of action and becoming liable to rejection: Order VII, rule 11 (*a*). The counterpart in the case of a written statement contained in Order VIII, rule 5, is relevent only for the purpose of bringing into relief the nature of the sanction which must apply against the plaintiff in similar circumstances.

(3) There is a third class of matters, which it may be the right of one of the parties to have recorded in a pleading or its equivalent, but which does not fall within either of the two classes above referred to, because it has not necessarily to be brought on the record by amending an existing pleading; nor does it consist of particulars of anything already stated. Matter of this kind (unless it is recorded under Order X, or would be redundant owing to interrogatories having been admitted, or is waived by the parties, or considered unnecessary by the Court) might appropriately be the subject of "pleading subsequent to the written statement" with leave of the Court under Order VIII, rule 9. Parties are not apt of their own accord to plead when they are not required to plead. But where the Court orders a written statement or additional written statement, the sanction for disobeying the order is contained in Order VIII, rule 10.

The significance of these rules lies in the control which the Court is given over the matters that have to be stated in the form of pleadings. These rules together with those contained in Orders X and XIV lay down a system of pleading very different from that according to which each party pleads alternately, and on each occasion states only his own case or his answer to the immediately preceding pleading of his opponent, without anticipating the answer that he expects from his opponent, or disclosing how he himself will meet the answer or defence so anticipated—until at last the final pleading consists of a bare joinder of issue (*i. e.*, denial of the facts stated in the penultimate pleading): so that the facts in issue necessarily appear in the pleadings and the issues are in effect framed and recorded in the pleadings themselves.

In India it is the Court that has to frame and record them. The "concise statement of material facts" contained in the pleadings in India may not cover the entire ground of allegations and counter-allegations; and the lacuna may have been caused either by the plaintiff not having anticipated the defendant's case at all, or anticipated it imperfectly, together with the failure of the Court to have followed Order X, rule 3, and the omission of the defendant to apply to the Court for a written statement of the

material facts on which the plaintiff relies. If for example, the written statement consists of a confession avoided, then it is obvious that none of the facts stated in the plaint are in issue and the plaintiff's true case as to the real questions in controversy, if pleaded at all, must be pleaded subsequently to the written statement.

It follows that if some matter that ought to be part of the pleadings is found not to be so, it is necessary to examine under which of the above-mentioned classes it falls, in order to discover who is responsible for the omission and what sanction is applicable.

In the present case, assuming that the matters on which the plaintiff intends to rely as a reply to the defences set up fall within Order VI, rule 4, he was not called upon to state his case as to those matters with greater particularity after he had indicated them in the plaint in anticipation of the defences that he expected the written statements to contain and his plaint should, therefore, not have been rejected.

These seem to me the lines on which the questions before the lower Court should have been dealt with; and as I find myself in complete accord with my learned brother's views as regards the arguments on which the order of the Subordinate Judge was sought to be supported before us, I need not deal with them afresh. One question I wish to leave open. I do not think it feasible at the present stage to consider whether the matters on which the plaintiff relies for his answer to the defences set up, are sufficiently particularised in the affidavit dated 19th November 1909. If they are not, then as my learned brother points out the plaintiff may be asked to furnish further particulars; or if he is not able to do so, the consequence may be that at the hearing he may be prevented from giving evidence as to any matters which were not sufficiently particularised to enable the defendants to be ready with their evidence; and if this prevents the plaintiff from establishing those facts which make up his cause of action, his suit will fail. At the present stage to determine with precision what circumstances will afford a valid answer to the defence, would be to try the whole suit hypothetically, instead of doing so after both sides have adduced the evidence on which they rely.

With reference to my learned brother's judgment, I desire in particular to associate myself with his remarks about the desirability of trying preliminary issues at a stage when it is not too late to make amendments consequent on the decision. It seems to me that if my learned brother's remarks were borne in mind, it would save a great deal of futile discussion about matters purely of form which have not even a remote bearing on the "real questions in controversy between the parties," as distinguished from the questions relating to procedure in controversy between the legal advisers of the parties.

I agree, therefore, in the order proposed by my learned brother.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 204 OF 1914.

January 2, 1915.

Present:—Mr. Justice Piggott.

BHURE LAL—PLAINTIFF—APPELLANT

versus

JAGAN NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), *s.* 118—*Partition—Site of building of one co-sharer allotted to another—Owner of building failing to express his intention to retain building on payment of ground-rent, effect of—Right to keep house after partition—Right to materials of house.*

Where in a partition proceeding before a Revenue Court a site of a building occupied by a co-sharer is allotted to the share of the other co-sharer, it is incumbent upon the co-sharer in possession of the building to invite the attention of the Revenue Authorities at the time of the partition to the existence of the building and to ask for an order fixing a ground-rent under the provisions of section 118 of the Land Revenue Act; and if he fails to do so, the other co-owner is entitled to possession in accordance with the partition decree and only an opportunity to remove the materials of the building can be allowed to him.

Nandan Pat Tewari v. *Radha Keshun Kalwar*, 5 Ind. Cas. 664, followed.

Ashiq Hussain v. *Muhammad Jan*, 22 A. 329; A. W. N. (1900) 116; *Iswar Prasad* v. *Jagarnath Singh*, A. W. N. (1906) 194, referred to.

BHURE LAL v. JAGAN NATH.

Second appeal from the decision of the District Judge of Jhansi, dated the 15th of November 1913.

Mr. *Gokul Prasad*, for the Appellant.

Mr. *Benode Behari*, for the Respondents.

JUDGMENT.—This is a second appeal by a plaintiff whose suit has been dismissed by both the Courts below. An unfortunate feature of the litigation is that the plaintiff's case was not properly laid before the lower Appellate Court. There had been a remand by that Court upon certain questions of fact, and findings were returned by the Court of first instance on the issues thus remitted. When the case then came before the learned District Judge for a final decision it was conceded in argument before him that, if the findings of the first Court on the remanded issues were accepted, the plaintiff's suit must fail. This second appeal has now been filed upon a precisely opposite contention, namely, that if the findings arrived at by the Court of first instance, and endorsed by the lower Appellate Court, be accepted, the plaintiff's claim must be decreed. The plaintiff sued for possession of a certain plot of land with certain trees standing thereon by demolition of certain constructions admittedly erected on the land in suit by the defendants. These constructions appear to be an enclosure-wall and a thatched shed. The plaintiff's document of title is a partition decree of July the 1st, 1910, by a Revenue Court. To this partition the plaintiff and the defendants were both parties as co-sharers in the same *mahal*. The Revenue Court allotted the land in suit, with the trees standing thereon, to the *mahal* of the plaintiff. It would appear that no question was raised at the time as to the existence of any building on the land in suit, for the partition order specifies it simply as *parti* or waste land. It necessarily follows that no action was taken under section 118 of the Land Revenue Act (Local Act III of 1901). It has now been found that for many years prior to the partition of 1910 there had been buildings on the land in suit and that the said land had for many years prior to the partition been in the exclusive occupation and possession of the defendants, being used by them as a yard or enclosure for the custody of cattle. It appears that whatever buildings originally existed on this land had sometime or other fallen into disrepair, for the finding is that the existing buildings have been re-erected by the defendants upon old foundations. The case might perhaps have been made clearer if there had been a finding as to whether this re-erection of buildings upon old foundations took place before or after the partition of 1910. In view of the fact that both parties at the time of the partition acquiesced in the description of this land as *parti* or waste, and that no question was then raised regarding the existence of any buildings thereon, or the applicability of section 118 of the Land Revenue Act to the circumstances then existing, I am not sure that I should not be justified in presuming against the defendants that the re-erection of the building took place subsequently to the partition. I do not, however, consider this point material. The case is, in my opinion, governed by the decision of a Bench of this Court in Letters Patent Appeal No. 43 of 1909 [*Nandan Pat Tewari* v. *Radha Keshun Kalwar* (1)] which decision has been reported in Volume 5 of the Indian Cases at page 664. The decision of the Revenue Court in the partition case must be accepted as conclusive of the fact that, up to July 1st, 1910, the plaintiff and the defendants were joint owners of the land in suit. The exclusive possession and occupation of the defendants prior to that date can only be regarded as having been the possession of a co-owner, and, therefore, not adverse as against the plaintiff. If the defendants had intended or desired to set up any claim to exclusive title in respect of this land, they were bound to do so in the course of the partition. The Revenue Court then, as it had jurisdiction to do, took this piece of joint land and assigned it to the *mahal* of the plaintiff. From that date the plaintiff became the sole owner of this plot of land and is *prima facie* entitled to possession of the same as against the defendants. According to the view taken by this Court in the case above referred to it was incumbent upon the defendants,

(1) 5 Ind. Cas. 664.

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assuming that any buildings constructed or occupied by them were in existence on the land in suit at the time of the partition, to have invited the attention of the Revenue Court at the time to the existence of these buildings and to have asked for an order fixing a ground-rent under the provisions of section 118 of the Land Revenue Act. As they failed to do this the plaintiff is now entitled to possession in accordance with the partition decree, and the utmost which the defendants can ask is to be allowed an opportunity to remove the materials of the buildings standing on the land in suit. This view of the law has been contested in argument before me on behalf of the defendants-respondents on the strength of certain reported decisions of this Court. Such cases as that of *Ashiq Husain* v. *Muhammad Jan* (2) have no real bearing on the question now before me. They merely lay down the principle that in a partition under the Land Revenue Act the Revenue Court cannot partition buildings or the materials thereof, but is only concerned with the partition of the land. This principle is perfectly correct and is in no way inconsistent with the view of the law taken in the case of *Nandan Put Tewari* v. *Radha Keshun Kalwar* (1). There is one case decided by a single Judge of this Court upon which some argument in support of the respondents' case might be based. That is the case of *Iswar Prasad* v. *Jagarnath Singh* (3). The facts of that case were somewhat peculiar, inasmuch as the plaintiff was seeking to take advantage of the allotment of a certain plot of land to him on partition in order to secure the demolition of a portion of a valuable building, the greater part of which stood on land of which the plaintiff was not the owner. The learned Judge who decided that case did suggest, though apparently by way of *obiter dictum*, that it might still be open to the plaintiff in the case before him to obtain an order fixing a ground-rent for the land of which he was the owner under the provisions of section 124 of the former Land Revenue Act of 1873. That same learned Judge was a member of the Bench which decided the case of *Nandan Pat Tewari* v. *Radha Keshan Kalwar* (1) already referred to. I think he would have been prepared to distinguish the two cases; whether this be so or not, it is the view of the law laid down by a Bench of two Judges which is binding upon me now. I am of opinion, therefore, that this appeal must prevail. I set aside the decree of both the Courts below and in lieu thereof I give the plaintiff a decree for recovery of possession over the land in suit, with the trees standing thereon, subject to the condition that the defendants will be allowed six weeks from the date of this decree within which to remove the materials of any buildings standing on the land in suit which they may see fit to remove. After expiration of this period the plaintiff will be given possession of the land and trees and of any buildings which may have been left standing thereon. The plaintiff is entitled to his costs, but not in my opinion to his costs in the lower Appellate Court, as the present appeal might not have been necessary if the plaintiff's case had been laid before that Court as it has now been in second appeal. I allow the plaintiff his costs in the first Court and this Court.

Appeal allowed.

(2) 22 A. 329; A. W. N. (1900) 116.
(3) A. W. N. (1906) 194.

CALCUTTA HIGH COURT.
ORIGINAL CIVIL APPEAL NO. 11 OF 1914.
May 1, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

LUCHMI CHAND JHOWAR—PLAINTIFF—APPELLANT

versus

HEMENDRA PRASAD GHOSH—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 92, Pro. (2)—Promissory note, suit on—Rate of interest not mentioned—Oral contemporaneous agreement, whether admissible to prove rate of interest—Admission by defendant as to rate of interest, effect of.

Where a promisssory note is silent about interest, section 92, proviso (2), of the Evidence Act (I of 1872) would bar the admission of any evidence to prove that interest was agreed to by a contemporaneous oral agreement.

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But where the defendant admits that he agreed to pay interest at a certain rate, effect may be given to such admission without encroaching upon the rule.

Appeal against the decree of Mr. Justice Chitty, reported in 26 Ind. Cas. 736.

FACTS appear fully from the judgment of Mr. Justice Chitty, reported in 26 Ind. Cas. 736.

Mr. *D. N. Basu*, for the Appellant.

Mr. *R. N. Mitter*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—In my opinion the judgment of Mr. Justice Chitty* should be affirmed. The only difficulty in the case is occasioned by the second paragraph in the defendant's written statement, for that gives some colour to the suggestion that section 92 of the Evidence Act is not applicable. But for that paragraph I think the plaintiff's claim would be barred by section 92 of the Evidence Act; and, even conceding that the second paragraph of the written statement entitles the plaintiff to say that the whole agreement is not contained in the document, still the Judge has given effect to that admission and allowed the plaintiff interest during the period for which he claims at the rate of 12 per cent. per annum. That appears to me to meet the justice of the case, and I would, therefore, dismiss the appeal with costs.

WOODROFFE, J.—I agree. I think that the evidence offered by the plaintiff was excluded by the provisions of section 92 of the Evidence Act. The plaintiff, however, can take advantage of the admission made by the defendant in the written statement, and he has been given the benefit of that by the decree under appeal. I agree, therefore, in the order passed.

Appeal dismissed.

*See 26 Ind. Cas. 736—*Ed.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 106 OF 1912.

December 22, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Rossignol.

KISHEN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE CHURCH MISSIONARY TRUST ASSOCIATION, THROUGH REV. E. F. E. WIGRAM, SECRETARY, AMRITSAR—PLAINTIFF—RESPONDENT.

Landlord and tenant—Improvement—Ejectment—Structures by tenant—Acquiescence or carelessness of landlord—Compensation.

A tenant is not entitled on ejectment to any compensation for the materials of his structures, unless the conditions of the lease suggest the inference that a permanent lease was contemplated or where the lessees were encouraged to build upon the area leased to them. In this connection, however, acquiescence of the landlord must be distinguished from his mere carelessness.

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division at Jullundur, dated the 25th October 1911, modifying that of the District Judge, Amritsar, dated the 25th March 1911, decreeing the claim.

Mr. *Duni Chand*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—This was a suit by the Church Missionary Society of Amritsar for the ejectmant of 24 persons and for the recovery of Rs. 300, being compensation for unauthorized use of the land in dispute and rent of the same.

The first Court decreed the ejectment, also Rs. 240 damages in addition to the usual rent of Rs. 60, which had been paid by the defendants Nos. 1 to 3, who were the original tenants but had associated with themselves, or had sub-let portions of the land in dispute to, the other defendants.

The defendants appealed to the Divisional Judge, urging that plaintiffs were not the owners of the land, that defendants were permanent tenants, that defendants' possession was adverse and proprietary that the plaintiffs had acquiesced in the defendants' erection of structures on the land and were estopped from ousting them, that defendants were in any case entitled to compensation, that there was misjoinder of defendants,

that the defendants were not liable to pay an enhanced rate of rent for holding over.

The Divisional Judge affirmed the first Court's decree, with this exception that he reduced the compensation from Rs. 240 to Rs. 120. The defendants have preferred this further appeal in which they reiterate some of the arguments used before the learned Divisional Judge. A preliminary objection is raised by the repondent Society that no further appeal lies, but inasmuch as the decree directly involves a question as to the materials valued at Rs. 4,460 of the structures on the land, we have overruled this objection.

Before this Court only three points have been pressed and all others raised in the grounds of appeal have been dropped.

Those on which we have been addressed are :—

1. The defendants are not liable to ejectment.

2. The plaintiffs are not entitled to any enhancement of rent.

3. The defendants are entitled, if ousted, to compensation for the materials of their structures.

It may be at once noted that the defendants are not deserving of any sympathy, for they attacked even the prorpietary status of the plaintiffs, which is as clear as daylight.

The facts we hold established are that the land in suit was part of an area granted in 1868 by Government to the Society; between that time and 1890-91 the Society granted a tenancy-at-will to defendants Nos. 1 to 3 for use as a stand for hackney carriages and that implied the right to erect sheds and stables of a more or less temporary character. The Settlement papers of 1887 make no mention of the lessees' possession, which is first mentioned in the papers of 1890-1891, so that the lease which was for Rs. 60 per annum in all probability began between 1887 and 1890.

The supervision of the Society, like that of most corporate bodies, was careless, and by degrees the number of buildings increased, though they are still only of the *kacha pakka*, *i.e.*, burnt bricks set in mud, type.

In 1899 defendants Nos. 1 to 3 already showed signs of contumacy and the Society sued for and obtained rent for three years, 1899-1901, in 1904. In that case the defendants pleaded that they were not lessees of the plaintiff Society, but that the land had been granted to their ancestor by Government. It was held that they were tenants-at-will of the plaintiff Society.

The next contention was that after the decree of 1904, the plaintiff Society covenanted with them that on payment of a monthly rent of Rs. 5, they should be regarded as permanent tenants.

This agreement is absolutely unproved and removes all force from the defendants' contention that they were permanent tenants from the outset.

We hold it unproved that the land was let as a building site, also that a permanent lease was granted to defendants, and it follows that the Society is entitled to compensation or rent at an enhanced rate in respect of the period during which the defendants held over after receipt of plaintiff's notice requiring them to vacate the site. If Rs. 60 per annum was a fair rent in 1887, we do not regard Rs. 120 as an excessive rent for a contumacious tenant twenty years later.

Coming now to the question of compensation to which most of the argument before us has been devoted, we find ourselves in agreement with the Courts below.

We can find not one single point, which argues the acquiescence, as distinguished from mere carelessness, of the plaintiff Society. There is not a tittle of evidence on which it might be argued that the Society had *intentionally* led the defendants to believe that their possession was of a permanent nature, and to act in that belief.

We agree with the learned Divisional Judge that the case is one of a dishonest tenant who takes every opportunity provided him by the carelessness of his lessor to strengthen his grip on the latter's property.

Many decisions have been cited before us, but they need not be detailed here, for none of them are quite in point. They deal with cases where the conditions of the lease suggested the inference that a permanent

lease was contemplated or where the lessees were encouraged to build upon the area leased to them.

The circumstances of this case, as above stated, we find to be quite other.

Connected with this appeal is Second Appeal No. 600 of 1913, in respect of a claim by the plaintiff Society for the rent of this site from April 1907 to April 1910.

On that appeal we have not been addressed at all. Ground No. 1, of course, falls to the ground as a result of the decision in this appeal, and ground No. 2 is beside the point also: the rent was enhanced after notice to quit had been served and the amount allowed by the lower Appellate Court is quite reasonable. That must fail also.

For the above detailed reasons we dismiss this appeal with costs, merely providing that the defendants shall be given time to remove their materials up to the 31st day of March 1915.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 749 OF 1913.

October 1, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

CHOKKALINGA CHETTY AND ANOTHER —DEFENDANTS Nos. 2 AND 6—APPELLANTS

versus

KANNUSAMI PILLAI AND OTHERS—PLAINTIFFS Nos. 1 AND 2 AND DEFENDANTS Nos. 1 TO 3—RESPONDENTS.

Limitation Act (IX of 1908), s. 31—Mortgage executed before Transfer of Property Act, whether included in s. 31 (2).

For the purposes of section 31 (2) of the Limitation Act there is no distinction between mortgages executed before 1882 and those executed after that date.

Ambalagran v. *Sundilapathi*, 16 Ind. Cas. 236, followed.

Balasubramania Nadar v. *Sivaguru Asari*, 11 Ind. Cas. 629; 21 M. L. J. 562; *Rama Brahmam* v. *Venkatanarasu Pantulu*, 16 Ind. Cas. 209; 23 M. L. J. 131; (1912) M. W. N. 1124, *Aliba* v. *Nanu*, 9 M. 218; *Rangasami* v. *Muthukumarappa*, 10 M. 509, dissented from

Second appeal against the decree of the Court of the Subordinate Judge of Nagapatam, in Appeal Suit No. 345 of 1912, preferred against that of the District Munsif of Tanjore, in Original Suit No. 589 of 1910.

FACTS.—The plaintiff in this case is a mortgagee. Defendants are the heirs of the mortgagor. The suit is to recover the amount due under the mortgage executed by the 1st defendant's father on 25th September 1880 by sale of the mortgaged properties. 2nd to 5th defendants are in enjoyment of the properties through the 1st defendant. The 3rd defendant pleaded that as the mortgage was executed prior to 1882, there is merely a charge on the property and not a mortgage. The District Munsif found that the mortgage was supported by consideration; but held that as the mortgage-deed contained no specific direction to pay, it created only a charge, and not a mortgage within the meaning of section 31 (2) of the Limitation Act and that the suit was, therefore, barred by limitation.

On appeal, the Subordinate Judge held that it is not an essential element of a mortgage that it should contain a specific direction to pay and that a mere covenant is quite sufficient to create a mortgage in this respect. He held that there was no difference between hypothecations before 1882 and those after that date for the purposes of limitation. He accordingly reversed the decree of the District Munsif and passed a decree in favour of the plaintiffs. The present appeal is against that decree.

Mr. *P. M. Srinivasa Aiyangar*, for Mr. *R. Subramania Aiyar*, for the Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.—It is first argued that the suit document, Exhibit F, merely created a charge. Having regard to its terms, we think that this argument must be rejected with reference to *Balasubramania Nadar* v. *Sivaguru Asari* (1) and *Rama Brahmam* v. *Venkatanarasu Puntulu* (2).

The second of these cases is authority also against the appellants' remaining

(1) 11 Ind. Cas. 629; 21 M. L. J. 562.

(2) 16 Ind. Cas. 209; 23 M. L. J. 131; (1912) M. W. N. 1124.

contention that Exhibit F, being dated prior to 1882, is not a mortgage within the purview of section 31 of the Indian Limitation Act (IX of 1908) and the suit on it is, therefore, out of time. In *Sakkarai Ambalagaran* v. *Sundilapathi* (3) also it has been held that for purposes of limitation no special character attaches to documents prior to 1882. In each of these decisions the Court refused to follow *Aliba* v. *Nanu* (4) and *Rangasami* v. *Muthukumarappa* (5) on which the appellants' argument is based. We respectfully follow the more recent cases and decide against the appellants.

The second appeal, therefore, fails and is dismissed with costs.

The 1st and 2nd respondents' memorandum of cross-objections relates to the lower Appellate Court's failure to award interest from date of suit to date fixed for payment. No tenable explanation has been given for it. Interest of this period and until date of realisation at six per cent. per annum must be included in the decree. The appellants' must pay costs in the memorandum of cross-objections.

Time for payment is extended to three months from this date.

Appeal dismissed.

(3) 16 Ind. Cas. 236.
(4) 9 M. 218.
(5) 10 M. 509.

CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL NO. 260 OF 1912.
May 26, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
NARENDRA CHANDRA LAHIRI—DEFENDANT—APPELLANT
versus
NALINI SUNDARI DEBI—PLAINTIFF—RESPONDENT.

Limitation Act IX of 1908, Sch. I, Arts. 115, 128, 131—*Maintenance—Suit for arrears—Relationship of parties—Adoption—Simultaneous adoption, validity of—Compromise decree evidencing contract—Interest by way of damages—Execution, right to proceed by way of.*

In a suit by the widow of one who was adopted by the defendant's step-mother simultaneously with the adoption of the defendant by the step-mother's co-wife:

Held, (1) that, as simultaneous adoptions are invalid and void, the plaintiff was not a member of the family of the original owner of the estate, nor was she related in any way to the defendant and could not, therefore, plead the limitation allowed by Article 128 of the Limitation Act;

(2) that inasmuch as the plaintiff's claim was based on a contract evidenced by a compromise decree, her case was governed by Article 115;

(3) that since the defendant had kept the plaintiff out of her just dues wrongfully, she was entitled to interest by way of damages;

(4) that Article 131 of the Limitation Act applies only where there has been a denial of the plaintiff's right to receive the maintenance in question as well as a cessation of payment;

(5) that where there has been a decree declaring a right to maintenance, the decree-holder can proceed by way of execution.

Appeal against the decree of the Sub-Judge, Rangpur, dated 26th April 1912.

Babus *Bepin Behary Ghosh* (Junior), *Nagendra Nath Ghosh* and *Kehrode Narain Bhuyan*, for the Appellant.

Babu *Mohini Mohan Chakravarti*, for the Respondent.

JUDGMENT.—This was a suit brought by the plaintiff, a Hindu lady, for arrears of maintenance by virtue of a decree passed on compromis, ewhich is not before us.

The plaintiff is the widow of one Jnanendra Chandra Lahiri, who was adopted by the defendant's step-mother simultaneously with the adoption of the defendant by the step-mother's co-wife. In the well-known case of *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1) the Privy Council held that this Jnanendra Chandra suing as plaintiff in a rent suit could not recover the rents due to the estate of his alleged adoptive father, by reason of the fact that simultaneous adoptions are invalid and void. The plaintiff, therefore, cannot be heard to say that she is a member of the original owner of the family estate or that she is the step-sister-in-law of the defendant or in any way related to him under the Hindu Law. She cannot, therefore, plead the limitation allowed by Article 128 of the Limitation Act. If any authority were needed for this proposition

(1) 12 C. 406; 21 I. A. 198; 9 Ind. Jur. 400; 4 Sar. P. C. J. 678.

the case of *Girijanund Datta Jha* v. *Sailajanunda Jha* (2) is quite sufficient. The point of limitation is really the most importart point in this appeal, inasmuch as it is admitted that maintenance is due from the defendant under the contract evidenced by the decree, and the only question is for how long a period she is entitled to recover arrears.

In addition to this point of limitation three other grounds were taken in appeal against the learned Subordinate Judge's judgment decreeing the whole of plaintiff's claim. The first objection was that if the plaintiff claims maintenance under the decree, she can only proceed by execution and not by a fresh suit. The next objection was that no interest can be claimed as no interest was provided in the decree. The fourth objection was a question of fact, whether the lady was in the habit of taking large sums of money from the defendant from time to time to meet her father's liability and her own and whether these were set off against her maintenance and she used to execute hand-notes for the balance and, therefore, nothing is due.

Taking the last point first, we find that there is really no evidence beyond the statement of the defendant and his employees that there was any account ever taken. No account is produced, and we do not know how the matter stands previous to the year 1316 when the suit was brought by the defendant on a certain *kistbandi* bond. Nothing has been put before us in evidence to show what happened in that suit, and it is admitted that no arrears of maintenance have been paid during the last three years and no advances have been made by the defendant to the lady. There is, therefore, nothing to show that payment has been made and that the arrears for three years which she could claim either under the contract or by way of execution are barred or have been liquidated.

As regards the interest, we certainly must find that no interest can be claimed on the contract as evidence in the decree. But we see that what was claimed in the plaint was interest at 1 per cent. per month by way of damages; and if it be that the defendant has kept the plaintiff out of her just dues wrongfully for three years for which she could recover them, we think that it is only fair that she should have this interest by way of damages.

As regards the question whether she can proceed in this suit at all without producing the *solenama*, we have been referred to the Full Bench ruling of this Court in *Ashutosh Banerjee* v. *Lukhimoni Debya* (3) where the facts dealt with were just the converse of the facts in the present case. There the defendant objected to the maintenance-holders executing the decree and maintained that he could only proceed by a separate suit; and what the Full Bench really decided was that he could proceed by way of execution. But the question as to whether circumstances might not arise in which she might legitimately bring a suit was not discussed. But a ruling of the Madras High Court, *Sinthayee* v. *Thanakapdayen* (4), was cited by the Full Bench with approval as containing the rule on the subject, and that ruling distinctly lays down that such arrears must be recovered in execution and cannot be made the subject of a fresh suit. But it appears to us that although the details of the contract between the parties are not in evidence before us, the particular contract as regards this payment of maintenance has been set out in the decree, and that it is stated to be one of the terms of the contract between the parties. The objection to this would be that it is secondary evidence of the contract. But on reading the written statement we must hold that there was no objection made to the suit going on upon the basis of the contract as evidenced in the compromise decree, and that this secondary evidence cannot here in appeal be objected to.

A further contention was sought to be raised by the learned Vakil for the respondent that Article 131 of the Limitation Act might apply to this case, and in that connection the case of *Gajpat Rai* v. *Chimman Rai* (5) was relied upon. On referring to the judgment in that case, we find that the learned Judges laid down no rule of law at all, but simply stated that they followed the case of *Chhagan Lal*

(2) 23 C. 645.

(3) 19 C. 139.
(4) 4 M. H. C. R. 183.
(5) 16 A. 189; A. W. N. (1894) 19.

v. *Bapubhai* (6) and there the rule is laid down as it has also been laid down in this Court, that there must have been a denial of the plaintiff's right to receive the maintenance in question as well as cessation of payment; and that this is so is rendered perfectly clear by the passage at page 663 of the case of *Girijanund Datta Jha* v. *Sailajanund Jha* (2) to which we have already referred, where the same point is dealt with in deciding that Articles 128 and 129 should not govern a case of this description, and in that case the contract was a registered one and it was held that Article 116 would apply, or in this case, of course, Article 115. It cannot, therefore, be said that either the Madras Court or this Court has followed the very general and vague rule which is laid down in the head-note of the Allahabad case without any reference to any words contained in the judgment of the Allahabad Judges.

The result is that the suit must be decreed for three years' arrears of maintenance, that is Rs. 1,080, with interest at Rs. 12 per cent. per annum by way of damages for the first year's arrears Rs. 129, for the second year's Rs. 86 and for the third year's Rs. 43, that is to say, in round numbers for the total sum of Rs. 1,338.

The parties will get and pay costs in proportion to their success and failure respectively in this Court.

Appeal partly allowed.

(6) 5 B. 68.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 209 OF 1913.

October 19, 1914.

Present:—Sir George Shaw, J. C.

RAMCHANDRA—APPLICANT

versus

LATCHMAN PILLAY, AGENT OF VIRAVEN CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 63, 73, O. XXI, r. 52—Attachment of money in another district—Procedure.

It is illegal for a Court to attach money lying in the hands of a Court in another district. The proper procedure for a decree-holder in such a case is to have his decree transferred to the Court in that district for execution

Money attached before judgment in a case is liable to rateable distribution in execution of decrees against the same defendant.

Mr. *A. C. Mukerji*, for the Applicant.

Mr. *J. C. Chatterji*, for the Respondent.

ORDER.—The facts were as follows:—Applicant instituted a suit against one Po Hlaing on the 19th March 1912 in the Township Court, Pyinmana, and while it was pending, namely, on the 7th May 1912, he applied citing Order XXXIX, rule 1, for the issue of a temporary injunction restraining the defendant from drawing Rs. 500 belonging to him in possession of the Bombay Burma Trading Corporation. The Township Court immediately granted a temporary injunction in the old form prescribed for temporary injunctions under section 492 of the Code of Civil Procedure, 1882, prohibiting the Bombay Burma Corporation's agent from paying Rs. 500 to the defendant. On the 16th July 1912, the Township Court allowed the defendant to draw the money on his giving security. On the 4th March 1913 the Court passed a decree in favour of the applicant, and on the 8th April 1913, applicant applied for execution, that is, he applied that the sureties might be ordered to pay Rs. 500 into Court (with a view to the decree money and costs being disbursed to him). On the 21st July 1913 the sureties deposited the amount of the decree and costs, Rs. 477-15, in the Court. In the meanwhile, namely, on the 21st January 1913, the respondent who had obtained a decree against the same defendant in 1908 in the Sub-Divisional Court, Yamethin, applied to that Court for the attachment of the Rs. 500 just mentioned as being in the Township Court, Pyinmana, and the Sub-Divisional Court, Yamethin, granted an attachment accordingly under Order XXI, rule 52, requesting the Township Court, Pyinmana, to make a rateable distribution. The Township Court accordingly, when the sureties had paid in Rs. 477-15, proceeded to distribute this sum rateably between the two decree-holders.

The applicant now comes here in revision raising various objections of illegality or material irregularity. The principal objection is that the Sub-Divisional Court, Yamethin, acted illegally and without jurisdiction in attaching money in the Township Court, Pyinmana. There seems to be no doubt that the Sub-Divisional Court, Yamethin, was not empowered to make this attachment,

What the Court ought to have done was to tell the respondent that if he wished an attacement in execution made in Pyinmana, he must apply to have his decree transferred to Pyinmana. The result of the Sub-Divisional Court, Yamethin's illegal procedure was that the Township Court, Pyinmana, acted illegally in giving effect to the respondent's attachment.

I do not think that the other objections raised call for particular notice. The Township Court seems to have satisfied itself that the respondent's application was not barred by limitation and Order XXI, rule 52, expressly laid upon the Township Court the duty of distributing the money, if it was to be distributed.

It has been admitted before me on both sides that from the time when the defendant, Po Hlaing, was allowed to draw the Rs. 500 from the Bombay Burma Trading Corporation on security, that money must be taken to have been virtually in deposit in the Township Court. The case, therefore, was one to which Order XXI, rule 52, applied and not section 63.

Again while the applicant, no doubt, ought to have applied for an attachment before judgment and not a temporary injunction, he actually applied for a temporary injunction and the Court granted him a temporary injunction and not an attachment before judgment. The money in Court, therefore, was not actually under attachment by the applicant at the time when it was (illegally) attached by the Sub-Divisional Court, Yamethin, at the instance of the respondent. I think it must be considered to have been assets within the meaning of section 73. The case of *Sorabji* v. *Kala Raghunath* (1) to which the learned Advocate for the applicant has referred is distinguishable. In that case the judgment-debtor paid into Court the amount of the decree money for payment to his decree-holder, a step which *ipso facto* involved the withdrawal of a previous attachment. (Order XXI, rule 55). It was accordingly held that the money having been paid into Court for a particular purpose must be applied to that purpose and could not be regarded as assets available for the distribution. In the present case, the money was the money of the judgment-debtor's which was in deposit in Court, but not under attachment and not expressly for the purpose of paying the applicant's decree since at the date of the respondent's attachment there was no decree yet in existence in favour of the applicant.

The question then is simply, whether I ought to interfere in revision on the ground of the illegal procedure of the Sub-Divisional Court, Yamethin. It was held under the section of the old Code corresponding to Order XXI, rule 52, that an order of distribution made under that section was not final, and that it was open to an aggrieved party to file a regular suit (see the commentaries). Such a procedure would be similar to that expressly provided in section 73.

On consideration, I am of opinion that the lower Courts' proceedings being marked by illegality, it is open to this Court to interfere under section 115 of the Civil Procedure Code, although possibly the applicant might have instituted a regular suit. The procedure by way of a regular suit is open to the aggrieved party in a case where the lower Courts have not committed any illegality or material irregularity.

It has been contended on behalf of the respondent that the Sub-Divisional Court, Yamethin's attachment was a mere technical error, but that is not the view which is taken of proceedings without jurisdiction, and the illegality in question consisted of making an attachment without jurisdiction, that is, on property situated outside the local jurisdiction of the Court. The respondent is an agent of a Chetty firm who ought to be perfectly well acquainted with matters of this kind. He must indeed be well aware that if he wishes to execute a decree beyond the local jurisdication of the Court which passed it, his proper course is to apply for the transfer of the decree. I cannot, therefore, regard the respondent as in any way entitled to sympathy.

The order of the Township Court giving respondent a share of the money in question is set aside, and it is directed that the respondent re-pay the amount to the applicant, and also pay the applicant's costs, two gold *mohurs*.

Order set aside.

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193.

UMACHARAN BHATTACHARJEE *v.* HIRONMOYEE DEBI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2469 OF 1911.

April 8, 1913.

Present:—Mr. Justice Chapman and Mr. Justice Newbould.

UMACHARAN BHATTACHARJEE—DEFENDANT—APPELLANT

versus

HIRONMOYEE DEBI—PLAINTIFF—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 11, applicability of—Limitation Act (IX of 1908), s. 30, scope of—Civil Procedure Code (Act XIV of 1882), ss. 278, 281—Dismissed for absence, claim under s. 278—Dismissal, whether under s. 281 Suit for possession—Limitation.

Article 11 of the second Schedule of the Limitation Act of 1877 applies only to orders passed after nquiry.

Therefore, where a claim preferred under section 278 of the Civil Procedure Code of 1882 is "dismissed for absence," a suit for the same property is not barred if not brought within one year of the order, as the order for dismissal is not one under section 281 of the Code but under the sections which enable a Court to dismiss a miscellaneous case for default

Section 30 of the Limitation Act of 1903 is not limited in its operation to cases in which the period of limitation has been expressly altered, but also applies to a case where the period of limitation has been altered as the result of an alteration of the description of the suit.

Appeal from the decree of the Subordinate Judge of Faridpur, dated the 14th July 1911, confirming that of the Munsif, first Court of Madaripur, dated the 31st May 1910.

Dr. *Dwarka Nath Mitter* Babu *Prokash Chandra Majumdar*, for the Appellant.

Babus *Gunoda Charan Sen* and *Bimal Chandra Das Gupta*, for the Respondent.

JUDGMENT.—The first ground taken in appeal is the ground of limitation. It appears that the plaintiff instituted a case under section 278 of the old Code of Civil Procedure on the 24th January 1902 preferring a claim to the property in dispute. On the 8th February 1902 the case under section 278 was "dismissed for absence." The present suit was filed on the 4th June 1909. It is contended that Article 11 of the Limitation Act applies and that the plaintiff's suit is barred, inasmuch as it was not instituted within one year of the date of the order passed under section 281 of the Code of Civil Procedure. We are of opinion that the order "dismissed for absence" was an order passed, not under section 281 Civil Procedure Code, but under the sections of the Code which enabled the Court to dismiss a miscellaneous case for default. We are confirmed in this view by the ruling of this Court in the case reported as *Sarat Chandra* v. *Tarini Prasad Pal*(1), which settled that Article 11 of the Limitation Act applies only in respect to orders passed after inquiry. It is true that that case related to proceedings under section 335 of the Code. We are unable to distinguish proceedings instituted under section 278 and cases under section 335 of the Code in this connection. The wording of Article 11 has been altered in the new Limitation Act of 1908. The result of the alteration of the wording may be an alteration of the law in this matter. But even if we were to hold that the law has been altered, we are of opinion that section 30 of the new Act is sufficient to save the plaintiff's suit. We are not prepared to limit the operation of section 30 to a case in which the period of limitation has been expressly altered. We are of opinion that the section applies also to a case where the period of limitation has been altered as the result of an alteration of the description of the suit. We are, therefore, of opinion that the suit was not barred by limitation.

It was then contended that the lower Court should have held that the conveyance to the plaintiff was vitiated by fraud, that is, that it was a conveyance for the purpose of defrauding the creditors. The learned Subordinate Judge went into this question in detail and came to the finding that fraud had not been proved, and we are not satisfied that the case of fraud is so strong as to justify our interference with that finding, which is a finding of fact.

The next ground taken in appeal is that the plaintiff having purchased an occupancy holding was not rightly held to have obtained any right by her purchase, in the absence of proof that the holding was transferable. But the Munsif had held that the transfer to the plaintiff had been recognised by the plaintiff's landlord, and this finding has not been upset by the learned Subordinate Judge.

Reliance in the last resort is placed upon a sentence in the judgment of the learned

(1) 34 C. 491; 11 C. W. N. 487.

Subordinate Judge to the effect that what the defendant's father purchased must have been a *yiorfa* right, which was an under-*raiyati* right. This is said to be a finding that there was a valid purchase of an under-*raiyati* right. This is not the meaning we attach to this sentence, which is merely an incidental sentence at the end of the judgment. It was not the defendants' case that they had acquired an under-*raiyati* right; and if it was the finding of the learned Subordinate Judge, it was a finding which could not be supported in the absence of evidence that under-*raiyatis* are transferable.

The contentions in appeal fail and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 360 OF 1913.

October 20, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

SALICHEEMALA VENKATASWAMI NAIDU—DEFENDANT No. 4—APPELLANT

versus

GUNTURU RANGAPPA NAIDU AND ANOTHER—PLAINTIFF AND TRANSFEREE DECREE-HOLDER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXI, rr.* 2 *and* 16—*Execution—Decree, transfer of, recognition of —Judgment-debtor, right of, to appeal—Adjustment, uncertified, admissibility of, in evidence—Fraud not specifically alleged—Transferor admitting transfer—Consideration, want of, for transfer, if can be pleaded by judgment-debtor.*

A judgment-debtor is entitled to appeal against an order recognising a transfer of a decree, as the matter would be *res judicata* in subsequent proceedings.

Order XXI, rule 2, of the Code of Civil Procedure, 1908, not only excludes proof of an uncertified payment but also of an agreement to release the debtor from all liability to pay his share of the decree-debt in consideration of a sum paid by him, which agreement had not been certified to the Court within the 90 days prescribed by law.

In the absence of any specific allegation of fraud, it is immaterial whether a transfer of a decree is supported by consideration or not, provided both the transferor and the transferee are before the Court and the transferor admits the transfer and declares himself satisfied.

Appeal against the order of the Court of the City Civil Judge of Madras, dated 30th September 1913, in Civil Miscellaneous Petition No. 432 of 1913, in Original Suit No. 2 of 1911.

FACTS.—One Rangappa Naidu obtained a decree against defendants Nos. 2 to 4 and transferred it to one Rajaratnam Naidu. The latter applied under Order XXI, rule 16, for leave to execute the decree by the arrest of the judgment-debtors. On notices being issued, the original decree-holder admitted the transfer. One of the judgment-debtors, the 4th defendant, opposed the application on the grounds that subsequent to the decree on 23rd November 1912, he had paid Rs. 900 to Rangappa Naidu, the original decree-holder, as and for his ⅓rd share of the decree-debt, that the latter agreed to release him from all liability under the decree, that he obtained a recipt therefor, Exhibit A, and that owing to some family quarrels Rangappa Naidu executed the transfer fraudulently and without consideration. He, therefore, prayed that either the transfer may not be recognised at all or that he may be exempted from liability under the decree. This petition was presented on 15th April 1913. The learned City Civil Judge, Mr. C. R. Tiruvenkatachariar, recognised the transfer, holding that he need not go into the question of consideration. His judgment on the point was as follows:—

"3. The only contesting respondent is the 4th defendant. He opposes the application on the ground that, on the 14th of September 1912, he paid to the decree-holder a sum of Rs. 900 in full satisfaction of his liability under the decree and that he obtained from the decree-holder a receipt also to that effect on the same day. He says that the decree-holder owing to some family quarrels transferred the decree subsequently to the petitioner for the purpose of annoying him and that the transfer was collusive and should not be recognised. The decree-holder having admitted the transfer of the decree to the petitioner by the assignment, dated 24th November 1912, the only question which arises so far as the 4th defendant is concerned relates to the alleged payment of Rs. 900 made by him to the decree-holder on the 14th September 1912 in full satisfaction of his liability under the decree and accepted by the latter as such. This payment was not certified to the Court by the decree-holder, nor did the judgment-debtor inform the

SALICHEEMALA VENKATASWAMI NAIDU *v.* GUNTURU RANGAPPA NAIDU.

Court of such payment and apply for the issue of a not ce to the decree-holder for the payment to be recorded.

"4. The first intimation to the Court of the said payment to the decree-holder is made by the 4th defendant in his affidavit, dated 15th April 1913, which he has filed in connection with the present application for the execution of the decree put in by the transferee of the decree.

"5. The petitioner denies the alleged payment and the genuineness of the receipt filed by the 4th defendant. He further contends that in any case the payment, not being recorded within the time allowed therefor, cannot be recognised, so far as the present application, which is one for executing the decree, is concerned. I am of opinion that this contention must prevail. The defendant relies upon a payment made on the 14th of September 1912. Even if the affidavit of the 4th defendant, filed in connection with the present application, may be treated as an application made by him for the purpose of having the payment recorded, it is nearly four months out of time. It is argued that the rule in question does not apply to transferees from the decree-holder and that in their case it may be shown that they had derived no right by the transfer to the whole or any portion of the decree debt by reason of payment made to the transferor prior to the transfer; in other words, that they have no title to apply to execute the decree in virtue of the transfer. I am of opinion that there is no warrant in the rule for making any such distinction. It does not nullify the payment or adjustment which has not been certified or recorded, but provides merely that it shall not be recognised by the Court executing the decree; when the transferee applies for execution of the decree, the Court which has to deal with that application cannot recognise an uncertified payment which is pleaded by the judgment-debtor, if the period within which the application to be made under that rule for the recording of such payment has elapsed, as it has in the present case. But for the rule, the objection as to want of title or right to execute the decree by reason of the same having been satisfied should equally prevail against the transferor. For how can a person whose decree-debt has been fully discharged lawfully apply to recover the same by levying execution against the debtor who has already discharged his obligation? And hence the position of the transferee of a decree-debt is not in this respect really different from that of the decree-holder himself.

"6. The petitioner's contention that the plea set up by the 4th defendant cannot be entertained in virtue of Order XXI, rule 2, Civil Procedure Code, is in my opinion correct [See *Alathoor Badrudeen* v. *Gulam Mohideen* (1)]. I accordingly overrule the 4th defendant's plea founded on the alleged payment."

Against this decision the 4th defendant appealed to the High Court.

Mr. *K. V. L. Narasimham*, for the Appellant:—The learned Judge erred in holding that Order XXI, rule 2, applied to the case. That order has no application to cases of transferees from the original decree-holder, where it is sought to be shown that the applicant derived no title under his transfer to execute the decree. The learned Judge ought to have allowed the appellant to adduce evidence as to the fraudulent and collusive nature of the transfer.

Messrs. *T. R. Venkatrama Sastrair* and *S. Duraiswami Iyer*, for the Respondent, were not called on.

JUDGMENT.—It is agreed on all hands that the recognition by the lower Court of petitioner, 2nd respondent, as transferee of 1st respondent's decree, would be binding on the parties in any future proceedings and that the first mentioned is entitled to appeal against the order containing it. We, therefore, deal with the case on that footing

Appellant's objections to the lower Court's decision are, that it did not permit him to prove the payment to the 1st respondent or the agreement of which (he contends) the discharge of the decree-debt was one term and the payment another. The lower Court was clearly right, under Order XXI, rule 2, in refusing to allow him to prove the payment; and that provision would also exclude evidence of an adjustment such as the agreement, which also is not alleged to have been certified to the Court, if indeed it can be separated from the payment and receipt for it.

(1) 12 Ind. Cas. 562; 36 M. 357; 24 M. L. J. 54; 10 M. L. T. 396; (1911) 2 N. W. N. 473.

Next, appellant complains of the lower Court's omission to allow him to prove that the transfer was without consideration and fraudulent. If it was without consideration, that is immaterial where (1) the transferee and transferor are before the Court and the latter declares himself satisfied; (2) there is no fraud specified in appellant's affidavit and his Counsel cannot specify any, the affidavit giving no particulars except that the transferee is appellant's enemy.

The result is that the appeal must be dismissed with costs, one set for respondents.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 186 OF 1912.

December 11, 1914.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

ETTISHERI EDATHIL SAMANDAN CHATHAPPA NAMBIAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

POTHERA KALLOOR KOMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust property—Breach of trust—Person entitled to become trustee in future, suit by, for possession, whether maintainable.

A person entitled to the office of a trustee only *in futuro*, has no subsisting interest and cannot sue for possession of trust properties *in præsenti*.

Where a breach of trust is alleged against the trustees in office, the proper remedy is a suit for their removal from office and appointment of a Receiver pending appointment of new trustees.

Appeal against the decree of the District Court of North Malabar, in Original Suit No. 9 of 1911.

Mr. *J. L. Rosario*, for the Appellants.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—We think the District Judge was right in this case in holding that the plaintiffs were not entitled to sue for possession of property alleged to belong to the temple. They are not at present *urallars* of the temple, though they may some day become so by becoming the senior members of their *tarwads*. They have, therefore, no subsisting interest entitling them to possession. If the present trustees have improperly alienated properties belonging to the temple to be recovered by the 1st

defendant, the remedy is to sue for the removal of the trustees, when in a proper case a Receiver can be appointed to recover possession for the trust pending the appointment of new trustees. It is unnecessary to express any opinion as to whether the present suit was barred as *res judicata*, as held by the District Judge.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL APPLICATION NO. 6638 OF 1913.

December 11, 1913.

Present:—Justice Sir Herbert Carnduff, KT., and Mr. Justice Richardson.

BARHAMDEO SINGH AND OTHERS—DEFENDANT NOS. 9, 11 & 12—PETITIONERS

versus

HARMANOGE SINGH AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151, 152—Amendment—Decree in accord with judgment but not with intention of Court, whether can be amended—Inherent power—Jurisdiction—Amendment of decree, if allowed, after appeal against that decree pending.

Where a decree is not really in accord with the intention of a Court as gathered from its judgment as a whole, the Court has an inherent power, under sections 151 and 152 of the Civil Procedure Code of 1908, to amend or vary a perfected order and to make such other orders as may be necessary for the ends of justice.

Section 152 of the Civil Procedure Code expressly contemplates amendment "at any time" and, therefore, a decree can be amended even after an appeal has been preferred against it.

Babu *Ganesh Dutt Singh*, for the Petitioners.

Dr. *Dwarka Nath Mitter*, for the Opposite Party.

JUDGMENT.

CARNDUFF, J.—This is an application for the amendment of a decree, which has, it is said, erroneously and inadvertently made the applicants liable for the costs of certain litigation.

The plaintiff sued for the recovery of land occupied by one Ram Gopal Acharia as *mohant* under a deed of endowment executed by a Hindu lady. Ram Gopal Acharia was made the first and principal

defendant; but the deed associated with him a number of other persons in the management of the endowment, and these the plaintiff added as defendants Nos. 2 to 14. In the trial Court the suit was contested by Ram Gopal Acharia alone. The plaintiff obtained a partial decree. He then appealed to this Court, and before us the contest was again solely between him and the first defendant. In our judgment* Mr. Justice Harington, who has since left the Bench, and I ordered that "the appeal should be allowed and the suit decreed with costs." The decree subsequently prepared in the Court's office and, let me say at once, signed by both of us, has given costs against all the defendants, and the present applicants, who were named as defendants Nos. 9, 11 and 12, now submit that as it cannot have been really intended to saddle them with costs, it should be amended so as to relieve them of that liability.

The applicants were nominated in the deed as *panches* authorised to supervise the management of the endowment. They filed written statements protesting against their inclusion in the category of defendants and disclaiming not only all interest in, and concern with, the endowment, but also all knowledge of their nomination in connection with it. They had never acted as *panches* nor had they ever been asked to do so. The judgment shows that Mr. Justice Harington and I were to a certain extent influenced by these disclaimers in coming to the conclusion that the endowment was of an illusory character; and, had these defendants entered appearance, they would certainly have been allowed their costs, unless, indeed, it would have been possible to disallow them on the ground that they had been unnecessarily incurred. In these circumstances, it cannot be contended—and Dr. Dwarka Nath Mitter does not contend—that it could have been our intention to make them responsible for the costs: but what the learned Vakil does contend is that the decree in fact agrees with the judgment, as required by Order XX, ruler 6, of the present Code of Civil Procedure, that the former cannot, therefore, be amended as suggested, and that the only remedy, which the applicants had but have lost through limitation, was for a review of the latter.

No doubt, the decree is not inconsistent with the order in the judgment as to costs, and in this way it may at first sight be said to agree therewith. But the order is elliptical, and if the judgment as a whole be referred to, it becomes manifest that the order cannot have been meant to affect the applicants. The result is that the decree is not really in accord with the intention of the Court and that Mr. Justice Harington and I can have passed it only through inadvertence. As pointed out in *Brijratan* v. *Jaynarain* (1) and *In re Swire* (2), there cited, a Court, hasan inherent power to amend or vary a perfected order when it finds that it does not correctly state what it actually decided, and apart from this inherent power to make such orders as may be necessary for the ends of justice, which is expressly recognised by section 151 of the Code, section 152 provides that errors arising in a decree from any accidental slip or omission may be corrected by the Court either *suo motu* or on application. I hold, therefore, that it is open to us to amend this decree.

There is a further contention that this Court is *functus officio*, an appeal to the Privy Council having heen lodged: but section 152 expressly contemplates amendment "at any time," and *E.* v. *E.* (3) is a precedent for the amendment of a decree under appeal. This contention, therefore, must, I think, also fail.

But the success of the applicants at once raises the further question whether the decree for costs should not now be confined by us, acting *ex proprio motu*, as regards the added defendants other than the applicants, to the first defendant alone. The consideration of the whole matter was, therefore, adjourned in order to enable Dr. Dwarka Nath Mitter to argue this point, and that he has now done. The learned Vakil admits that all the other defendants except Nos. 2 and 13 are in practically the same position as the applicants. He also admits that the 8th defendant, who was impleaded because he was at the moment managing the Devria Indigo Concern—and the Manager of that concern had been nominated by the deed, *ex officio* so to speak, as one of the *panches*—is in a much stronger position both by reason of the representative character he was required

[*The judgment referred to is reported in 19 Ind. Cas. 417—*Ed.*]

(1) 7 Ind. Cas. 876; 37 C. 649 at p. 659.
(2) (1885) 30 Ch. D. 239, 53 L. T. 205; 33 W. R 785.
(3) (1903) P. 88; 72 L. J. P. 44; 88 L. T. 570.

BARHAMDEO SINGH v. HARMANOGE SINGH.

to assume, and in view of the fact that he has applied in time for a review of judgment. But Dr. Dwarka Nath Mitter seeks, as I have indicated, to differentiate the cases of defendants Nos. 2 and 13, one of whom was nominated by the deed as a *pujari* of the endowment and the other as a *panch*. Both filed written statements protesting against their inclusion as defendants and declaring that they had had nothing to do with the endowment and were not interested in it : but, at the same time, they refused to admit that the deed was invalid, and indeed asserted that it was a valid deed of endowment. To this extent, therefore, they may be said to have resisted the plaintiff in the first instance, but they did nothing more than file written statements and no complaint of any interference, much less of any tortious act, on their part has been made against them in the pleadings or in the evidence. There is no doubt this slight difference between them and the others, but Mr. Justice Harington and I certainly did not discriminate between the absent defendants. When we directed that the suit should be "decreed with costs," we can have contemplated only one of two things, —costs against all the defendants or costs against the solitary defendant who was before us and present to our minds. No third intention can possibly be extracted from the elliptical words we used : but as I have shown, we cannot have meant to saddle the applicants with the costs and *a fortiori* we cannot have meant to render the present Manager of the Devria Indigo Concern liable. Therefore, we did not intend to saddle all the defendants with costs. And, therefore, we must have meant to saddle only the first defendant with the liability. As Mr. Justice Harington has gone I must here speak for myself : and I have no hesitation in saying that, as a matter of fact, it was the first defendant alone that I had in mind, and that I had no idea of rendering anybody except Ram Gopal Acharia liable for the costs of the litigation. That being so, it seems to me to be our clear duty, now that the matter has come to our notice, to amend the decree by confining the order to the first defendant, Ram Gopal Acharia, and I think that, if we were to shirk that duty, we should be causing needless anxiety, useless trouble and the accumulation of unnecessary costs.

In the result, I would allow this application and going further I would amend the decree in favour, not only of the applicants, but of all the defendants Nos. 2 to 14, making no order as to the costs of the present hearing.

RICHARDSON, J.—I was not a party to the judgment and decree out of which the question before us has arisen and am not in a position, therefore, to speak from personal knowledge as to what was intended or not intended. Upon the materials placed before me, however, it seems to me that the question really comes to this, whether the decree as drawn up correctly represents the judgment according to its true intent.

The language of the judgment in regard to costs is ambiguous, the person or persons against whom costs are given not being specified. The difficulty has been caused by the ambiguity and can only be solved by ascertaining what the judgment means. As to that there can be little doubt. Regard being had to the pleadings and the course which the litigation took and the terms of the judgment as a whole, it seems impossible to suppose that the learned Judges intended to give costs against any of the defendants-respondents except the one who actually came forward to contest the case in the Courts. I am fortified in that view by what has been said by Carnduff, J., who as one of the Judges who heard the appeal can speak with authority on the point.

The result then is that an error has been committed in the Court's offices in drawing up the decree and the error is one which, as it seems to me, it is open to this Court to rectify either under section 152 of the Civil Procedure Code or under its inherent powers. It is not necessary to review the judgment which, regard being had to the provisions of Order XLVII, rule 5, I am not entitled to do. All that we do, as I understand the matter, is to bring the decree into accordance with what the Judges really intended, the judgment being left intact. Under Order XX, rule 6, the decree is to agree with the judgment and it is to state "the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid." All we are doing is to apply these provisions to the decree before us.

I agree in the order proposed.

Application allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 6, 1913.

Present:—Lord Moulton, Sir John Edge and Mr. Ameer Ali.

JOHN KING & CO., LTD.—PLAINTIFFS —APPELLANTS

versus

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF HOWRAH AND OTHERS—RESPONDENTS.

Title—Possession, suit for—Original grant not forthcoming—Registered conveyances extending over fifty years produced, whether sufficient to prove title—Boundary, fixing of—Description in deeds to be followed.

Where in a suit for possession the plaintiffs traced their title to a grant by Government which was not forthcoming, but proved a clear title to the lands for over fifty years by a succession of duly registered conveyances, mortgages, re-conveyances and other title-deeds, and also proved that during that period they had leased portions of the land by registered leases:

Held, that as none of the documents produced by the plaintiffs were impugned, a clear title to the property was proved.

In fixing the boundary of a property the description which is to be found consistently in deeds pertaining to that property must be followed.

Appeal from a judgment and decree of the High Court of Calcutta, dated July 25th, 1910, reversing those of the Second Subordinate Judge of Hooghly, dated August 10th, 1908.

FACTS appear from the following extracts from the judgment of the High Court:—

"In the suit out of which this appeal has arisen the plaintiffs, Messrs. John King and Company, Limited, of Howrah, sought as against (1) the Municipal Commissioners of that town and (2) the Howrah Amta Light Railway Company, Limited, for a declaration of title to, and recovery of possession of, a piece of land in the Gholadanga quarter of the town, lying between their premises on the north and the Telkalghat Road on the south and including part of a certain natural drainage channel or *khal*. It appears that, on the 26th March 1895, Messrs. Martin and Company of Calcutta obtained, on behalf of the Light Railway, an order (Exhibit K) from the Local Government under the Bengal Tramways Act, 1883, authorising the laying of a tram-line between Howrah and Amta; and that on the 28th August 1902, the Municipal Commissioners of Howrah and the Light Railways Company entered into an agreement (Exhibit L) under which the former were to transfer to the latter for the purposes of the supply of power and the construction of sidings so much of the *khal* as lay opposite the plaintiff Company's premises. In pursuance of this covenant the Railway Company proceeded to fill up the *khal* and on the portion filled up to erect offices and lay down lines, with the result, as the plaint alleges, that the plaintiffs were dispossessed of land which was theirs and had been held by them and their predecessors-in-interest for many years. The lower Court found in favour of the plaintiff Company on the question of title as well as on that of limitation, and decreed their suit against both the defendants. The Municipal Commissioners alone have preferred this appeal.

"It is common ground that the land in dispute was originally part of a *char* measuring some 55 *bighas*, which was settled by the Government of the day with one Smith in or about the year 1830 and conveyed by the said Smith to another, Calder, in 1844. The original grant is not forthcoming and Calder's conveyance is thus the earliest instrument before us. It may also be said to be admitted that the *khal*, part of which is, as we have said, included in the land claimed by the plaintiff Company as their private property, has existed from time out of memory and played, as it still plays, a conspicuous part in the drainage system of the Howrah Municipality. It appears to be a natural channel, about half a mile long and at the present time more than 10 feet broad, and its characteristics are described in similar terms by witnesses on both sides. Thus Sambhoo Chandra Bose, P. W. No. 6, who was born in 1833 and has lived all his life in Howrah, states that the water of the Howrah *maidan*, or public park, is drained into the river Hooghly through it, and that the Municipal drains of this quarter of the town are discharged into it. Similarly, Mr. Donnithorne, who was the Secretary to the Municipality from 1871 to 1884 and subsequently up to the year 1906, when he retired, Secretary to the Port Commissioners and a resident in the town, states in his evidence, which was taken on commission in England, that the *khal* is an inlet from, or outlet to, the river receiving for discharge thereinto all the drainage of a large part of the Municipal area. There can, therefore,

be no question as to the *khal's* being a public drain, nor can there be any doubt as to the legal position of the case in so far as it is concerned. *Qua* a public drain, it "vests in and belongs to" and always has "vested in and belonged to" the Municipal Commissioners, see section 10 of the District Municipalities Improvement Act of 1864, under which the Howrah Municipality was first constituted, section 32 of the Bengal Municipal Act of 1876, which repealed and re-placed the earlier enactment, and section 30 of the present Act, which was passed in 1884 and amended in 1894. So long as it continued to be a public drain, any private rights in the sub-soil must remain, so to speak, dormant and in abeyance, and it is not suggested that there is more than a very remote and problematical chance of its ceasing to be connected with the drainage of Howrah. In these circumstances the dispute as to the channel itself is only of academic importance, and the legal aspect of the part of the case need not be further discussed. The real bone of contention is the land situated between the drain on the north and the Telkalghat Road on the south, the *khal* being brought into the controversy merely because their main issue in the case is as to whether it or the road is the southern boundary of the plaintiff Company's property.

"The plaintiff Company have claimed the land, first, as lessees and finally, as proprietors. As to their lease-hold, it appears that sometime before 1849 Calder, who has already been mentioned, granted a permanent lease of 2 out of his 55 *bighas* to one Craig, who built upon it what was known as the Vulcan Foundry, and this is the site of the northern part of the plaintiff Company's present premises. Craig's interest in these 2 *bighas* was subsequently conveyed to one Stewart, and in 1854 forty years' lease was granted by Calder's successor, Golapi Dassi, to a certain Hugh McLardy in respect of 4 more *bighas* of the 55 immediately adjoining Craig's land on the south. McLardy's interest likewise eventually passed to Stewart, who thus became the lessee of the whole 6 *bighas* and who, on the 26th March 1881, conveyed his entire interest to Messrs. John King and Company, the predecessors of the present limited liability Company. The lease granted by Golapi Dassi expired in 1894, and in anticipation of this Messrs. John King & Company obtained in 1891 a further lease for 15 years. In all the documents relating to these leases except one, a permanent lease with option of purchase (Exhibit L9) obtained on the 4th April 1855 by one Mackay, the southern boundary is given as a *nullah*.

"Turning next to the acquisition of the proprietary right claimed, we find that it passed from Smith to Calder, then to Craig, then to Golapi Dassi, then to Mackay and eventually to a certain Chandra Kanta Mookherjee, who mortgaged a parcel of 8 *bighas*, including the land in suit. In execution of a decree obtained on the basis of that mortgage this land was put up for sale and purchased by Messrs. John King and Company on the 4th August 1893. In Calder's conveyance the land is described as bounded 'on the south by the north of the public road to the north of Mr. Humphrey's house', and in the other documents connected with the claim of transfers indicated above, as well as in the mortgages and other transactions arising therefrom, it is referred to as 'the public road,' or 'a public road,' or 'the Gholadangaghat Road' or 'the Telkalghat Road.'"

"Now none of the documents referred to in this case can be regarded as being in any sense title-deeds. They are obviously insufficient to create title, they are at most mere assertions of title made from time to time by the predecessors-in-interest of the plaintiff Company. In themselves, therefore, even if their intendment were perfectly clear they would be of little value and could be useful only if supported by evidence of conduct pointing in the same direction. The mere repetition, even with variations, in subsequent deeds of a description relied upon in earlier deeds relating to the same property seems to us to carry the case little, if any further; and we have on that account refrained from burdening this judgment with references to all the documents exhibited on either side. It comes indeed to this, that whereas in the lease (Exhibit 2) granted by Golapi Dassi to McLardy in 1854 the southern boundary is given as a *nullah*, in the conveyance (Exhibit 6) from Smith and Calder in 1844 the property is described as bounded on the south by a road lying somewhere to the north of a particular

building then known as Mr. Humphrey's house. That the *nullah* indicated in the lease is the existing *nullah* or *khal* is evident. There can scarcely have been in this locality another channel of the same kind and the plaintiff Company's own witness, Sambhoo Chandra Bose, who is, as has been shown above, in a position to speak with authority, says that the (existing) state of "affairs has been obtaining since" the time of McLardy and "his (own) childhood". On the other hand, although "Mr. Humphrey's house" has been identified by the same witness as the premises now occupied by Messrs. Burn & Co. on the southern side of the Telkalghat Road, the description of the southern boundary in Calder's conveyance is on the face of it vague and indefinite, and there is nothing on the record to show exactly where the public road lay in McLardy's time. The Howrah Municipality was not then in existence; regular roads were but little known in those days, and if, as may well have been the case, the road was a track running alongside the *nullah*, then the description of the southern boundary in Calder's conveyance was, for all practical purposes, the same as that in McLardy's lease. Considerable stress has been laid on the circumstance that the *nullah* was excluded from the lease, the argument being that it was but natural that the landlord, when letting a portion of his land for a term, should take care, in the interests of his other tenants on either side, that the lessee should be precluded from interference with the *khal* passing through the area demised. But that object could have been best attained by the insertion in the lease of a restrictive covenant as to the user of the channel; and the best likely method seems to us to be that which, it is suggested, was adopted. For, if the proprietor had any land south of the *khal* it must have been a comparatively narrow isolated strip, the separation and exclusion of which, can hardly have benefited any one. Moreover, the argument assumed that the proprietor himself had entire control over the *khal*, and that is an assumption which we are not prepared to make; for it seems most unlikely that a natural channel of such manifest importance and general utility should have been actually included in the grant from the Government to Smith, unless its continued existence and utility for public purposes had been at the same time secured.

"There remain certain other documents upon which the plaintiff Company perhaps, and the lower Court certainly, has relied more than upon anything else. The Gholadanga property, of which the area now in dispute then admittedly formed a part, appertained in the year 1856 to Mackay's estate, and in 1862 the whole of it, excepting a small area in the south-east corner which was the site of the Vulcan Foundry and corresponds with the site of the plaintiff Company's present premises and the land in suit, was acquired by the Government for the East Indian Railway. Exhibit 19 is the declaration published in this connection on the 29th November 1861, under Act VI of 1857, the enactment then in force for the acquisition of land for public purposes, and in it the area to be acquired is described as 'bounded on the south partly by Telkalghat Road and partly by Messrs. Craig and Company's foundry.' The Deputy Collector's valuation of this land was Rs. 90,000, but Mackay's representatives claimed Rs. 8,28,000; and the matter was eventually referred to arbitration, with the result that the arbitrators awarded Rs. 5,21,650 and expressly declared in their award (Exhibit 24*h*) that the compensation granted was in respect of the whole of the land and premises shown on a map, which seems to have been annexed but is not forthcoming, together with the *nullah* on the south side thereof."

"*First*, there is over the *khal* a masonry culvert or bridge with a parapet and iron railings, giving access to the plaintiff Company's premises from the Telkalghat Road. It is in evidence that this was constructed by McLardy in or about the year 1854, and the fact has not been disputed before us by the learned Vakil for the appellants. It is also alleged, and likewise not denied, that in 1890 or 1891 Messrs. John King & Co. built a staircase resting on the middle of this culvert and leading to the first story of their premises, and there is nothing to indicate that this was done after a reference to the Municipal authorities. As regards the culvert, it seems to us that its construction as far back as in 1854 is no foundation whatever for the assertion of title to the *khal* thus bridged over; for it was purely for the benefit of,

and absolutely necessary for, the occupation of any premises on the northern side of the *khal*, while it in no way interfered with the channel or its public utility. The erection of the staircase, although it also was for the convenience of Messrs. John King & Co. alone, is of more importance in view of the circumstance that the Municipality was in existence at the time, and a reference to it might have been expected. But such a reference would probably have been equally necessary under the building regulations in force under the Bengal Municipal Act, 1884, even if the land concerned had been private property; and we have it on the authority of Mr. Donnrithorne that the Municipality was always on the best of terms with the Company, a circumstance which may well account for any irregular action in a matter of this kind having been allowed to pass unchallenged. Moreover, we find it quite impossible to believe that Messrs. John King & Co. were asserting any claim of right by their action at this time, or indeed at any time before 1905. We have already pointed out that, on their present Managing Agent's own showing, they were unaware of the right now asserted by them until it was discovered in the year last mentioned, and their correspondence with the Municipality in 1887, (Exhibit Ill *et seq.*) when they applied for permission to extend the culvert so as to cover the whole of the *khal* opposite their premises, proves this conclusively. The attitude they then assumed was on the basis of the extreme limit of their property being the middle of the *nullah*, and when they were met by the explicit statement of the Secretary for the time being—see Exhibit M2—that 'the Municipal Commissioners believed the whole width of the *nullah* to be their property' they were content to allow the matter to rest there: see their letters (Exhibit M7 and Exhibit M9) dated, respectively, the 9th and 17th November 1887. And this was the position which they took up again as lately as in 1903 in the correspondence (Exhibit G and Exhibit G1) which they then had with Messrs. Martin & Co. and the Engineer-in-Chief of the Howrah Amta Light Railway. We are, therefore, of opinion that the plaintiff Company's action in connection with the culvert and the staircase cannot be said to furnish any substantial support for their case.

The plaintiffs *next* rely upon the erection by them in 1888 of *darwans'* quarters on a portion of the slope of the *khal* which they had filled up and levelled for the purpose. As to this, it is *first* to be observed that what was done on this occasion was done on the northern side of the *khal*, and with that we are hardly concerned. And, *secondly*, it is in evidence that this 'encroachment," although it was ultimately allowed, was in fact protested against by the Municipality through the issue in the first instance of a notice for its removal. The circumstances connected with this matter are, therefore, inconclusive and of comparatively little assistance to either side.

"*Thirdly*, reliance is placed upon the alleged picketing of bullocks belonging to the plaintiff Company on the south side of the *khal*. Here, however, there is a conflict of evidence, and the balance seems to us to be decidedly in favour of the appellants. Mr. Donnithrone's evidence impresses us as being that of a strong and independent witness who know exactly what he was speaking about, and we have it from him that any cattle found on the south of the *khal* in his time were treated as stray cattle and impounded. He is confirmed in this by the fact that in 1905 an employee of the plaintiff Company was prosecuted under the Bengal Municipal Act, 1884, and convicted by the Deputy Magistrate of Howrah for having picketed bullocks on the banks of the *khal*. The conviction was, no doubt, set aside by this Court, but the ground of the reversal was that the prosecution had failed to prove, and as a matter of fact had not attempted to prove, that the *khal* was a public drain and it was held that, on a reasonable construction, section 250 of the Act, although it referred to 'any drain,' was applicable to public drains only. And in this connection we feel bound to remark that there is nothing on the record to justify the, we hope merely unguarded and hasty, observation of the Court below that the Chairman (of the Municipality) as Magistrate got the plaintiff's servant convicted by his subordinate."

"In the *fourth* place, reference is made to the fact that the plaintiff Company had been in the habit of depositing certain property of their own on the land south of the *khal*,

It is, however, impossible to lay any stress upon this; for while Mr. Gilmour, who was in the employment of the Company for some years, states that they 'kept some of their materials there,' Mr. Muir puts rather a different complexion on the matter by alluding to the materials deposited as 'scrap materials' and admitting that they were 'materials which they had no use for, and which they threw away.'

"*Fifthly*, and *lastly*, it is alleged that the plaintiff Company's steam-launches were moved in the *khal*. This, however, is perfectly consistent with the theory of the defence that the *khal* was a public channel. Moreover, it is to be gathered from the evidence of Mr. Muir that the Company's launches were brought up to a distance of not more than 100 feet from the river; whence it follows that they were not harboured in the part of the channel now in dispute, and the point, therefore, becomes immaterial."

Messrs. *Lawrence, K. C.*, and *Drunnequer*, for the Appellants, contended that the High Court had erred in holding that the documents adduced at the trial were insufficient to create title and could not, in any sense, be regard as title-deeds. They emphasised upon the conduct of the parties and ignored documentary evidence. The property in the sub-soil of the *khal* was wrongly held to belong to the State. There were a number of documents which clearly showed that the appellants and their predecessors-in-title had dealt with the property in dispute as owners. The property in the land on which a claim lay did not belong to the Government, but to private owners.

Messrs. *DeGruyther, K. C.*, and *Dunne*, on behalf of the Respondents, contended that the appellants had not established being in possession of the property within 12 years of their suit. The *khal* and the land were vested in the Municipal Commissioners of Howrah as owners. The respondents on the other hand had been in possession of the *khal* and land adversely to the appellants for over 12 years prior to the suit. They, therefore, could not claim the same.

Mr. *Lawrence, K. C.*, in reply.

Reference was made to *Sundram Ayyar* v. *Muncipal Council of Madura and the Secretary of State* (1) and the Bengal Municipal Act, 1884, and of 1899, and the Bengal Tenancy Act, 1885.

(1) 25 M. 635; 12 M. L. J. 37.

JUDGMENT.

LORD MOULTON—This is an appeal in an action brought by John King & Co., Limited, to obtain a declaration of their title to certain lands mainly consisting of a *khal*, or *nullah*, along the Telkalghat Road, Howrah, and for ejectment of the defendants therefrom, and for damages or mesne profits.

The course of the case has been rather a singular one. The plaintiffs at the trial proved a clear title to the lands for over fifty years by a succession of duly registered conveyances, mortgages, re-conveyances, and other title-deeds, and also proved that during that period they leased portions of the land by leases that themselves were registered. Their Lordships indeed think that they might go so far as to say that, after the rather complex devolution which took place within that long period had been carefully explained by Counsel for the appellants, it became evident that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the plaintiffs. They also proved that they had not been dispossessed by the defendants until a period well within the period of limitation, and that, therefore, the Statute of Limitations did not apply.

The Judge at the trial, who went into the evidence with very great care, found in favour of the plaintiffs on all points. An appeal was brought to the High Court. It would seem, from the judgment of that Court, that the Judges pronouncing it took a most extraordinary view of the plaintiffs' case, ignored entirely the clear title to the land which the plaintiffs had proved, and expressly held that they came into Court without title-deeds. They, therefore, treated the case as though it was one in which the Court had nothing relevant before them but the conduct of the parties to decide which of them was entitled to the land.

Their Lordships are entirely unable to understand the grounds on which the High Court rejected the title of the plaintiffs on their title-deeds, nor can they understand what the learned Judges meant by saying that the plaintiffs have no title-deeds. The consequence of this error on the part of the Judges of the High Court is that they never considered the real questions in the case, and their judgment gives to their Lordships no assistance.

The title-deeds of the plaintiffs (none of which are impugned), which are all duly registered, show that the plaintiffs or their predecessors-in-title have been, ever since 1855, the owners of a parcel of land bounded on the south by the Telkalghat Road. Now it may very well be that the Telkalghat Road was not at that date the broad metalled road that it is now, but it is certain that it lay to the south of a *khal*, or *nullah*, the bed of which, with its banks, is the principal subject in dispute in the present action.

Their Lordships have been asked to interpret this boundary of the property as meaning that the property of the plaintiffs' predecessors-in-title only went up to the central line of the *nullah*, which lies to the north of the Telkalghat Road itself. To do that would be to reject the description of the parcels which is to be found consistently in the deeds, and to make these deeds convey land marked out by different metes and bounds from that which there appears. Their Lordships decline so to do. They think that it is possible that by allowing certain portions from time to time to be added to the Telkalghat Road for the purpose of improving that road, the plaintiffs and their predecessors-in-title may have parted with the property, or at all events with the right of possession of those strips of land; but none of those form part of that which is claimed in this action. So far as that which is claimed in this action is concerned, they have title and they have had possession. They have been dispossessed from this, but they brought this action in due time, and their action of ejectment must succeed, and this appeal must be allowed. Their Lordships are quite satisfied both with the reasons and the conclusions of the Judge at the trial, and they will humbly advise His Majesty that the decree of the High Court which is appealed against should be set aside, and that the decree of the Subordinate Judge should be restored and affirmed. The respondents must pay the costs of the appeal to the High Court and to this Board.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Thomas, Cooper & Co.*

Solicitors for the Respondents: Messrs. *Morgan, Price & Co.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 338 OF 1914.

July 21, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Rai YATINDRA NATH CHAUDHURY AND ANOTHER—DEFENDANTS—PETITIONERS

versus

HARI CHARAN CHAUDHURI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, *O. XIV, r.* 2, *O. XV, r.* 3 (1)—*Issues involving mixed questions of law and fact decided without evidence—Decision, whether legal—Trial piecemeal—Practice—Custom, validity of, to be determined when custom established—Revision—Interlocutory orders, when can be reversed.*

As the trial of a case piecemeal might lead to protracted litigation and serious inconvenience and involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal, it is much to be desired that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on all the important points and decide on all the issues joined.

A Court acts quite illegally if it treats issues which really raise mixed questions of law and fact as involving only pure questions of law, and decides them as such without taking any evidence.

A Court should not consider the question of validity of a custom till the custom itself has been established with precision.

In exceptional cases, the special facts and circumstances of which so require, the High Court will reverse in revision the interlocutory orders of subordinate Courts.

Civil Rule against the orders of the Subordinate Judge of 24-Pergannas, dated the 10th February and 9th March, 1914.

Dr. *Rash Behary Ghose*, Babus *Sarat Chunder Ray Chaudhury* and *Lalit Mohan Banerjee*, for the Petitioners.

Messrs. *B. Chakrabarti* and *S. R. Das*, Babus *Joges Chunder Ray*, *Narendra Chandra Bose* and *Satyendra Nath Mitter*, for the Plaintiff-Opposite Party.

Babu *Surendra Nath Guha*, for the Defendant-Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Subordinate Judge has directed the trial of certain issues in a title suit before evidence has been adduced by the parties. For the appreciation of the objection taken to the order of the Subordinate Judge, a brief outline of the circumstances under which the suit has been instituted is essential. One Mathura Nath Chaudhuri, the predecessor of the first two defendants,

died on the 4th November 1863. Three days before his death, he had made a testamentary disposition whereby he authorised his wives, Jogmaya and Sasimukhi, to take sons in adoption. On the 15th June 1866, the senior widow adopted the father of the second defendant, and the junior widow took the first defendant in adoption. It is said—and this is one of the matters in controversy between the parties—that the last surviving widow of the testator died on the 4th December 1900. On the 30th November 1912 one Lalit Mohan Chaudhuri, who claimed to be reversionary heir to the estate of Mathura Nath Chaudhuri, executed a conveyance of a half share in favour of the first plaintiff, Hari Charan Chaudhuri. On the 2nd December 1912 the transferor and transferee jointly instituted the present suit for recovery of possession of the estate of Mathura Nath Chaudhuri, on the assertion that the alleged adoptions by his two widows were void. They joined four persons as defendants, namely, the son adopted by the junior widow, the son of the son adopted by the senior widow, and two transferees of portions of the estate from them. The defendants resisted the claim on various grounds. The questions in controversy between the parties may be gathered from the issues which were settled in the following terms :—

1. Have the plaintiffs or has either of them any cause of action for the suit ?

2. Has defendant No. 1 been properly described in the plaint; if not, can the suit proceed against him ?

3. Has the plaintiff No. 1 acquired any interest in the properties in suit or any one or more of them, by conveyance from plaintiff No. 2 ?

4. Is the alleged transfer by plaintiff No. 2 to plaintiff No. 1 void, as being without consideration and against the rules of Hindu Law and public policy ?

5. Is the suit as framed maintainable, the plaintiffs not having prayed for the declaration of the invalidity of the adoptions of the late Rai Surendra Nath Chowdhury and Rai Yatindra Nath Chowdhury as alleged by plaintiffs in answer to the interrogatories filed by the defendants Nos. 1 and 2 ?

6. Is the suit barred by limitation ?

7. Is the plaintiff No. 2 the nearest *sapinda* and heir-at-law of the deceased Rai Mathura Nath Chowdhury, as alleged in the plaint, and entitled to his estate on the death of Jogmaya Chowdhurani in case the title of defendants Nos. 1 and 2, by virtue of adoption, fails ?

8. Is the authority to adopt given by the late Rai Mathura Nath Chowdhury by his Will, dated the 16th *Kartick* 1270 B. S., invalid ?

9. Whether the adoptions of the late Rai Surendra Nath Chowdhury and of the defendant No. 1, Rai Yatindra Nath Chowdhury, were simultaneous, and if simultanious, invalid on that ground. Was Rai Surendra Nath Chowdhury adopted previous to the adoption of defendant No. 1 ?

10. Assuming the said adoptions to have been simultaneous, was there at the time any custom or usage in Bengal validating such adoption ? Assuming the existence of such custom or usage, if any, is the same valid in law ?

11. Is the defendant No. 1 and was the father of defendant No. 2 entitled to possession of the estate of the late Rai Mathura Nath Chowdhury as persons designated to succeed him as heirs or legal representatives, as alleged in paragraph 7 of the written statement of defendant No. 1? Are the allegations made in the said paragraph 7 sufficient to raise the contention ?

12. Are the plaintiffs estopped from questioning the legal status of the defendants Nos. 1 and 2 based on adoption, or their right to possession of the estate left by Rai Mathura Nath Chowdhury and the derivative rights of defendants Nos. 3 and 4, on allegations made in that behalf in the written statement of the defendants and in the statements made in answer to the interrogatories by the plaintiffs?

13. Have the defendants acquired absolute and indefeasible rights to properties in suit by adverse possession irrespective of adoption ?

14. Which of the properties, if any, mentioned in the schedules to the plaint form part of the estate of Rai Mathura Nath Chowdhury ? Are the plaintiffs or either of them entitled to possession thereof ?

15. Are the properties mentioned in

schedules B and C of the plaint and schedule (...) of the written statement unconnected with the estate of Rai Mathura Nath Chowdhury and is their claim thereto, or of any of them, barred by limitation ?

16. Were the properties mentioned in schedule B of the plaint the *stridhan* properties of Shama Sundari Chowdhurani, and were they validly disposed of by her ?

17. Assuming the plaintiffs or either of them to be entitled to possession of any property covered by the suit, on what terms, if any, are they, or either of them, entitled to do so ?

18. Have the defendants or any of them spent any money for the improvement of the properties in suit and if so, what amount ?

19. Are the plaintiffs entitled to any mesne profits ; and if so, for what period and for what amount ?

20. Was the transfer made by defendant No. 1 to the defendants Nos. 3 and 4 for the purpose of paying off debts of the estate of Rai Mathura Nath Chowdhury valid ? Did the defendant No. 1 and the father of defendant No. 2 at the time for such transfer represent the estate of Rai Mathura Nath Chowdhury ? If so, what is the legal effect of such transfer ?

21. Are the defendants Nos. 3 and 4, or either of them, *bona fide* purchasers for value ? If so, can the plaintiffs avoid the sale to them, at all events except on terms, and in the latter event, on what terms ?

22. To what relief, if any, are the plaintiffs, or either of them, entitled ?

On the application of the plaintiffs, commissions were issued for examination of two of their witnesses, one of them the reversioner claimant himself. After the examination of these witnesses the first plaintiff, the transferee from the reversioner, applied to the Subordinate Judge that issues Nos. 1, 2 and 5—13 might be decided without evidence. The defendants protested against the adoption of this course, as, according to their contention, some at any rate of these issues raised questions of fact or mixed questions of fact and law. The Subordinate Judge overruled the objection, and on the 10th February 1914 directed that the eleven issues specified above except the first part of the tenth issue be tried as issues of law without reception of evidence. On the 16th February, the second plaintiff unconditionally withdrew from the suit and his name was struck off from the category of plaintiffs. Thereafter, on the 28th February, on the application of the first plaintiff, the original second plaintiff was added as a party defendant, but the recitals in the plaint were not suitably amended. On the same day, the defendants applied to the Subordinate Judge to review his order of the 10th February, and prayed that if any issues were to be heard in advance of the others, the third and fourth issues, which raised the question of the validity of the purchase by the champertor-plaintiff from the claimant reversioner, might be so tried under the altered circumstances of the case. On the 9th March 1914, the Subordinate Judge refused to recall or modify in any way his previous order. We are now asked to set aside the orders of the 10th February and 9th March as erroneous and unjust.

It is not disputed that under rule 2 of Order XIV, where issues both of law and of fact arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. This rule has reference to the stage of settlement of issues, and has no direct application to the present case. Nor does Order XV, rule 3 (1), which contains a similar provision for the disposal of the suit at the first hearing, apply to this case. Here the plaintiff made his application long after the settlement of issues and expiry of the date fixed for first hearing. These provisions are analogous to rule 3 of Order XXV and rule 2 of Order XXXIV of the Rules of the Supreme Court, with reference to which it was said by Mathew, J., in *Tattersall* v. *National Steamship Co. Ltd.* (1) that it is very desirable that questions of law, the decision of which may make unnecessary the trial of any question of fact, should be raised and decided in advance of issues of

(1) (1884) W. N. 32.

fact. In *Corporation of Preston* v. *Fullwood Local Board* (2), it was ruled that a question of law, which could not be clearly separated from the other questions in the action or on which evidence might be required, might be tried first at the trial upon such admissions as the parties might make or upon such evidence as might be necessary. To the same effect is the decision in *London Chatham and Dover Ry. Co.* v. *South E. Ry. Co.* (3) where Chitty, J., observed that the mere fact that there might be many appeals would not stand in the way of an order for trial of questions of law first, if that would be convenient to the parties and save them expense. On the other hand, the Court of Appeal in *Robinson* v. *Fenner* (4) reversed the order of Channel, J. [*Robinson* v. *Fenner* (5)], and directed that the action proceed to trial in the ordinary way and that all questions of law and fact be dealt with at the trial. In the Courts of this country, it has frequently been pointed out that the trial of a case piecemeal may lead to protracted litigation and serious inconvenience and involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal. *Mahipal Singh* v. *Lalji Singh* (6).

As Lord Justice Turner said in *Tarakant Bannerjee* v. *Puddomoney Dossee* (7), it is much to be desired that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on all the important points, because the Courts below, by forbearing from deciding on all the issues joined, not infrequently rendered necessary a remand in a case which might otherwise be finally decided on appeal; this is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. [See also *Devarakonda Narasamma* v. *Devarakonda Kannaya* (8); *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (9); *Shib Charan Lal* v. *Raghu Nath* (10); *Baldeo Singh* v. *Dharam Kunwar* (11); *Wasantrao Madhowrao* v. *Anandrao Ganpatrao* (12) and *Ismail Khan Mahomed* v. *Hari Charan Pal* (13)]. Tested from the point of view of these principles, the order of the Subordinate Judge is clearly unsustainable. The fundamental defect of his decision is that he has treated issues which really raise mixed questions of fact and law, as involving only pure questions of law. For instance, the sixth issue, which raises the question of limitation, is not an issue of pure law, because the third and fourth defendants, who are strangers to the family, do not admit the time of death of the last surviving widow of Mathura Nath Chowdhury. Again, the seventh issue involves a question of fact, namely, whether the original second plaintiff was the nearest reversioner when the succession opened out on the death of the last surviving widow. The first issue also required modification in the events which had happened; but the gravest objection to the order of the Subordinate Judge arises in connection with the tenth issue, which raises the question of the existence and validity of a custom of simultaneous adoptions. The Subordinate Judge has assumed that the question of the validity of the custom might be determined before the elements which constitute the custom had been ascertained from the evidence. In our opinion, this mode of trial is not calculated to secure the ends of justice. There has been discussion at the Bar as to the validity of such a custom, and reference has been made to the observations in *Monemothonath Day* v. *Onathnath Dey* (14); *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (15); *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (16). It is plain that the Court should not consider the question of validity of the custom till the custom itself has been established with precision. But the order of the Subordinate Judge is open to objection not merely on the ground that he has treated mixed questions of fact and law as pure

(2) (1886) 2 T. L. R. 60.
(3) (1885) 53 L. T. 109.
(4) (1912) 106 L. T. 722.
(5) (1912) 106 L. T. 542.
(6) 16 Ind. Cas. 705; 17 C. W. N. 166 at p. 168.
(7) 10 M. I. A 476 at p. 488; 5 W. R. (P. C.) 63; 1 Suth. P. C. J. 631; 2 Sar. P. C. J. 184; 19 E. R. 1052.
(8) 4 M. 134; 5 Ind. Jur. 634.
(9) 11 A. 460 at p. 470; 16 I.A. 205; 5 Sar. P. C.J. 433.
(10) 17 A. 174 at p. 196; A. W. N. 1895) 47.
(11) 26 A. 234; A. W. N. 1904) 6.
(12) 6 Bom. L. R. 925 at p. 931.
(13) 9 C. W. N. 60.
(14) (1865) 2 Ind. Jur. (N. S.) 22; Bourke O. C. 189.
(15) 12 C. 406, 12 I. A, 198; 9 Ind. Jur. 400; 4 Sar. P. C. J. 678.
(16) 23 Ind. Cas 166; (1914) M. W. N. 299; 12 A. L. J. 315; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328; 41 I. A. 369; 19 C. L. J. 369; 18 C. W. N. 554 at p. 563; 37 M. 199.

questions of law, it is open to criticism also on the ground that if any issues are to be tried in advance of others, the third and fourth, which go to the root of the title of the first plaintiff, should obviously have been given precedence. Those issues raised the question whether, on the principle recognised by the Judicial Committee in *Chedambara Chetty* v. *Ranja Krishna Muthu Vira Puchanja Naikar* (17) and *Basant Singh* v. *Mahabir Pershad*(18) and applied by this Court in *Gossain Ramdhan Puri* v. *Gossain Dalmir Puri* (19), the first plaintiff, who is now the sole plaintiff, iscompetent to maintain the suit. Upon a consideration of the entire order of the Subordinate Judge, we are clearly of opinion that, if maintained, it will not secure a proper and speedy trial of this heavy litigation, which involves property worth more than thirty-five lacs of rupees. At the same time, we are of opinion that the issues may be divided broadly into two groups, namely, 1—13 and 14—22. The first group of issues involves questions of the rights of the parties to the estate of Mathura Nath Chowdhury; the second group raises questions as to the extent of that estate, the conditions, if any, subject to which the plaintiff may recover that estate if his title is at all established, and other analogous matters. It is clear that the second group of issues will not require consideration, if the title of the plaintiff is not established.

In these circumstances, as we intimated at the close of the hearing, the Rule must be made absolute and the order of the Court below discharged. We direct the Subordinate Judge to take up issues Nos. 1—13 for trial; the parties will be called upon to adduce all relevent evidence bearing upon the subject-matter of these issues. If these issues are ultimately decided in favour of the plaintiff, the Subordinate Judge will take up for disposal the remaining issues. The costs of this Rule will be costs in the suit. We assess the hearing fee in this Court at five gold *mohurs*.

We may add that it was faintly suggested on behalf of the opposite party that this Court is not competent to grant relief, even if satisfied that the order of the Subordinate Judge is erroneous and unjust. We are not prepared to take such a restricted view of the jurisdiction of this Court to grant relief, in the exercise either of our revisional powers or the power of superintendence vested in this Court by the Indian High Courts Act, 1861. Instances are by no means rare where, in very exceptional cases, this Court has interfered and set matters right by the reversal of interlocutory orders; *Gobind Mohan Doss* v. *Kunja Behary Doss* (20); *Amjad Ali* v. *Ali Hussain* (21); *Khirode Chunder* v. *Saroda Prosad* (22); *Charu Chandra Dutt* v. *Sarat Chandra Singh* (23); *British India Steam Navigation Co.* v. *Secretary of State* (24); *Umatul Mehdi* v. *Kulsum* (25). No doubt, the facts of each individual case must be the determining factor; in the present case, for the reasons already assigned, we are of opinion that in its special circumstances, the order of the Subordinate Judge should not be allowed to stand.

Rule made absolute.

(17) 1 I. A. 241; 13 B. L. R. 509; 22 W. R. 148.

(18) 19 Ind. Cas. 340; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301; 40 I. A. 86; 17 C L. J. 566; 35 A. 273.

(19) 2 Ind. Cas. 385; 14 C. W. N. 191.

(20) 4 Ind. Cas. 364; 10 C. L. J. 407; 14 C. W. N. 147.

(21) 6 Ind. Cas. 574; 12 C. L. J. 519; 15 C. W. N. 353.

(22) 7 Ind. Cas. 436; 12 C. L. J. 525

(23) 8 Ind. Cas. 87; 12 C. L. J. 537.

(24) 8 Ind. Cas. 107; 38 C. 230; 15 C. W. N., 87; 12 C. L. J, 505.

(25) 12 C. W. N. 16; 35 C. 120; 8 C. L. J. 245.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2308 OF 1913.

November 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

SUBBARAYA AIYAR—PLAINTIFF—APPELLANT

versus

KOLANDAVELU MUDALI—DEFENDANT—RESPONDENT.

Landlord and tenant—Agreement to remit portion of teerva, *how far binding—Contract Act (IX of* 1872), *s.* 63—*Promise to remit part of rent.*

A promise to remit a portion of rent, made merely out of grace and not out of any legal obligation, does not affect the right of the obligee to enforce his legal rights as regards payments due to him in future.

Gopalasami Chettiar v. *Fischer*, 28 M. 328; 15 M. L. J. 14; *Radha Raman Chowdhry* v. *Bhowani Prosad Bhowmick*, 6 C. W. N. 60; 12 C. L. J. 139; 8 Ind. Cas. 790; *Karampalli Unnikurup* v. *Thekku Vittil Muthorakutti*, 26 M. 195 at p. 196, followed.

Where a promise to remit rent is coupled with

conditions, it is not an absolute remission and the landlord is not estopped from enforcing his rights in full.

Where the agreement of parties is distinct and clear as to the rate of rent, subsequent conduct of parties is inadmissible in evidence to show that some other rate was intended by the parties.

Second appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 513 of 1912, preferred against that of the District Munsif of Namakkal, in Original Suit No. 262 of 1911.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellant.

Mr. *M. R. Rangaswami Aiyangar*, for the Respondent.

JUDGMENT.—The plaintiff is the appellant in this second appeal. He sued (among other reliefs) for a declaration that he was entitled to a sum of Rs. 11-0-4 yearly as the rent reserved under one of the covenants in the sale-deed, Exhibit I, executed by him to the defendant conveying 7/8ths, share in the *kudivaram* right in the plaint lands. The sum of Rs. 11-0-4 does not expressly appear in Exhibit I as the rent due on the 7/8ths share sold, but the *Faisal* rent on the whole land is entered as Rs. 12-9-6. The document then recites that 7/8ths share of the lands bearing the said rent of Rs. 12-9-6 is sold, and it concludes by saying that the purchaser should pay the vendor (who retained the *melvaram* right) "the assessment of the aforesaid land" (that is, the assessment on the 7/8ths share sold.) Having in view the fact that it has been held in *Gopalasami Chettiar* v. *Fischer* (1), that the rent payable by a tenant of *inam* land in the Salem District is *prima facie* the money assesment fixed at the *Faisal* survey and settlement, we think that the *teerva* which the defendant had to pay was 7/8ths of the Rs. 12-9-6 and it was that *teerva* which (accordinging to the true construction of Exhibit I) was reserved by the plaintiff to himself. Even reading Exhibit II with Exhibit J, it only shows that for the first two years, two different sums (Rs. $3\frac{1}{2}$ and Rs. 4) were respectively fixed as rents by agreement between the parties and that the plaintiff promised not to enforce the *Faisal teervai* rate till the defendant sank a well and cultivated wet crops. We think that on the construction of Exhibit J, the Court of first instance came to the more correct conclusion.

But it is contended that Exhibit II might be treated as an agreement to dispense with the payment by the defendant of more than four rupees a year as rent and that such an agreement does not require consideration to support it under section 63 of the Contract Act. In the first place, this plea based on section 63 of the Contract Act was never put forward in the lower Courts.

In the second place, Exhibit II does not state that only four rupees will be claimed as yearly rent after the two years' period to which it specifically relates, and it only says that the *Faisal* rate will be enforced if a well is sunk and wet crops are raised. The fact that the plaintiff has been getting only four rupees a year afterwards, that is, his subsequent conduct, cannot be legally considered for the purpose of construing Exhibit I or Exhibit II.

In the third place, if it is to be treated as an agreement varying the contract under Exhibit I, it is not valid as there was no consideration for it. But if it is treated merely as a promise to remit a portion of the rents under section 63 of the Contract Act, it cannot affect the rents which fell due after the plaintiff revoked his promise to remit a portion of the rent. That a promise to remit made merely out of grace and not out of any legal obligation does not affect the right of the obligee to enforce his legal rights as regards payments due to him in future, has been held in *Radha Raman Chowdhry* v. *Bhowani Prosad Bhowmik* (2) in the judgment of Gupta, J., and also by Sir V. Bhashyam Aiyangar, J., in the case of *Karampalli Unnikurup* v. *Thekku Vittil Muthorakutti* (3), and we are prepared to follow the said decisions.

In the result, the lower Appellate Courts' decree is set aside and the District Munsif's decree is restored. As the plaintiff has succeeded only on his strict legal rights ignoring his promise made in Exhibit II and as he withdrew his claim for a declaration of his alleged right to levy even *Faisal nanjah* rates of *teerva* in certain circumstances (see 8th paragraph of the District Munsif's judg-

(1) 28 M. 328 at p. 330; 15 M. L. J. 14.

(2) 6 C. W. N. 60; 12 C. L. J. 139; 8 Ind. Cas. 790.

(3) 26 M. 195 at p. 196.

ment), we direct the parties to bear their respective costs throughout.

Appeal allowed; Suit decreed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1228 OF 1913.

June 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

ISHAN CHANDRA KAR—PLAINTIFF—PETITIONER

versus

RAM CHARAN PAL—DEFENDANT—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 28—Pleader and client—Oral agreement for payment of fees and expenses, validity of.

An oral agreement between a Pleader and his client for the payment of fees and litigation expenses is invalid and, therefore, unenforceable.

Civil Rule against the decision of the Munsif of Chandpur, dated the 8th July 1913.

Babu *Kritanta Kumar Basu*, for the Petitioner.

Babu *Jatindra Mohan Ghose*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside a decree of a Small Cause Court Judge, by which he has dismissed a suit brought by a Pleader against his client for recovery of money due on an agreement for payment of fees and litigation expenses. The case for the plaintiff is that he has been for many years past employed by the defendant to conduct his cases, and that the defendant agreed with him verbally to pay him in respect of each case a fixed retaining fee, besides such fees as might be leviable from the opposite party under the rules of Court, together with the actual expenses of litigation and a fee for his clerk. The plaintiff alleges that on accounts taken for the years 1908-1912, he has found that although the defendant has made payments from time to time, a sum of Rs. 83-10-0 is still due from him. He accordingly sues to recover this sum on the basis of the alleged agreement. The defendant contends that he never entered into the alleged agreement with the plaintiff, that if there was such an agreement, it was illegal and unenforceable, and that nothing is due from him as he has always paid the plaintiff in cash for his professional services. The Small Cause Court Judge has not investigated facts, but has dismissed the suit on the ground that the alleged agreement, even if it were established, could not be enforced. We are now invited to hold that the Small Cause Court Judge has taken an erroneous view of the scope of section 28 of the Legal Practitioners Act.

Section 28—we quote only so much of the section as is applicable to the present case—is in these terms: "No agreement entered into by any Pleader . . . with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such Pleader... shall be valid, unless it is made in writing signed by such person, and is, within fifteen days from the date on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done." This section, it is plain, completely covers the case before us. The plaintiff, a Pleader, sues to enforce an alleged oral agreement with his client for payment of his fees and incidental expenses for the conduct of his cases. The agreement is not vaild under section 28 of the Legal Practitioners Act and cannot consequently be enforced. An earnest endeavour, however, has been made to escape from the provisions of section 28 by reference to the terms of section 27, and reliance has been placed upon the cases of *Sarat Chandra Roy Chowdry* v. *Chandi Charan Mitra* (1); *Sarat Chunder Roy Chawdhry* v. *Chundra Kanta Roy* (2); *Razi-ud-din* v. *Karim Bakhsh* (3); *Raghunath Saran Singh* v. *Sri Ram* (4); *Rama* v. *Kunji*(5); *Krishnasami* v. *Kesava*(6) and *Subba Pillai* v. *Ramasami Aiyar* (7). Reference has also been made to sections 4, 6 and 9 of the English Attorney and Solicitors Act,

(1) 7 C. W. N. 300.
(2) 25 C. 805.
(3) 2 A. 169; A. W. N. (1890) 36.
(4) 28 A. 764; 3 A. L. J. 579 (F. B.); A. W. N. (1906) 235; 1 M. L. T. 242.
(5) 9 M. 375.
(6) 14 M. 63.
(7) 27 M. 512; 14 M. L. J. 274.

33 and 34 Victoria, Chapter 28, which, it is said, indicate the policy which underlies sections 28, 29 and 30 of the Legal Practitioners Act. The cases mentioned were reviewed by this Court in *Kamini Debi* v. *Khettra Mohan Ganguli* (8) and *Kamini Moni Debi* v. *Khetra Mohan Ganguli* (9), where it was pointed out that the language of section 28 is comprehensive enough to include every oral agreement between a Pleader and his client for the payment of fees for professional services and incidental expenses, and cannot be restricted by reference to section 27, which does not apply to such an agreement. We see no reason to doubt the correctness of the view taken in the two cases last mentioned, which has been accepted in *Mohendra Lal* v. *Akhil Chandra* (10). We are not disposed to accept the invitation of the petitioner to place a narrow construction upon section 28 and thus to fritter away the effect of a salutary provision of the law. The tendency of modern decisions clearly points in the opposite direction, for instance it was ruled in *Kattick Ramunni* v. *Udayamangalath* (11) that section 28 forbids all verbal agreements for the payment of fees between Pleaders and clients, and in *Game* v. *Kye* (12) it was held that the section applies to agreements for fees in respect of professional services by a Pleader, even where the business does not lie in any Court, civil or criminal. We hold accordingly that the oral agreement on which this suit is founded, is not valid and cannot be made the foundation for a decree against the defendant. In view of the frame of the suit, we need not consider whether the plaintiff could have succeeded on a claim for value of services rendered *quantum meruit*, or on a claim under section 70 of the Indian Contract Act for recovery of sums actually spent for the benefit of the defendant.

The Rule is discharged with costs, three gold *mohurs*.

Rule discharged.

(8) 11 Ind. Cas. 382; 15 C. L. J. 690; 15 C. W. N. 681.
(9) 13 Ind. Cas. 43; 15 C. L. J. 660; 17 C. W. N. 45.
(10) 20 Ind. Cas. 47; 20 C. L. J. 424.
(11) 14 Ind. Cas. 279; (1912) M. W. N. 524.
(12) 19 Ind. Cas. 209; 7 L. B. R. 6; 6 Bur. L. T. 18.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1548 OF 1913.

October 30, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL BY THE COLLECTOR OF GUNTUR—DEFENDANT—APPELLANT

versus

MIKKELINENI CHINNA VENKATA SUBBAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Ryot *petitioning Government to remit assessment in respect of land to be used by him for cattle-shed and farm-house—Remission granted—Land not excluded from* patta—Ryot's *interest in land not extinguished.*

The plaintiffs petitioned Government to allow them to use 45 cents of *their own land free of assessment* for the purposes of a cattle-shed and a farm-house in connection with their adjoining lands. This request was granted and in the next *patta* 45 cents of land was included, although the assessment was deducted from the total amount payable:

Held, that the plaintiffs did not give up their interest in the land and place it at the absolute disposal of Government.

Kattai Mahammad Meera Mohideen v. *Secretary of State for India*, 13 M. L. J. 269, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Appeal Suit No. 57 of 1911, preferred against that of the District Munsif of Tenali, in Original Suit No. 402 of 1909.

The *Government Pleader*, for the Government.

Mr. *V. Ramadoss*, for the Respondents.

JUGDMENT.—It is admitted that the suit land was the property of plaintiffs' family in 1857, and the lower Appellate Court has found that they did not then give up their interest in it and place it at the absolute disposal of Government. The Government Pleader argues that the lower Appellate Court has wrongly interpreted the facts and relies on *Kattai Mahammad Meera Mohideen* v. *Secretary of State for India* (1). The facts in that case are very different from those in the present case. In that case the *ryots* at the time of Settlement petitioned the Collector to remit the assessment on certain of their lands, in order that the land should be used for village house site. This was accordingly done and the lands were classified with the knowledge of the *ryots* in the Settlement Registers as village site *poramboke*, and it

(1) 13 M. L. J. 269.

was held that the *ryot's* private rights in the lands were extinguished.

In the present case it appears that plaintiffs' family were much inconvenienced in their agricultural work by the fact that a canal had been newly excavated between their lands and the village. They accordingly petitioned Government to allow them to use 45 cents of their *own land free of assessment* for the purposes of a cattle-shed and a farm-house in connection with their other adjoining lands. This request was granted and in the next *patta*, Exhibit A, the 45 cents of land was included although the assessment, as it was, was deducted fromthe total amount payable.

There is, therefore, no analogy between the two cases: and the finding of the Subordinate Judge cannot be regarded as illegal.

The second appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 250 OF 1912.

July 21, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

GOBINDA CHANDRA SAHA AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

DWARKA NATH PATITA—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 106, 107, 116—Lease—Yearly rent fixed—Period of tenancy not settled—Holding over—Nature of tenancy—Registration of lease—Presumption—"Agreement to the contrary," meaning of—Notice sent by post—Calculation of period of notice—Duty of service of notice excluded—Day of expiry taken into account—On what date notice should expire—Notice signed by am-mukhtear, *validity of—Post mark—Genuineness—Presumption—Evidence of date and place of stamping—Date of letter—Date of posting—Date of tender of postal article to addressee—Date of delivery—Evidence—Time of trains—Matter of public notoriety—Court, notice by—Letter refused—Proof of refusal—Indorsement by postal peon, value and proof of—Presumption of fact—Evidence Act (I of 1872), ss. 16, 32, 33, 114.*

Certain premises were rented by an unregistered lease. A yearly rental was fixed, but the period during which the tenancy was to continue was not settled. The tenant, however, continued in possession for several years and the landlord accepted rent from him:

Held, that the tenancy was for one year only and the legal effect of its being held over was that it was renewed from month to month and was, therefore, terminable by the lessor by 15 days' notice,

The presumption of a yearly taking does not always arise from the rent being payable yearly.

"An agreement to the contrary" within the meaning of section 116, Transfer of Property Act, means an agreement as to the terms of the holding over.

A tenancy for one year coupled with an express or implied agreement to renew it from year to year cannot be created except by a registered agreement.

In calculating the fifteen days' notice mentioned in section 106, Transfer of Property Act, the day on which the notice is served is excluded, but the day on which it expires is taken into account. The notice must expire with the end of a month of tenancy.

A notice under section 106, Transfer of Property Act, is valid if signed by the *am-mukhtear* of the landlord.

A post mark is presumed to be genuine and when taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears and that the place or office mentioned therein was actually the place where it was affixed.

The date of a letter is not necessarily the date of its posting.

An article sent by post is presumed to be delivered to the addressee in due course of post, but to fix the date of its tender to the addressee the usual course of mail between the place of posting and the place of receipt must be ascertained from evidence, inasmuch as a Court cannot take as matters of public notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time and other facts involved in such an inquiry.

The date of delivery of an article sent by mail cannot necessarily be inferred from the post mark of the receiving office, more so in the case of registered articles which are delivered by the post office only on specified days and between specified working hours.

An endorsement on the cover of a letter by a postal peon that the cover was tendered to the addressee on a certain date and was refused, is at best a record of a statement by the peon and the events recited therein must be proved by calling him as a witness, unless, the statement becomes admissible under section 32 (2), or section 33 of the Evidence Act applies.

Such an endorsement is not admissible even as a statement made by a Public Officer in the discharge of his duty.

Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the Postal Authorities does not justify the presumption that it has been so returned because it has been refused by the addressee; for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date.

The presumption mentioned in section 114 of the Evidence Act is not a presumption of law but a presumption of fact.

GOBINDA CHANDRA SAHA *v.* DWARKA NATH PATITA.

Therefore, where the addressee pledges his oath that a certain cover was never tendered to him, the presumption of regularity of official business cannot be treated as conclusive against him.

Appeal against the decree of the Subordinate Judge of Dacca, dated the 1st March, 1913.

Babus *Baidya Nath Dutta*, *Benode Behari Mukerjee* and *Satindra Nath Mukerjee*, for the Appellant.

Babus *Gunada Charan Sen*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in a suit for ejectment of the defendant, on the allegation that he held as a tenant of the disputed premises from month to month and had failed to vacate the land inspite of service of notice to quit. The defendant resisted the claim on the ground that his tenancy had not been validly terminated. The Subordinate Judge has given effect to this contention and has dismissed the suit. On the present appeal, three points have emerged for consideration, namely, *first*, was the defendant, as alleged by the plaintiffs, a tenant from month to month, entitled only to fifteen days' notice to quit; *secondly*, was the notice in proper form; and, *thirdly*, was the notice served in accordance with law?

As regards the first question, the case for the defendant is that he took the premises from the commencement of the Bengali year 1306, that the rent was fixed at Rs. 275 a year, and that the period during which the tenancy was to continue was not settled. It is plain that the defendant became a tenant for one year only for a rent of Rs. 275 because, under section 107 of the Transfer of Property Act, which was in force when the tenancy was constituted, a lease of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent could be made only by a registered instrument. The position, consequently, was that the tenancy would, in ordinary course, expire at the end of the year 1306. The tenant, however, continued in occupation, and the landlords accepted rent from him for 1307; in other words, the tenant held over, the legal effect whereof is deducible from section 116 of the Transfer of Property Act. That section—we quote only so much of it as is applicable to the present case—is in these terms: "If a lessee.....of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee.....or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106." In the case before us, the lease was neither for agricultural nor for manufacturing purposes within the meaning of section 106, as the defendant had taken the property for a stationery shop. The lease was consequently renewed, *prima facie*, from month to month. The question next arises, whether there was "an agreement to the contrary" within the meaning of section 116. As was pointed out by Maclean, C. J., in *Troilokya Nath Roy* v. *Sarat Chandra Banerjee* (1), the agreement mentioned means an agreement as to the terms of the holding over. Now, there is no proof of an express agreement as to the terms on which the tenant was to hold over. But it is argued that as the rent was originally agreed to be an annual rent, there was an implied agreement that if the tenant held over, he should hold over from year to year. This argument is obviously fallacious. Let us assume that the mode in which the rent is expressed to be reserved, for example, at so much a year, affords a presumption that the tenancy is of a character corresponding to it: *Wilkinson* v. *Hall* (2); though it is plain that the rule is not of universal application and the presumption of a yearly taking does not always arise from the rent being payable yearly: *Atherstone* v. *Bostock* (3); *Wilson* v. *Abbott* (4). The argument for the defendant in substance is that the lease was for one year, coupled with an implied agreement that the tenant would hold over from year to year; this in substance would be a lease from year to year, which under section 107 could not be created except by a registered instrument. In fact, this is an ingenious

(1) 32 C. 123 at p. 127; 8 C. W. N. 901.

(2) (1837) 3 Bing. (N. C.) 508; 43 R. R. 723; 4 Scott. 301; 3 Hodges 56; 6 L. J. C. P. 82; 132 E. R. 506.

(3) (1841) 2 M. & G. 511; 10 L. J. C. P. 115; 2 Scott (N. R.) 637; 1 Drink. 96; 133 E. R. 850.

(4) (1824) 3 B. & C. 88; 4 D. & R. 693; 2 L. J. (O. S.) K. B. 215; 107 E. R. 667.

attempt to substitute for a lease from year to year] a tenancy for one year coupled with an agreement to renew it from year to year: *Mati Lal* v. *Darjeeling Municipality* (5). We hold accordingly that there was no "agreement to the contrary" within the meaning of section 116, and that after the expiry of the year for which the tenancy took effect, it was renewed from month to month: *Debendra Nath* v. *Syama Prosanna* (6); *Durgi Nikarini* v. *Gobardhan Bose* (7). Under section 106, this tenancy was terminable by the lessors by fifteen days' notice expiring with the end of a month of the tenancy.

As regards the second question, two objections have been taken to the form of the notice, namely, *first*, that the notice, which was dated the 16th *Baisakh* 1318 and may, for the present purpose, be assumed to have been served on that date, called upon the defendant to vacate the premises 'within' (that is, not later than) the 31st *Baisakh* 1318; and *secondly*, that the notice was signed on behalf of the first plaintiff by one Bharat Chandra De. These objections are manifestly groundless. A notice served on the 16th *Baisakh* which calls upon the tenant to quit on the 31st *Baisakh* (the last day of the month) gives the tenant fifteen days' notice, excluding the day on which the notice is served and expiring with the end of a month of the tenancy. The case of *Subadini* v. *Durga Charan* (8), upon which much stress has been laid by the defendant, is clearly distinguishable. In that case, the notice was served on the 16th *Falgoon* and required the tenant to quit the land on the 30th *Falgoon*. It was contended on behalf of the landlord that if the day on which the notice was served was taken into account, the tenant had fifteen days' notice. This contention was overruled, and it was held that he had only fourteen clear days' notice, while he was entitled under section 106 to fifteen clear days' notice. It is plain that the learned Judges took into account the day on which the notice was to expire and excluded from calculation only the day on which the notice was served. The learned Judges plainly could not have intended to use the expression 'clear days' in its technical sense that the time is to be reckoned exclusive of both the first and last days: *Rex* v. *Herefordshire* (9); *Liffin* v. *Pitcher* (10). The judgment, taken as a whole, indicates conclusively that when they laid down that the fifteen days' notice mentioned in section 106 meant fifteen clear days' notice, they never intended to hold that, in calculating the fifteen days, the day on which the notice is served as also the date on which the notice expires are both to be excluded. This is in accord with what may be taken as the well-settled rule on the subject: *Doe d King* v. *Grafton* (11); *Doe d Cornwall* v. *Matthews* (12); *Poole* v. *Warren* (13). The contention that the notice was not a fifteen days' notice to quit must consequently be overruled.

The second objection that the notice was not signed by the first plaintiff is equally untenable. Section 106 requires the notice to be in writing, signed by or on behalf of the person giving it. The notice in this case was signed by Bharat Chandra De, *am-mukhtear* of the first plaintiff, Haridas Saha. The power-of-atterney has not been produced, but the defendant admitted that he was the *am-mukhtear*. The objection is clearly untenable, as the notice was signed by an authorised agent.

As regards the third question, we have to consider whether the notice was served in accordance with the second paragraph of section 106, which provides as follows: "Every notice under this section must be in writing, signed by or on behalf of the person giving it and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property." In this case, attempt was made by the plaintiffs to comply with the requirements of the law by forwarding the notice to the defendant in a registered cover through the Post Office. The cover was ultimately returned to the plaintiffs by the Postal Authorities on the

(5) 18 Ind. Cas. 844; 17 C. L. J. 167.
(6) 11 C. W. N. 1124.
(7) 24 Ind. Cas. 183; 20 C. L. J. 448.
(8) 28 C. 118; 4 C. W. N. 790.

(9) (1820) 3 B. & Ald. 581; 106 E. R. 773.
(10) (1843) 1 Dowling (N. S.) 767; 6 Jur. 537.
(11) (1852) 18 Q. B. 496; 88 R. R. 678; 21 L. J. Q. B. 276; 16 Jur. 833; 19 L. T. (o.s.) 108; 118 E. R. 188.
(12) (1851) 11 C. B. 675; 87 R.R. 749; 138 E.R. 640.
(13) (1838) 8 A. & E. 582 at p. 587; 3 N. & P. 693; 3 Jur. 23; 112 E. R. 959.

GOBINDA CHANDRA SAHA *v.* DWARKA NATH PATITA.

allegation that the addressee had refused to accept it. The cover, with the notice contained therein, has been produced in the course of the trial. There is no oral evidence to show when the cover was posted, nor has the postal peon been examined to prove when and where the cover was tendered to the defendant. The only oral evidence on the subject is a statement by the agent of the plaintiffs, who pledges his oath that he had given notice by a registered cover. The defendant, on the other hand, asserted in the course of his deposition that the cover in question had never been tendered to him. In these circumstances, the question requires consideration whether the plaintiffs have proved that the notice was tendered either personally to the defendant or to one of his family or servants at his residence at least fifteen days before the expiry of the month of *Biasakh*, that is, not later than the 16th *Baisakh*. The evidence for the determination of this question consists of the envelope and its contents (the notice). The notice on the face of it, is dated the 16th *Baisakh* 1318. The envelope is addressed to the defendant "Dwarkanath Patita, P. O. Narayanganj, Bhagawanganj Bazar, Nij Gadi." In a corner is the following endorsement; "from Madanganj, Gobinda Chandra Saha" (the second plaintiff). On the three postage stamps affixed to the envelope, we have what purport to be impressions of the seal of the Madanganj Post Office; each bears date the 29th April 1911 which corresponds to the 16th *Baisakh* 1318. We have also a very faint and almost illegible impression of the seal of the Narayanganj Post Office, dated the 29th April 1911. We have further an impression of the seal of the Madanganj Post Office, dated the 1st May 1911. In addition, we have two endorsements on the cover in the following terms: (1) "This letter returned as the addressee refused to recieve it. No. 5. 29th April, 1911." (2) "Refused and returned to sender, J. C. G. 1st May, 1911.'

The first of these endorsements is in Bengali and the second is in English. The first point for determination is, when was the letter posted? There is, as we have said, no oral evidence on the subject, and we are left entirely to the post marks on the envolope. The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises, may it be inferred from the presence of what purports to be the official mark that the mark was genuinely affixed by an officer of the Post Office concerned? This is a question of authentication and may be answered in the affirmative, though there has been some fluctuation of judicial opinion on the subject. In *Rex* v. *Johnson* (14) an objection to the use of an Irish post mark as evidence of a posting in Ireland, to the effect that "there was no evidence that either of the papers was received from the Post Office which might have been ascertained by the persons employed in that office," was not sanctioned. In *Rex* v. *Waston* (15) a post mark was held not sufficient to show posting at the place named. In *Arcangelo* v. *Thompson* (16) a post mark was assumed genuine in proving receipt of a letter in a certain year. In *Rex* v. *Plumer* (17) Post Office marks were used to show that a letter came to a particular office, and similarly in *Hitchon* v. *Best* (18) a post mark was presumed to be genuine. In *Fletcher* v. *Braddyll* (19) a Post Mistress was called to identify a post mark. In *Abbey* v. *Lill* (20) Gaselee, J., said: "Where it is disputed, it ought, perhaps, to be proved, though what might be deemed to amount to proof is not clear." In *Warren* v. *Warren* (21) the Post Master of one of the offices was called to prove the post mark. In *Shipley* v. *Todhunter* (22) and *Stocen* v. *Collen* (23) post marks were presumed genuine. But in *Woodcock* v. *Houldsworth* (24) it was said that some witness must prove the post mark. In the United States there are cases in which post marks have been presumed genuine: *New Haven* v. *Mitchell* (25); *Burgess* v. *Clark* (26). The preponderence of judicial authority

(14) (1805) 7 East 65 at pp. 66, 70; 3 Smith 94; 8 R. R. 597; 103 E. R. 26.
(15) (1808) 1 Camp. 215.
(16) (1811) 2 Camp. 620 at p. 623; 12 R. R. 758.
(17) (1814) Russ. & R. 264; 15 R. R. 741.
(18) (1819) 2 B. & B. 299; 129 E. R. 737.
(19) (1821) 3 Stark. 64; 23 R. R. 758.
(20) (1829) 5 Bing. 299 at p. 304; 2 M. & P. 534; 7 L. J. (o. s.) C. P. 96; 130 E. R. 1076.
(21) (1834) 1. C. M. & R. 250; 4 Tyr. 850; 3 L. J. (N. S.) Ex. 294; 40 R. R 547.
(22) (1836) 7 C. & P. 680 at p 686.
(23) (1841) 7 M. & W. 515; 9 Car. & P. 653; 10 L. J. Ex. 227; 56 R. R. 785.
(24) (1846) 16 M. & W. 124; 16 L. J. Ex. 49.
(25) (1842) 15 Conn. 206 at p. 225.
(26) (1851) 3 Ind. 250.

is in favour of the view that what purports to be the impression of a Post Office seal on an envelope which has been posted, may be presumed to be genuine, at any rate where its genuineness is not expressly questioned.

In the second place, the question arises whether if the post mark be taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears. The answer has been given in the affirmative. In *Canning's Trial* (27) a post mark, verified as authentic by the clerk, was admitted to show that the cover passed through the office on the date of the mark. In *Fletcher* v. *Braddyll* (19) a post mark was used to show that the letter existed on the date thereof. In *Abbey* v. *Lill* (20) a post mark on the cover was used to show that the enclosed letter was wrongly dated. In *Stocken* v. *Collen* (23) a post mark was used to show the hour of posting a notice. These cases show that the post mark, when proved or assumed to be genuine, implies an assertion that the date on the mark is the date of affixing it.

In the third place, on the same principle the post mark is evidence that the place or office mentioned therein was actually the place where it was affixed: *Canning's Trial* (27); *Rex.* v. *Johnson* (14). We may, consequently, infer from the date in the three post marks on the three postage stamps on the cover, that the letter was posted at Madanganj on the 29th April 1911. It is necessary to rely on the date in the post marks, because the mere fact that the notice is dated the 29th April 1911 does not show that it must have been posted on the same date; as was said in *Phelan* v. *N. W. Life Insurance Co.* (28), experience indicates no such uniform connection between the date of a letter and the time of its mailing as to raise an inference that a letter was posted on the day of its date.

The next question which requires consideration is, when was the cover tendered to the addressee? For this purpose it would be necessary to know the usual course of mail between the place of posting and the place of receipt, for the inference is that the article posted was delivered in due course of post: *Pitts* v. *Hartford* (29). We have here no evidence on the subject, and the Court cannot take as matters of public notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time, and other like facts involved in such an inquiry: *Wiggins* v. *Burkham* (30). We are, therefore, obliged to rely upon the date in the post mark of the Narayanganj Post Office. This shows that the cover reached that office on the very date it was posted at Madanganj *i. e.* 29th April 1911; but it does not follow that it was tendered to the addressee on the same date; as was said in *Early* v. *Preston* (31), the date of delivery of an article sent by mail cannot necessarily be inferred from the post mark of the recieving office. This observation applies with special force to registered articles which are delivered by the Post Office only between specified working hours. The plaintiffs are, consequently, driven to rely upon the vernacular endorsement on the cover, and this leads to the question whether that endorsement is admissible in evidence. The endorsement is not signed; but it is urged that it must have been made by the peon No. 5 who was probably entrusted with the delivery of the letter to the addressee. Assume the endorsement to be genuine, but still there remains the question whether it is admissible in proof of the fact recited therein, namely, that the cover had been tendered to the addressee on the 29th April 1911 and had been refused by him. This plainly is at best a record of a statement by the peon. Such a statement would have been admissible under section 32 (2) of the Indian Evidence Act, if it had been proved that the peon was dead or could not be found or had become incapable of giving evidence or that his attendance could not be procured without an unreasonable amount of delay or expense. No foundation, however, has been laid for the reception of the evidence under section 32 (2). The only other section which deals with statements by persons who cannot be called as witnesses, namely, section 33, has no application. Nor can any assistance be derived from the group of sections relating to statements made

(27) (1754) 19 How. St. Trial 370.
(28) (1889) 113 N. Y. 147; 10 Am. St. Rep. 441.
(29) (1895) 66 Conn. 876; 50 Am. St. Rep. 96.
(30) (1869) 77 U. S., 10 Wallace 129; 19 Law Ed. 884.
(31) (1855) 1 Patt. & H. 228.

under sepcial circumstances. It cannot be argued with any show of reason that the endorsement is admissible because it is a statement made by a public officer in the discharge of his duty; our attention has not been drawn to any provision of the Indian Evidence Act, which would make a statement admissible on such a ground; indeed, if such a ground for admission of evidence was recognised, section 32 (2) would be superfluous. The inference follows accordingly that the vernacular endorsement on the cover mentioned above is not admissible in evidence in proof of the allegation that the cover was tendered to and refused by the addressee on the 29th April 1911. But it has been argued that this view is opposed to the decision in *Jogendro Chunder* v. *Dwarka Nath* (32). That case, however, if it be assumed to have been correctly decided, is clearly distinguishable. There a suit was brought for ejectment of a tenant of an agricultural holding, and the question arose whether the tenancy had been terminated by service of notice to quit. The plaintiffs alleged that they had sent a notice to the defendant in a registered cover, duly posted, which had been returned to them by the postal authorities on the allegation that it had been refused by the addressee. The Courts below held that these facts were proved, but it does not transpire from the judgment, on what evidence this conclusion was based; both Courts, however, held that there was no service of notice, as the defendant had not opened the letter and become acquainted with its contents. The plaintiffs appealed to this Court on the ground that the bare fact of refusal to take and open the registered cover did not entitle the defendant to plead non-service of notice. In the course of the argument for the appellants in this Court, reference was made by their Counsel to section 16, illustration (*b*), of the Indian Evidence Act and to the cases of *Papillon* v. *Brunton*(33) and *Lootf Ali* v. *Pearee Mohun*(34); the attention of the Court was also drawn to evidence of service of notice; we have not been able to ascertain what particular evidence of service had been given, as after this lapse of time the record must have been destroyed. On the evidence on the record and on the arguments mentioned, the Court made the following observation: "The service of the notice in another form (that is, other than service by actually handing the notice) was, however, proved, having been effected by a registered letter, the posting of which was proved and which was produced in Court in the cover in which it was despatched, that cover containing the notice, with an endorsement upon it purporting to be by an officer of the Post Office stating the refusal by the defendant to receive the document. Upon the cases cited before us —*Lootf Ali* v. *Pearee Mohun* (34) and *Papillon* v. *Brunton* (33)—and having regard also to section 16 illustration (*b*),of the Evidence Act, we think that only a captious doubt could lead us to regard that service as insufficient." It has been argued that the learned Judges held solely on what purported to be an endorsement by an officer of the Post Office that the cover had been tendered to and refused by the addressee. If the learned Judges intended to lay this down as a matter of law, it is worthy of note that the question of the admissibility of the endorsement was not argued before them; if there was evidence to show that the peon was dead or not available, the endorsement might be admissible under section 32 (2) of the Indian Evidence Act. In the absence of information as to evidence of service of notice to which the attention of the Court was drawn, we are not prepared to treat the decision as a binding authority in support of the proposition, that an endorsement of the description now before us is admissible in evidence though the requisite conditions for admissibility mentioned in section 32 have not been fulfilled. We may further point out that the wide interpretation suggested by the plaintiffs is not justified by the authorities mentioned in the judgment. Illustration (*b*) to section 16 is in these terms: "The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant." This is very different from the assertion that if the letter is returned with a note thereon by the peon that it had been tendered to and refused by the addressee, the inference follows that it was so actually tendered and refused. The case of *Lootf Ali* v.

(32) 15 C. 681.
(33) (1860) 5 H. & N. 518; 29 L. J. Ex. 265; 120 R. R. 704.
(34) 16 W. R. 223.

Pearee Mohun (34) was decided before the Indian Evidence Act came into force and cannot be treated as an authority on the question of the admissibility of evidence under section 32 (2); but the facts are so meagrely stated in the judgment that, even treated as such authority, it is quite inconclusive; all that appears is that one of the plaintiffs sent a notice to the defendant in a cover which was refused by the addressee, came back to the hands of the sender and was produced in Court. What evidence there was on the point does not appear, but we have the following observation in another part of the judgment: "that letter was forwarded to him by post duly registered and we must presume that it was tendered to him; he, therefore, cannot take advantage of his refusal to take it." The case of *Papillon* v. *Brunton* (33) was of a very different character. There the tenant posted a notice to the agent of the landlord on the morning of the 25th March 1859. The agent was in his office until 6 or 7 o'clock in the evening; he did not receive the letter, but found it the next morning. The jury found upon all these circumstances that as the letter had been posted in the morning and had to be carried from Waterloo Place to the Temple, it must have reached the office of the agent the same evening, probably after he had left. An application was made to set aside this verdict, but the Exchequer Chamber declined to grant a rule. This, again, is clearly a very different case from that of *Jogendro Chunder* v. *Dwarka Nath* (32). It may be further observed that in a case under the Transfer of Property Act, *Subadini* v. *Durga Charan* (8), where reference is made to *Rajoni Bibi* v. *Hafisonnissa Bibi* (35), it was said that service of notice by a registered letter through the Post Office is not necessarily a non-compliance with the provisions of section 106, if there is evidence that the peon tendered or delivered the notice either personally to the party or to one of his family or to his servant. In both these cases, receipts signed by the addressees were produced, and that clearly was sufficient proof of good service. The case of *Ismail Khan* v. *Kali Krishna Mondal* (36) does not carry the matter further than *Jogendro Chunder* v. *Dwarka Nath* (32). Finally, the decision in *Jogendro Chunder* v. *Dwarka Nath* (32) is no uthority for the proposition that the cover must be assumed to have been tendered to the addressee on the particular date, if any, which the endorsement may bear. Neither in *Jogendro Chunder* v. *Dwarka Nath* (32) nor in *Lootf Ali* v. *Pearee Mohun* (34) did any question arise as to the particular date on which the notice had been served. On that question no assistance can be derived from the principle embodied in section 16 of the Indian Evidence Act, namely, that when there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done is a relevant fact. In the case before us, the plaintiffs can succeed only upon proof that on the 29th April 1911, the cover was tendered either personally to the defendant or to one of his family or servants at his residence and was refused by the defendant. The vernacular endorsement is not admissible for this purpose and cannot be treated as evidence of the events recited therein. Nor would section 114 of the Indian Evidence Act and illustration (*f*) thereto, which are mentioned in the case of *Mir Tapurah Hossein* v. *Gopi Narayan* (37), be sufficient to remove the difficulty in the way of the plaintiffs; even if we presume it as likely that the cover was tendered to the addressee, we cannot assume that it was so tendered on the 29th April 1911, yet such assumption is essential for the success of the plaintiffs. Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee; for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date. We may further point out that the presumption mentioned in section 114 is not a presumption of law but a presumption of fact,

(35) 4 C. W. N. 572.
(36) 6 C. W. N. 134 at p. 137.
(37) 7 C. L. J. 251 at p. 258.

and where, as in this case, the defendant pledges his oath that the cover was never tendered to him, we cannot treat the presumption of regularity of official business as conclusive against him. We have finally the not unimportant fact that the cover was addressed to the defendant at his *gadi* or place of business; there is nothing to show that that was his residence within the meaning of section 106. We are, consequently, of opinion that the plaintiffs have failed to prove that the notice was duly served on the defendant.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 457 OF 1912.

December 12, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

MAHBUB ALI, MINOR, THROUGH HIS MOTHER, *Musammat* SAHIBO, AND OTHERS—DEFENDANTS—APPELLANTS

versus

TAJ KHAN, MINOR, SON OF MUHAMMAD KHAN—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 112—Legitimacy—Son born seven months after marriage—Punjab Land Revenue Act (XVII of 1887), s. 44—Presumption of entries—Burden of proof.

Where a boy was born about seven months after his father and mother were lawfully married and it was not disputed that they had had opportunity of access to each other at a time when he could have been begotten of them:

Held, that the boy was the legitimate son of his parents.

Where mutation has been effected in favour of *A* as the legitimate son of *B*, the burden of proving the illegitimacy of *A* will lie upon the person affirming it.

First appeal from the decree of the District Judge, Attock, dated the 28th February 1912, decreeing the claim.

Mr. *Bhagat Ram Puri*, for the Appellants.

Mr. *Beechey*, for the Respondent.

JUDGMENT.—The following tree will be of assistance in understanding the facts to which reference will hereafter be made :—

MUHAMMAD KHAN had two wives,

Musammat Mulk Bano, — *Musammat* Bibi Rakhia,

Inayat Ali Khan. — Taj Khan.

The family are very influential members of the *Khattar* tribe of the Attock *Tahsil* and own large landed estates in *Mauza* Wah. Inayat Ali Khan (whose property is now in dispute) was a *Subedar* in the 7th Punjabis and was about twenty-three years of age when he died on the 31st October 1910.

Shortly after his death Muhammad Ashraf Khan (also known as Kala Khan), *sarbrah lambardar*, informed the *patwari* that the deceased's son, Mahbub Ali, was in possession of his father's property and applied on his behalf (Mahbub Ali being then a child of about three years of age) for mutation of names in his favour. The *patwari*, on the 19th November 1910, duly reported the matter to his official superiors, and on the 7th April 1911, the *Naib* Tahsildar, acting upon the statements made by the said Muhammad Ashraf Khan and Muhammad Akbar Khan, *Rais* of *Mauza* Wah, sanctioned mutation of names in favour of Mahbub Ali Khan, the deceased's alleged son.

Prior to this order in January 1911, a dispute arose as to the person who should be appointed *lambardar*, the claimants being Taj Khan, the deceased's half-brother, and the minor, Mahbub Ali Khan, who was put forward as the son of the deceased, and in the course of the proceedings before the Deputy Commissioner, *Musammat* Bibi Rakhia, the step-mother of the deceased and the mother of Taj Khan, made a statement to the effect that her own son was entitled to the post, inasmuch as the minor son of Inayat Ali Khan was born five months after Inayat Ali Khan had contracted marriage (*nikah*) and of a mother who was a *Kashmiri* by birth, and it was "not consistent with the practice in the family that the son of a woman of a different tribe should be appointed a *lambardar*." At this time Taj Khan was also a minor and his mother was appearing on his behalf as his next friend.

The order of the Deputy Commissioner is set out at page 30 of the paper-book. In the course of it, that officer remarked—"The objection to Mahbub Ali is that his mother is said to be a woman of low caste, a *Kashmiri*, and hence the family members press for the appointment of Taj Muhammad. But Muhammad Ashraf Khan who is of the

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same branch of the family as Inayat Ali Khan, deceased, and is acting as *sarbrah lambardar*, asks that Mahbub Ali be appointed. On page 6 of the Customary Law of the Rawalpindi District, it is stated that amongst *Khattars* (to which tribe the parties belong) the sons of women of inferior rank and different tribes to their husbands succeed equally with those of the same or superior rank." As a result, the Deputy Commissioner (by order, dated 23rd March 1911) appointed Mahbub Ali Khan, *lamlardar*, and directed that Muhammad Ashraf Khan should continue to act as his *sarbrah*.

Mutation of names having been effected in favour of, and the post of *lambardar* conferred upon, the minor, Mahbub Ali Khan, Taj Khan, through his mother, *Musammat* Bibi Rakhia (*alias* Bahoti), on the 15th June 1911 instituted the present suit and prayed for a declaratory decree to the effect that the plaintiff was the sole heir of Inayat Ali Khan, deceased; and that defendant No. 1, Mahbub Ali, was not the son, and that defendant No. 2, *Musammat* Sahibo, was not the lawful widow of the said deceased.

As mutation of names had been effected before the date of suit in favour of defendant No. 1 and as possession of the deceased's property was presumably with him, it is somewhat surprising to find that no objection was taken to plaintiff's claim for a mere declaratory decree. But no such objection was taken and defendants merely traversed the plaintiff's allegations as to their respective status.

Upon the pleadings of the parties, the following issues were framed by the District Judge, *viz.* :—

(1) "Is *Musammat* Sahibo the wedded wife of Inayat Ali Khan, deceased?

(2) Is Mahbub Ali Khan the legitimate son of Inayat Ali Khan?

(3) In the event of issues Nos. 1 and 2 being found in favour of the defendants, whether according to custom, they are entitled to maintenance only and are not lawful heirs of the deceased?

(4) Did Inayat Ali Khan, deceased, by any deed or action recognize the defendants as his son and wife respectively, and can plaintiffs consequently raise no objection now on that account?

The burden of proof as regards these issues was laid upon defendants, despite the fact that mutation had been effected in favour of defendant No. 1 and there was thus the presumption arising in his favour of the correctness of the entries in the revenue papers (section 44 of the Punjab Land Revenue Act, 1887). The parties, however, were not prejudiced by this error on the part of the Court so far as the production of evidence was concerned, and it is not contended that plaintiff could have produced further evidence had it been realized that in point of law, it was for him to establish the illegitimacy of defendant No. 1 rather than for the latter to prove his legitimacy.

After a somewhat protracted trial, the District Judge delivered judgment on the 28th February 1912 in favour of plaintiff, to whom he granted the decree prayed for. The grounds upon which the learned Judge based his conclusions are, briefly, as follows:—

(*a*) Fakira is alleged to have been one of the witnesses who were present when the *nikah* ceremony between the deceased and *Musammat* Sahibo was performed, and yet Muhammad Ashraf (*alias* Kala Khan) when examined on the 1st August 1911 (page 34 of the paper-book) stated that he did not know who the witnesses to the *nikah* were.

(*b*). The evidence of Abdul Rahman, *Nikah Khwan*, who deposes that he officiated at the *nikah*, "is largely discounted by the fact that he admits having written a letter (Exhibit P 2) to the defendants' agent with regard to this marriage, saying that he knew nothing of it."

(*c*). No entry regarding the marriage was made in the register of marriages admittedly kept by Abdul Rahman, and the explanation of the omission given by that witness is "highly unsatisfactory."

(*d*). *Musammat* Sahibo deposes that Inayat Ali Khan came home on leave 2 or 3 days before the *nikah* ceremony took place, whereas his "Leave Register" (Exhibit P 5), shows that he took leave on the 15th October 1905, and the *nikah* could not have been performed until after the expiry of three months from the date when *Musammat* Sahibo was divorced by her first husband

(the 17th September 1905). Thus Inayat Ali Khan must have been at home at least two months before the *nikah* could have taken place.

(*e*). There is no mention whatever of any wife or son in Inayat Ali Khan's "Kindred Roll" (Exhibit P 5) which was verified on several occasions and finally on the 27th October 1910, a few days before his death. In that Roll, the person who is mentioned as the heir to whom his estate is to be made over is his half-brother, the plaintiff, while his mother, *Musammat* Tajwar Sultan, is mentioned as the person to whom his family pension is payable, no reference being made to either defendant No. 1 or defendant No. 2. Defendants have appealed to this Court and we have had the case fully and ably argued before us by Mr. Bhagat Ram Puri on their behalf and by Mr. Beechey on behalf of plaintiff-respondent. Aftercareful consideration of the arguments of these learned gentlemen and of the evidence on the record, we are unable to accept the conclusions of the District Judge. as we consider that defendants have succeeded in proving that a marriage actually took place between Inayat Ali Khan and *Musammat* Sahibo and that Mahbub Ali Khan is the legitimate issue of that marriage. Before proceeding to give our reasons for the finding, we may here observe that it is not now contended that a marriage between a *Khattar* and a *Kashmiri* woman is invalid or that a son born of such union would have rights inferior to those of a son born of a *Khattar* husband and *Khattar* wife. On the contrary, it is conceded that if Inayat Ali Khan actually married *Musammat* Sahibo and if Mahbub Ali Khan can be regarded as the legitimate son of Inayat Ali Khan, Mahbub Ali Khan must be held entitled to succeed to the whole of the deceased's property. The only two points now urged against the latter's claims are (1) that it has not been proved that a marriage took place between Inayat Ali Khan and *Musammat* Sahibo; and (2) that even if such marriage did take place, Mahbub Ali Khan, who was born on the 20th July 1906 (page 27 of paper-book), must have been conceived at a time when marriage between his father and mother was prohibited by the Muhammadan Law (*i. e.*, before the woman's period of *iddat* had expired), and must, therefore, be regarded not as the legitimate, but as the illegitimate, offspring of his parents. We shall deal with these two questions in due order.

The first question, then, is whether it has been established that a marriage ceremony actually was performed between Inayat Ali Khan and *Musammat* Sahibo.

The evidence, direct and circumstantial, in support of the alleged marriage is, we consider, fairly strong. There is, in the first place, the testimony of Abdul Rahman who is admittedly one of the *Nikah Khwans* of the village. He deposes that he officiated at the marriage ceremony and that the witnesses who were present on that occasion were three servants of the deceased, Gaman, Jiwan and Fakira, of whom the first two are dead, and the third has given evidence on defendants' behalf. The objections urged against Abdul Rahman's evidence are:

(1) that in his letter (Exhibit P 2) addressed to the defendants' guardian *ad litem* he stated that he had no knowledge about the marriage; and

(2) that though he admittedly keeps a marriage register, there is no entry therein regarding this particular *nikah*.

These objections when carefully examined have little or no weight. The District Judge, in attaching great importance to the letter in question, which he says largely discounts the value of the witness's evidence, has overlooked the very important fact that the letter, though addressed to Kala Khan (*alias* Ashraf Khan), never reached the addressee and has been produced curiously enough by the plaintiff's Pleader. Abdul Rahman has explained that the letter was written at the suggestion of *Musammat* Gulab Jan, plaintiff's sister, and the whole tenor of the letter shows clearly that considerable pressure was being brought to bear on the writer to keep him out of the witness-box. In this connection it is noteworthy that Kala Khan, when examined on the 1st of August 1911, stated the *Nikah Khwan* who performed the alleged ceremony was Abdul Rahman, and there is reason to suppose that Mr. Bhagat Ram's theory that the plaintiff's friends forthwith got hold of

Abdul Rahman and made him write the letter to Kala Khan, represents the actual facts. So far, therefore, from this letter telling in favour of the plaintiff, it seems to us to indicate that plaintiff's friends were actually endeavouring to tamper with the witnesses whom defendant relied upon. Then as to the absence of the entry relating to the marriage in the register, it is to be remembered that Inayat Ali Khan was a man of high caste and of an influential family while the woman with whom he contracted the marriage was a *Kashmiri* and the divorced wife of a man of no position. In the circumstances it is not surprising to find that as little publicity as possible was given to the ceremony which was performed in the presence, not of the husband's friends and relations, but of three menial servants. It was, we think, for this reason that no entry was made in the register and also that no mention was made by Inayat Ali Khan to his officers at the time when the entries in his Kindred Roll were filled up. The other witness who gives direct evidence in support of the marriage is Fakira, one of the three persons alleged by Abdul Rahman to have been present at the marriage. We see no reason to disbelieve this witness who gave his evidence seemingly in a straightforward manner and was in no way shaken on cross-examination. The District Judge remarks that Kala Khan made no mention of Fakira when he was asked on the 1st August 1911 the names of the persons who were present at the ceremony. No doubt this is so, but it is to be remembered that Kala Khan himself was not present on the occasion in question and it may be that he was at that time somewhat chary of disclosing the names of his witnesses to the other side. We have carefully examined the evidence of the above-mentioned two persons and also such criticisms thereon as Mr. Beechey had to offer, and we see no good ground for refusing to believe them when they state that the *nikah* took place and that they were present at it.

As regards the indirect evidence which lends support to the defendants' case, we have first of all the statement made by *Musammat* Bibi Rakhia in the *lambardari* proceedings. At that time it is quite clear both from her own statement and from the order passed by the Deputy Commissioner on the 23rd March 1911 that the marriage between Inayat Ali Khan and *Musammat* Sahibo was not challenged, and that the sole contention then was that the son of a wife who was of inferior rank and of a different tribe to her husband was not eligible for appointment to the vacant post of *lambardar* (see pages 28 and 30 of the paper-book).

Next, we have the admitted fact that Inayat Ali Khan's father, Muhammad Khan, actually induced *Musammat* Sahibo's former husband, Fakira (who is not to be confused with the witness above-mentioned). to divorce her by paying him a sum of Rs. 120. It is said that Muhammad Khan secured this divorce in order to protect his son, who was *Subedar* of his regiment, from possibility of harm in the event of Fakira taking action against Inayat Ali Khan under the provisions of the Indian Penal Code. We do not consider this a very plausible explanation, as we have little doubt that Fakira could have been satisfied at any time by payment of a small sum of money and was not likely to proceed to extremes against a member of the influential family to which Inayat Ali Khan belonged. There can be no doubt, nor indeed is it denied, that Inayat Ali Khan was passionately fond of *Musammat* Sahibo, and we see no reason to suppose that the divorce was effected for any other purpose than to enable him to marry that woman. Further, it is admitted that Mahbub Ali Khan was born on the 20th July 1906 in the house of Inayat Ali Khan at *Mauza* Wah, and we have the evidence of the *Chaukidar*, Atahia, that the entry in the *Chaukidar's* book relating to the birth and parentage of the child was made by him upon information supplied from the women who were present at Inayat Ali Khan's house, Inayat Ali Khan himself being then absent on service. The entry in question is printed at page 27 of the paper-book. Then, again, we have the admission of *Musammat* Bibi Rakhia, plaintiff's mother, that after the death of Muhammad Khan, her husband, she received a visit from *Musammat* Sahibo who came to condole with her and stayed in her house in *Mauza* Wah for 15 or 20 days. It is impossible for us to believe that a lady of the position of this witness would receive a visit of condolence from a woman

who was a mere mistress of one of the members of the family or that she would entertain such a woman as a guest for the period mentioned. On solemn occasions of this kind it is a practice for women who belong to the family to pay visits of condolence to another lady of that family who has lost her husband and the very fact that *Musammat* Sahibo paid such a visit to the senior lady of the family is, in our opinion, a very strong piece of evidence in favour of her assertion that she was throughout recognized as the lawful wife of Inayat Ali Khan.

Again Muhammad Akbar Khan, *inamkhar* of Wah, who is one of the leading members of the family and has, during the trial, given evidence in favour of the plaintiff, appears to have informed the *patwari* at the time when the mutation proceedings were going on, that Mahbub Ali Khan was the son of the deceased owner and entitled to mutation (page 17 of the paper-book).

Finally, we find Nawab Aslam Hayat Khan, Additional District Magistrate of the Gujranwala District, who was examined on interrogatories as a witness for the plaintiff, stating that Inayat Ali Khan was his cousin; that he heard that he had been married, and that *Musammat* Sahibo was his lawful wife. It is true that this witness gives no direct evidence upon the point, but it is to be kept in mind that he is perhaps the leading living member of the family and that his admission that he heard of the marriage with *Musammat* Sahibo is an important point in defendants' favour.

There is thus, as we have remarked, good evidence, direct and circumstantial, in support of defendants' allegations. On the other hand, the one important piece of evidence in favour of the plaintiff's case, namely, the Kindred Roll (Exhibit P5), is by no means conclusive. No doubt it does not make mention of either Mahbub Ali Khan or *Musammat* Sahibo, but as we have already observed, Inayat Ali Khan was probably averse from publishing the fact of his marriage with a low caste woman and the omission from the Kindred Roll of any reference to them would do them no great harm. The deceased possessed a large family property in Wah and the total value of his estate in the hands of his regimental officers came to about Rs. 140. In the circumstances we are not surprised to find that he did not disclose the fact of his marriage when he was questioned about himself and his relations.

For the reasons given we hold that the *nikah* ceremony was actually performed between Inayat Ali Khan and *Musammat* Sahibo, and that in all probability it took place shortly after the expiry of her period of *iddat*, namely, the 17th December 1905.

The next question is whether Mahbub Ali Khan, who was born on the 20th July 1906, is the legitimate son of Inayat Ali Khan. Before deciding this question, we may here state that there is now no dispute as to the following facts, *viz.*, (1) that Inayat Ali Khan was on very intimate terms with *Musammat* Sahibo even before her divorce from her first husband, Fakira and that it was on this account that Inayat Ali Khan's father, Muhammad Khan, induced Fakira to divorce his wife, (see the evidence of *Musammat* Bibi Rakhia, page 58 of paper-book); (2) that Inayat Ali Khan was on leave at his home from the 15th October 1905 to the 13th January 1906 (see judgment of District Judge, at page 63); (3) that Mahbub Ali Khan was born at the house of Inayat Ali Khan; and (4) that his natural father was Inayat Ali Khan. There is no suggestion that Fakira, her former husband, or any other man than Inayat Ali Khan had access to her after the date of her divorce (the 17th September 1905), and even Muhammad Akbar Khan, one of the leading men of the family and a strong partisan of the plaintiff, admits that he looked upon Mahbub Ali Khan as the son, though illegitimate, of Inayat Ali Khan. In view of the evidence upon the record Mr. Beechey accepted it as a fact that Inayat Ali Khan was Mahbub Ali Khan's natural father. We have already held that there was a marriage between Inayat Ali Khan and *Musammat* Sahibo, the mother of Mahbub Ali Khan, and we are satisfied that this marriage took place very soon after the period of her *iddat* which expired on the 17th December 1905. The result, then, is that Mahbub Ali Khan was born about seven months after the marriage in question and that his father and mother were at the time of his birth lawfully married and had had opportunity of access to each

other at a time when he could have been begotten of them; indeed, it is admitted now that he was begotten of them. In these circumstances, we must accept it as proved that Mahbub Ali Khan is the legitimate son of Inayat Ali Khan [see section 112 of the Indian Evidence Act, 1872; *Umra* v. *Muhammad Hayat* (1); *Nur-ul-Hasan* v. *Muhammad Hasan*(2)]. Even under the principles of Muhammadan Law, there would be a strong presumption in favour of the legitimacy of Mahbub Ali Khan as (upon our findings) he was born more than six months after the date of the marriage between Inayat Ali Khan and *Musammat* Sahibo [see Wilson's "Digest of Anglo-Muhammadan Law," paragraph 81 (*b*)]. This presumption has not been rebutted in the present case, but we need not in any case refer here to the rather vexed question whether in such matters section 112 of the Evidence Act does or does not override the peculiar provisions of the Muhammadan Law. The child was born seven months after the date of marriage and might, therefore, have been begotten after but about that date (see Lyon's Medical Jurisprudence, Chapter XXIX, Question V—" What is the earliest viable age ?").

Taking all the facts upon the record into consideration, we are compelled to differ from the findings of the District Judge and we, accordingly, accept this appeal and dismiss plaintiff's suit with costs throughout.

Appeal accepted.

(1) 79 P. R. 1907; 194 P. L. R. 1908.
(2) 7 Ind. Cas. 1022; 78 P. R. 1910; 107 P. W. R. 1910; 146 P. L. R. 1910.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 387 OF 1912.

Present:—Mr. McColl, A. J. C.

NGA PI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NGA KYAN THA—PLAINTIFF—RESPONDENT.

Water rights—Riparian owner, rights of.

A riparian proprietor may take from a flowing stream as much water as he really requires for ordinary purposes such as for drinking, washing and so on even though he may seriously diminish the quantity available for the proprietors below him but for purposes of irrigation he can only take a reasonable amount and what is a reasonable amount must be decided according to the particular circumstances of each case.

Where it was found that the defendants-appellants took the whole of the water that reached their land for irrigating purposes and thus completely cut off the water from the plaintiff-respondent's land:

Held, that they were not entitled to take the whole of the water unless they had acquired such a right by prescription.

Mr. *C. G. S. Pillay*, for the Appellants.

Mr. *Dutt*, for the Respondent.

JUDGMENT.—The plaintiff-respondent sued defendants-appellants for damages for having dammed a natural water-course flowing through his land, so as to prevent any water from reaching it. He alleged that he had suffered damages to the extent of Rs. 300. He apparently based his claim not only on his natural right but also on prescription. He alleged that for 30 years the whole of the water in the stream flowed into his land and was penned up on it by a large dam and that the defendants-appellants, whose lands are above his, irrigated their lands with the surplus water which flowed on to them owing to its being thus penned back if there was sufficient rain, but that in 1274 they had erected a dam above his land which stopped the flow completely.

The defendants-appellants contended that they had erected the dam yearly from the time of their grandfathers and that it was owing to drought and not to this dam that the plaintiff-respondent was unable to work his land in 1274. Apparently the argument was that if there had been a greater flow, water would have reached plaintiff-respondent's land in spite of the dam because the defendant-appellant admitted when giving evidence that had he not dammed the stream, the plaintiff-respondent would have got about 100 baskets of paddy from his land in spite of the drought.

The Courts below found that the defendants-appellants had not acquired a prescriptive right to erect the dam and awarded the plaintiff-respondent Rs. 300 damages.

The defendant-appellant has now appealed to this Court on various grounds. The first ground is that the lower Appellate Court erred in procedure in not duly con-

sidering that it is customary to erect *bunds* and that there are in fact several such *bunds* above the appellant's land and that these *bunds* had to be made for the purpose of supplying water to the lands above plaintiff-respondent's land owing to the scarcity of water.

This raises the whole question of the rights in a natural stream of the owners of the lands through which it flows. In Alexander's Case-Law on Torts the author says: "The natural rights possessed by each successive riparian proprietor in a natural water-course is a right to use the water and pass it on. He has no right to pen back the water or divert it or the like, unless he has acquired that right by an easement inconsistent with the natural right." This is too sweeping a statement and is in fact incorrect.

In *Miner* v. *Gilmour* (1) Lord Kingsdown said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and his cattle, and this without regard to the effect which such use may have, in a case of deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him.

"Subject to this condition he may dam up the stream for the purpose of a mill or divert the water for the purpose of irrigation.

"But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

Thus for ordinary purposes such as for drinking, washing and so on, a riparian proprietor may take as much water as he really requires for the purpose, even though he seriously diminish the quantity available for the proprietors below him; but for the purpose of irrigation he can only take a reasonable amount, and what is a reasonable amount must be decided according to the particular circumstances of each case.

In *Swindon Waterworks* v. *Wilts and Berks Canal Navigation Co.* (2) it was held that in order to make the extraordinary use of water a reasonable use, the exhaustion of water which thereby takes place must be so inconsiderable as not to form a subject of complaint by the lower riparian proprietor and the water must be restored after the object of irrigation or other work is answered in a volume substantially equal to that in which it passed before.

In *Perumal* v. *Ramasami Chetty* (3) it was held that riparian proprietors are entitled to use and consume the water of the stream which their land adjoins for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture subject to the conditions that the use is reasonable, that it is required for purposes as owners of the land and that it does not destroy or render useless or materially diminish or affect the application of the water by lower riparian proprietors in the exercise of their rights. This case was followed in *Tha E* v. *Lon Ma Gale* (4). In *Debi Pershad Singh* v. *Jaynath Singh* (5) their Lordships of the Privy Council said: "The right claimed by the appellants.....is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of the proprietors below. In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common law right of a proprieter, in the position of the appellants, is to take and use for the purpose of irrigation so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What

(1) 12 Moore P. C. 131 at p. 156; 3 L. T. 98; 7 W. R. 328; 14 E. R. 861 at p. 870; 124 R. R. 3.

(2) 7 H. L. 697; 45 L. J. Ch. 638; 33 L. T. 513; 24 W. R. 284.

(3) 11 M. 16.

(4) 3 L. B. R. 23.

(5) 24 C. 865; 24 I. A. 60; 1 C. W. N. 401.

quantity of water can be abstracted and consumed without infringing that essential condition, must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume."

In the present case the defendants-appellants took the whole of the water that reached their land, and it was not for ordinary purposes only but for irrigating their lands; but it has been urged that it was necessary to erect their dam as otherwise they would have been unable to work their lands and that the dam was only 3 feet long and $2\frac{1}{2}$ feet high. Whatever its size, however, this dam completely cut off the water from the plaintiff-respondent's land and whether this was the only way in which they could irrigate their lands or not, I think it is clear from the cases cited above that they were not entitled to take the whole of the water, unless they had acquired such a right by prescription, even if the water in the stream was so little that though of use to the defendants-appellants, it would have been of no use at all for irrigation purposes to the plaintiff-respondent, which was admittedly not the case. The defendants-appellants not only prevented the plaintiff-respondent from using the water for extraordinary purposes—and he had as much right to use it for such purposes as the defendants-appellants—but by their extraordinary use of it they deprived the plaintiff-respondent of his right to use the water for ordinary purposes.

The Courts below have found that the defendants-appellants had not acquired a right to erect the dam by prescription and though the 2nd ground of appeal is that the lower Appellate Court disbelieved the witnesses for the defence for inadequate reasons, I agree that defendants-appellants failed to prove that they had acquired the right they claimed. It is not even clear whether their case was that they erected a dam every year; whether there was much rain or little; or whether they only erected one when rain was scarce, and they had to prove that for 20 years they had peaceably and openly enjoyed the use of the water *as an easement*. Now the enjoyment of all the water would have been an easement because it would have been an act done in derogation of plaintiff-respondent's rights, but the enjoyment of the water as a natural right—and that is how the defendants-appellants appear to have enjoyed the water previously—cannot support a claim to the user of it as an easement [*Chunilal* v. *Mangaldas* (6)]. Nothing less than proof that the defendants-appellants had deprived the plaintiff-respondent of the whole of the water every year for 20 years could establish the right they claim. The dam is clearly not of a permanent nature and its building could not be an invasion of plaintiff-respondent's rights until the volume of water entering his land was sensibly diminished. It is not the erection of the dam on defendants-appellants' own land or rather in the bed of the stream that constitutes the invasion of plaintiff-respondent's right, but the stopping of the water. The defendants-appellants certainly did not prove that they had deprived the plaintiff-respondent of the use of the water every year for 20 years.

The 3rd ground of appeal need not be discussed. It was not for the plaintiff-respondent to prove that he had a prescriptive right to the use of the water; he had a natural right to it; it was for the defendants-appellants to prove that they had by prescription acquired the right to deprive the plaintiff-respondent of the water.

The last ground of appeal is that the Courts below erred in fixing the damages at Rs. 300 without allowing for expenses of cultivation and in taking the value of paddy at Rs. 150 a hundred baskets without any evidence, and it has been urged that the whole damage has not been done by the defendant-appellant as there are several dams above his. On the last point I would say that it has not been shown that these other riparian proprietors have taken more than a reasonable quantity of water and in the second place, if they too have committed a tort, the general rule is that joint tortfeasors are jointly and severally liable.

As regards the actual damage caused, plaintiff-appellant's witness Mg. Po Lat should have been a valuable witness as he is a revenue surveyor, but he declined to make any statement on the point. The lower

(6) 16 B. 592.

Appellate Court assumed that the damage caused was the value of 200 baskets of paddy because plaintiff-respondent's land ordinarily grew that amount. But it is clear that it was a bad year with little rain. It is possible that nevertheless the plaintiff-respondent would have received sufficient water to raise the usual crop but for defendants-appellants' dam, but this has not been proved and cannot be assumed especially as the defendants-appeallants were entitled to take a reasonable proportion of the water for their own lands. It was for the plaintiff-respondent to prove the amount of damage which he had suffered, and I do not consider that he proved that he could have raised 200 baskets of paddy that year. The amount admitted by defendants-appellants will be taken, *viz.*, 100 baskets.

As the defendants-appellants did not deny that the value of 100 baskets was Rs. 150, the Courts below were right in taking it at that amount but the expenses of cultivation should have been allowed for. They may be put down at a third.

I accordingly modify the decree of the Courts below into a decree for Rs. 100 with costs on that amount in the Courts below. There will be no order as to the costs incurred in this Court.

Decree modified.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 869 OF 1912.

February 4, 1914.

Present:—Justice Sir Asutosh Mookeriee, KT., and Mr. Justice Beachcroft.

Raja RAJENDRA NATH ROY AND ANOTHER —DEFENDANTS—APPELLANTS

versus

Sarkar NANDA LAL GUHA—PLAINTIFF—RESPONDENT.

Regulation (XI of 1835), s. 4 (1)—Accretion to rent-free tenure—*Title of holder of parent tenure—Duty to pay rent—Claim for mesne profits—Tenant holding land* bona fide *under* de facto *proprietor*—De facto *proprietor not real owner, effect of.*

A tenant who enters upon a land and holds it *bona fide* under a *de facto* proprietor is entitled to be treated as a *raiyat*, although the *de facto* proprietor subsequently turns out to be not the real owner.

Where the land in dispute formed an accretion to a rent-free tenure:

Held, (1), in a suit for declaration of title to it and for recovery of possession thereof with mesne profits, that the plaintiff was entitled to possession, but the fact that he held the parent tenure rent-free did not entitle him to hold the accreted land rent-free and that he could hold it only on payment of rent to the *putnidar*;

(2) that as the plaintiff was not entitled to hold the land rent-free and as he had not only never paid rent to the *patnidar* but had never even offered to do so, he could not get a decree for mesne profits;

(3) that the plaintiff could not claim to eject a *bona fide* tenant put in by the superior holder.

Appeal against the decree of the Sub-Judge, 24-Parganas, dated 21st December 1911, reversing that of the Additional Munsif at Basirhat, dated 8th April 1911.

Babu *Shama Charan Roy*, for the Appellants.

Babus *Baidya Nath Dutta*, *Siva Prosanna Bhattacharjee* and *Hit Lal Guha*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for declaration of title to immoveable property and for recovery of possession thereof with mesne profits. The case for the plaintiff is that the land in dispute forms an accretion to a homestead which belonged to his maternal uncle, Raghunath Dutt, who died in 1885 and that since the death of his maternal aunt in 1898, he has become entitled to hold possession thereof. He further asserts that the homestead was rent-free *mahataran* land and that he is consequently entitled to hold the accretion as a rent-free tenure. The first defendant is the *putnidar* of the village and the second defendant is a *raiyat* under him. Their case is that the land does not form an accretion to the homestead of Raghunath Dutt and that the plaintiff has no title thereto. The second defendant further pleads that he had been in occupation for many years as a tenant under the first defendant. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision. On the present appeal by both the defendants, the decree of the Subordinate Judge has been assailed substantially on three grounds, namely, *first*, that the plaintiff is not entitled to hold the land as rent-free *mahataran*; *secondly*, that if the plaintiff has any title to the land, he can hold it only on payment of

rent to the *putnidar*; and *thirdly*, that the second defendant is a *raiyat* with right of occupancy and is not liable to be ejected. In our opinion, the decree made by the Subordinate Judge is erroneous and must be set aside.

In so far as the first question, namely, that of the title of the plaintiff is concerned, the Subordinate Judge has found that the disputed land forms an accretion to the homestead of his maternal uncle, Raghunath Dutt, which constituted a rent-free *mahataran* tenure. It is not open to the defendants to challenge these findings in second appeal. But the question remains, whether the plaintiff is entitled to hold the accretion rent-free on the ground that the parent tenure is held rent-free by him. In our opinion, there is no foundation for the claim of the plaintiff. Sub-section (1) of section 4 of Regulation XI of 1825 provides that when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a *zemindar* or other superior landholder or as a subordinate tenure by any description of under-tenant whatever: provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed and shall not, in any case, be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II of 1819 or of any other Regulation in force. There was a second proviso to the clause to the following effect, which was repealed by section 2 of the Bengal Tenancy Act of 1885: "Nor if annexed to a subordinate tenure, held under a superior landholder, shall the under-tenant, whether a *khodkasht ryot* holding a *mourasi istimrari* tenure at a fixed rate of rent per *bigha* or any other description of under-tenant liable by his engagements or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable." On behalf of the plaintiff it has been argued that as clause (1) of section 4 of Regulation XI of 1825 stands after the omission of the second proviso, the plaintiff is not bound to pay any rent in respect of the accreted land and is entitled to hold the same rent-free in the same manner as the parent tenure. This contention is clearly fallacious. The second proviso was omitted because provision was made in section 52 of the Bengal Tenancy Act for the ascertainment of additional rent payable for additional land in the occupation of the tenant. It is true that the terms of section 52 are not directly applicable to the case before us. But we are entitled, indeed bound, to act under clause (5) of section 4 of the Regulation. That clause provides that in all other cases, namely, in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a river or sea, which are not specially provided for by the rules contained in the Regulation, the Courts of Justice in deciding upon such claims and disputes shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not, by general principles of equity and justice. In the case before us, no evidence has been given of any established local usage applicable to the matter. We have thus to determine the rights and obligations of the parties on general principles of equity and justice. The question consequently reduces to this: Does the circumstance that the plaintiff holds the parent tenure rent-free entitle him to hold the accreted land rent-free? In our opinion, the question should be answered in the negative. It is plain from the proviso to the first clause of section 4 that in case of accretion, the proprietor himself who holds directly under the Government becomes liable to assessment of additional revenue; and the view cannot possibly be maintained on any intelligible principle of equity and justice that the properietor should be liable to pay additional revenue to Government, but that a subordinate holder under him should be entitled to hold the land without payment of rent to him. If this view were not

maintained, the result might be that where a proprietor had made a rent-free grant of a small portion of land included within his estate, the rent-free holder might become entitled by accretion to hold a large quantity of land rent-free, while the proprietor might become liable to the Government to pay additional revenue therefor. No rational principle has even been faintly suggested on which a result like this can be defended. It has been argued, however, that the contention of the plaintiff is supported by a number of judicial decisions, and our attention has been drawn to the case of *Miajan* v. *Akram Ali* (1) in which Mr. Justice Geidt held that the person to whose land the accretion is formed is entitled to hold the land on the same terms as those on which the parent tenure is held. This proposition was formulated in a case in which the question in controversy was, whether a non-occupancy *raiyat* was entitled to claim possession of the land which had accreted to his holding, and it was ruled that he was entitled to hold the accreted land as a non-occupancy *raiyat*. The question which arises before us, namely, whether a rent-free holder is entitled to hold the accreted land rent-free, was not in controversy in the case before Mr. Justice Geidt. The same observations apply to the case of *Gourhari* v. *Bhola Kaib rto*(2), where it was ruled that a *raiyat* who had a right of occupancy was entitled to the benefit of section 4 clause (1), of Regulation XI of 1825. An examination of the judgment of this Court in the cases of *Golam Ali* v. *Kali Krishna* (3); *Chooramoni Dey* v. *Howrah Mills Company* (4) shows that the view we take is not opposed to the principle which underlies these decisions. In fact, in the decision last mentioned Mr. Justice Mitter held that the rent payable in respect of accreted land might not always be on the same footing as rent payable in respect of the original holding, and he pointed out that if in fixing the rent of the original holding lower standard than the full letting value was adopted in consideration of any bonus paid, it would be unjust to the landlord to fix the rent of the accretion at the rate of rent fixed in respect of the original tenure. This observation applies obviously with much greater force to a case like the present, where we are unaware of the reason why rent was not assessed in respect of the land comprised in the original holding. In our opinion, it is plain that although the plaintiff is entitled to possession of the accreted land, he is not entitled to hold the same rent-free. He is only entitled to a declaration that he holds the accreted land as a tenant under the first defendant and is liable to pay rent in respect thereof, the amount to be assessed in a suit properly framed for the purpose. The view we take is in accord with that adopted in the cases of *Rammonee* v. *Oomes Chunder* (5) and *Ramgutty Nag* v. *Barodachurn Bose*(6).

In so far as the second point is concerned, it has been argued that as the plaintiff is not entitled to hold the land rent-free and as he has not only never paid rent to the first defendant but has never even offered to do so, he should not be allowed a decree for mesne profits. In our opinion this contention is just and should prevail. The claim for mesne profits may well be set off against the legitimate claim of the first defendant to rent. This will govern the rights of the parties up to the date of this judgment. If hereafter the first defendant interferes with the possession of the plaintiff, he will be liable for mesne profits.

In so far as the third point is concerned, it has been argued that the second defendant is not liable to be ejected. This contention is manifestly sound. The plaintiff has contended that the second defendant did not specifically state in his written statement that he held as a *raiyat* under the first defendant in good faith. Some weight may be attached to this circumstance, but the facts make it plain that the second defendant is a *bona fide raiyat* under the first defendant. The Subordinate Judge has found that the *chur* formed about the year 1887. Since then, the widow of the original holder, Raghunath

(1) 8 C. L. J. 541.
(2) 21 C. 233.
(3) 7 C. 479; 8 C. L. R. 517; 4 Shome L. R. 149.
(4) 11 C. 696.
(5) 1858 Beng. S. D. A. 1836.
(6) 1 W. R. 120.

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Dutt, never took possession of the land. The first defendant settled the land with tenants and allowed the second defendant to take possession as a *raiyat*. The title of the plaintiff accrued on the 2nd April 1898 on the death of his maternal aunt, and the present suit was not commenced till the 2nd April 1910, that is, on the very last day of the period of limitation prescribed by the Statute. The position consequently is that the second defendant has been allowed to remain in occupation of the land for many years and there is really no room for the idle suggestion that he is not a *bona fide raiyat* under the first defendant. There is also no reason why the rule laid down in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (7) should not be applied to the case of alluvial land. As Mr. Justice Banerjee pointed out in *Peary Mohun Mandal* v. *Radhika Mohun Hazra* (8), the principle which underlies that decision is that a tenant who enters upon the land and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as a *raiyat*, although the *de facto* proprietor subsequently turns out to be not the real owner. That doctrine is applicable quite as much to firm land as to alluvial accretions. We are clearly of opinion that all the grounds taken by the appellants must prevail.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge set aside. The plaintiff will have a decree declaring his right to hold the disputed land as a tenant under the first defendant upon payment of such rent as may hereafter be assessed in an appropriate proceeding. He will also have possession of the land by receipt of rent from the second defendant as *raiyat* under him. As the suit thus stands dismissed against the second defendant, the plaintiff will pay her costs both in the Court of first instance and the Court of Appeal below. As between the plaintiff and the first defendant, each party will bear his own costs in both the Courts below. The appellants are entitled to their costs in this Court from the plaintiff-respondent.

Appeal allowed in part.

(7) 20 C. 708.
(8) 5 C. L. J. 9 at p. 14; 8 C. W. N. 315.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1214 OF 1912.

March 6, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

SUKUMARI GUPTA—PLAINTIFF—APPELLANT

versus

BHARAT MANDAL—DEFENDANT—RESPONDENT.

Will—Hindu Wills Act (XXI of 1870), *s.* 2—*Probate and Administration Act (V of* 1881), *ss.* 24, 25—*Terms of Will—Probate Court only competent to decide whether Will imperfectly or inaccurately drawn up—Landlord and tenant—Suit to recover rent—Tenant setting up right of third party already on record.*

In cases to which the Hindu Wills Act applies, the terms of a Will can be proved only by a reference to the Probate or Letters of Administration, as the case may be.

Sections 24 and 25 of the Probate and Administration Act lay down the rule for cases in which the original may have been lost.

No Court other than the Court of Probate is competent to hold that the Letters of Administration had been imperfectly or inaccurately drawn up, or on an investigation of the proceedings of the Probate Court to hold that the Letters of Administration have the same effect as if a copy of the terms of the Will had been annexed thereto.

Where it is conceded that either *A* or *B* is the landlord of *C* and *A* institutes a suit to recover rent from *C* to which *B* is joined as a party, if it is agreed between *A* and *B* that *A* is entitled to the rent, it is not open to *C* to invite the Court to determine whether *A* or *B* is entitled to recover rent from him.

Appeal against the decree of the Subordinate Judge of Jessore, dated the 15th February 1912, reversing that of the Munsif of Narail, dated the 8th May 1911.

Babu *Surendra Chandra Sen*, for the Appellant.

Babu *Troylokya Nath Chakrabarti*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The first defendant, who is the tenant in occupation of the holding, took a lease on the 2nd January 1904 from the plaintiff's father who subsequently died on the 29th May 1904. After his death, an application was made on the 21st December 1907 by his widow for Letters of Administration to his estate with a copy of the Will alleged to have been left by the testator. In the petition it was stated that the original Will had been lost after the death of the testator, and the contents thereof were set out under four heads

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The application was verified by one of the attesting witnesses to the Will, who stated that the testator had written out a Will and executed the same in his presence and in the presence of other witnesses. The application was not opposed and the District Judge recorded an order for grant of Letters of Administration. When the Letters were drawn up, they were described as Letters of Administration without a copy of the Will annexed. The case for the plaintiff is that under the testamentary disposition of her father she has acquired a title to the disputed land, and she also alleges an oral gift of the land in her favour by her father during his life-time. It is on this two-fold basis that she claims to recover rent from the tenant defendant. She has also joined as second defendant to the suit her mother, who took out the Letters of Administration mentioned. The tenant defendant entered appearance and pleaded that the plaintiff had not acquired a title either under the alleged gift or under the alleged Will. He further pleaded that he had been in occupation of the disputed land for a term of two years and had thereafter surrendered possession to the landlord, so that he was not liable for rent of the years claimed. The defendant also urged that the plaintiff could not proceed with the suit as she had not carried out the provisions of sections 15 and 16 of the Bengal Tenancy Act, thereby implying that the plaintiff was a tenure-holder and he himself was a *raiyat*. The mother entered appearance and stated that the property had vested in the plaintiff (her daughter) and that rent was payable to her. The Court of first instance held that the contract of tenancy infringed the provitions of section 48 of the Bengal Tenancy Act and dismissed the suit. Upon appeal, the Subordinate Judge remanded the case for re-trial on the merits. The primary Court then held that section 48 of the Bengal Tenancy Act was not a bar and that the plaintiff was entitled to recover rent for the years in suit. On appeal, the Subordinate Judge has held that no title accrued to the plaintiff under the alleged oral gift in contravention of the provisions of section 123 of the Transfer of Property Act, and that, as the Letters of Administrations had been issued to the second defendant, she alone was entitled to the rent. The Subordinate Judge has thus allowed the appeal and dismissed the suit, although he has found expressly that the defendant had held over upon the expiry of the term of the lease and had been in possession of the disputed land during all three years for which rent was claimed.

The plaintiff has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed on two grounds, namely, *first*, that upon a true construction of the proceedings in the Probate Court, it should be held that the Letters of Administration had been granted to the second defendant on the basis of the testamentary disposition of her father and that consequently her title as legatee was established; and *secondly*, that if her title as legatee was deemed not to have been proved, the question whether the plaintiff or her mother was entitled to the rent due, could not be raised, in the circumstances of the case, by the tenant defendant.

In so far as the first ground is concerned, we are not prepared to give effect to it as well-founded. Under section 189 of the Indian Succession Act, which has been made applicable to Hindus by section 2 of the Hindu Wills Act, it is plain that no right as legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India shall have granted Probate of the Will under which the right is claimed or shall have granted Letters of Administation with the Will or with a copy of the authenticated copy of the Will annexed. Consequently the terms of the Will can be proved only by a reference to the Probate or Letters of Administration, as the case may be. It has been argued that the Probate Court was under a misapprehension and that although the Court intended to find and did find that the terms of the last Will were satisfactorily proved, a copy of the terms was not annexed to the Letters of Administration on the assumption that a copy could be annexed of the original Will only when the original was in existence. It is not necessary for us to investigate under what circumstances the Letters of Administration were drawn up in the form in which they were issued to the second defendant. It is plain from the decision

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in the case of *Sugden* v. *St. Leonards* (*Lord*) (1), that even where the original Will has been lost and its terms have been satisfactorily proved by secondary evidence, a copy of the terms as found by the Court should be annexed to the Probate or Letters of Administration, as the case may be. A similar rule has been laid down by the Indian Legislature in sections 24 and 25 of the Probate and Administration Act. This, however, is a matter for the Court of Probate to determine, and the true remedy of the plaintiff is to get the Letters of Administration amended by that Court on the application of the second defendant. No Court other than the Court of Probate is competent to hold that the Letters of Administration had been imperfectly or inaccurately drawn-up, or on an investigation of the proceedings of the Probate Court, to hold that the Letters of Administration have the same effect as if a copy of the terms of the Will had been annexed thereto. The first ground consequently fails.

In so far as the second ground is concerned, it must, in our opinion, prevail. The property originally belonged to the father of the plaintiff. On his death, the first defendant, if he continued in occupation as a tenant, became liable to pay rent either to the second defendant or to the plaintiff. If there was no Will, the second defendant was entitled to claim rent as the widow of the last full owner. If the second defendant took out Letters of Administration, she was entitled to claim rent in her character as administratrix. If there was a genuine Will by which this property had been bequeathed to the plaintiff, she was entitled to claim rent as legatee. Consequently, it is indisputable that the rent was due either to the plaintiff or to her mother. Now, in the suit as framed the plaintiff asserts her title to the rent due. She joins her mother as a defendant, who states that rent is due not to herself but to her daughter, the plaintiff. In these circumstances, is the first defendant competent to raise the question whether the plaintiff or the second defendant is entitled to the rent? In our opinion, it is not competent to him to raise this question. If the first defendant had deposited the rent under section 61 of the Bengal Tenancy Act and had obtained a receipt from the Court, his liability would have been discharged. As there was no real contest between the plaintiff and her mother, the rent deposited could have been withdrawn by the plaintiff and the Court would not have been called upon to determine whether the plaintiff or her mother was entitled to the rent. On the other hand, if the first defendant had honestly admitted that the rent claimed was due, under section 149 of the Bengal Tenancy Act the Court might have refused to take cognisance of the plea that rent was due to the mother and not to the plaintiff unless he paid into Court the amount admitted to be due. Thereupon the Court would have caused notice of the payment to be served on the mother, and if she did not institute a suit against the plaintiff and obtained an order restraining the payment of the money, the plaintiff would have been entitled to withdraw the sum from Court. In this event also, it would have been unnecessary for the Court to determine the relative rights of the plaintiff and her mother. It seems to us to be plain in these circumstances that where it is conceded that either *A* or *B* is the landlord of *C* and *A* institutes a suit to recover rent from *C* to which *B* is joined as a party, if it is agreed between *A* and *B* that *A* is entitled to the rent, it is not open to *C* to invite the Court to determine whether *A* or *B* is entitled to recover rent from him. He is not interested in the determination of this question and he cannot be prejudiced by a decree in favour of *A* in the presence of *B*, because *B* would not be at liberty thereafter to hold *C* liable for the rent. There is a class of cases to be found in the books where it has been ruled that the validity of an instrument cannot be challenged by a stranger, as, for instance, in the case of *Achal Ram* v. *Kazim Husain Khan* (2). A similar principle is, in our opinion, applicable to the case before us. There is no room for doubt that the first defendant has throughout occupied the land and has dishonestly put forward every conceivable defence to delay the recovery of rent from him; no Court will assist him,

(1) (1876) 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 369; 24 W. R. 479.

(2) 32 I. A. 113 (P. C.); 27 A. 271; 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197.

if it can be possibly avoided, in the achievement of this object.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed with costs in all the Courts. The plaintiff will have a decree for the sum claimed with interest thereon at the rate of 6 per cent. per annum from the institution of the suit to the date of realization. In view of the character of the defence taken by the first defendant, we assess the hearing fee in this Court at five gold *mohurs*.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 240 OF 1911.

September 24, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

DUVVUR SUBBA REDDY—PLAINTIFF—APPELLANT

versus

KAKUTURU VENKATARAMI REDDI *alias* VENKATA REDDI AND ANOTHER—DEFENDANTS—PESPONDENTS.

Specific Relief Act (I of 1877), s. 15—Specific performance of contract—Agreement to sell—Managing member of Hindu family—Necessity—Part performance.

A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share of the family property, but not to a decree for part performance. Conveyance of a portion is not such a part of the contract "as he can perform," in the terms of section 15 of the Specific Relief Act.

Where, therefore, a suit was brought for specific performance of a contract to sell entered into by the managing member of a Hindu family and the son was also made a party:

Held, that as there was no necessity to enter into the contract, it was not binding on the family and the suit could not be maintained.

Kosuri Ramaraju v. *Ivalury Ramalingam*, 26 M. 74; 12 M. L. J. 400; *Srinivasa Reddi* v. *Sivarama Reddi*, 4 Ind. Cas. 506; 32 M. 320; *Juturi Nagiah* v. *Aripirala Venkataram Sastrulu*, 15 Ind. Cas. 623; 37 M. 387; 14 M. L. T 199, distinguished.

Ponaka Subba Rani Reddi v. *Vaddamadi Seshachellam Chetty*, 5 Ind. Cas.79; 33 M. 359; 7 M. L. T. 137; 20 M. L. J. 328; *Nanjaya Mudali* v. *Shanmuga Mudali*, 22 Ind. Cas. 555; 15 M.L.J. 186; (1914) M.W.N. 356; 26 M. L.J. 576; *Maharaja of Bobbli* v. *W. S. Venkataramanjulu Naidu*, 25 Ind. Cas. 585; 16 M. L. T. 181; 27 M. L. J. 409, followed.

Appeal against the decree of the District Court of Nellore, in Original Suit No. 10 of 1909.

Mr. *T. V. Venkataramma Iyer* (with him Mr. *T. N. Muthukrishaa Iyer*), for the Appellant:—There is no finding that there was coercion or undue influence nor is there evidence. Plaintiff was not married to Ramachandra Reddy's daughter at the time of Exhibit I. When Exhibit I was renewed by Exhibit II, Ramachandra Reddy had already given evidence. The Judge erred in relying on these circumstances. As to the adequacy of consideration findings are inconsistent. There is no evidence on the point. And there was no coercion or undue influence and the price is adequate. Plaintiff is entitled to specific performance in law.

In any event plaintiff is entitled to a decree for specific performance against 1st defendant for the whole property, leaving the question as to the binding nature of the contract against the second defendant for a separate suit. *Kosuri Ramaraju* v. *Ivalury Ramalingam* (1); *Srinivasa Reddi* v. *Sivarama Reddi* (2). The whole suit cannot be dismissed when the 1st defendant was the only party to the contract and is competent as manager to give specific performance.

Mr. *T. Prakasam* (with him Mr. *P. Venkataramana Rao*), for the Respondents:—Specific performance is an equitable relief. To refuse such a relief no coercion or undue influence need exist. It is enough if it is an unfair bargain and undue advantage is taken of the position of the defendant. Admittedly defendant was a debtor of Ramachandra Reddy and plaintiff had no means of his own. When Exhibit I was renewed by Exhibit II, it was purposely antedated to make it appear that it was done after Ramachandra Reddy gave evidence. The price need not necessarily be inadequate at the time. It is enough if the creditor puts pressure upon the debtor to make him part with the land when the price was steadily rising.

First defendant cannot be compelled to convey the whole land ignoring the 2nd defendant. The authorities relied upon do not apply to the facts of this case. In *Kosuri Ramaraju* v. *Ivalury Ramalingam* (1) the decision turned on the ground that the plaintiff disclosed no cause of action against 2nd and 3rd defendants for specific performance of the 1st defendant's contract. Both in this

(1) 26 M. 74; 12 M. L. J. 400.
(2) 4 Ind. Cas. 506; 32 M. 320.

case and *Srinivasa Reddi* v. *Sivarama Reddi*, (2) it was not found that the contract was binding on the family. In *Kosuri Ramaraju* v. *Ivaluri Ramalingam* (1) the provisions of the Specific Relief Act were not considered. If *Srinivasa Reddi* v. *Sirarama Reddi* (2) should be construed as an authority against me, I submit that it was doubted in *Ponaka Subba Rani Reddi* v. *Vadamadi Seshachellam Chetty* (3) and *Govinda Naicken* v. *Apathsahaya Iyer* (4). It was expressly dissented from in *Juturi Nagiah* v. *Ariparala Venkatarama Sastrulu* (5). The result of the decisions is, if there is no finding that the contract was binding on the family, the father who was a party to the contract would be compelled to part with his share for the value agreed to be paid for the whole of the family land. In this case the son was a party, issue was joined and it was expressly found by the Court on evidence that the contract was not binding on the family. The father agreed to convey specific portions of the family property which he would not be entitled to do until partition. Specific performance cannot be granted even against the father's share. In none of the decisions referred to is an authority for the proposition that the question of family necessity should be fought out once again in a separate suit when it was once decided by a competent Court.

Mr. *T. V. Venkatarama Iyer*, in reply.

JUDGMENT.

SANKARAN NAIR, J.—This is an appeal from a decree of the District Judge of Nellore dismissing the plaintiff's suit for specific performance of a contract entered into between himself and the 1st defendant. The plaintiff's case is that the 1st defendant who had brought a suit for partition against his co-parceners for his 2/7ths share of the family properties, was in embarrassed circumstances and in order to get rid of his debts agreed to sell the plaint properties to him for a sum of Rs. 8, 429 on the 14th April 1904, Exhibit I. The properties were to be sold soon after the disposal of the suit and after he had obtained his lands on partition. This agreement was *renewed* on 1st August 1907. The plaintiff states that after the decree was passed in favour of the defendant, he was placed in possession of some of the lands but has not obtained possession of the rest. He accordingly prays for specific performance and for possession of the rest of the lands. The suit was originally brought only against the 1st defendant. His plea was that the agreement was really entered into between him and the plaintiff's father-in-law, one Ramachandra Reddi, as a consideration for the latter giving evidence in the partition suit which was then pending. He also pleaded that Ramachandra Reddy threatened to place obstacles in the way of his obtaining a decree, that he was thus coerced into entering into this transaction and that it is, therefore, not binding on him. He pleaded that the sale price is inadequate and that there was no necessity for him to enter into this agreement to sell his property. His son, the 2nd defendant, was subsequently made a party to the suit. In addition to the pleas advanced by his father, he said that there was no necessity to sell the lands, the agreement is not binding on him and cannot be enforced against him under the Hindu Law.

The District Judge found that there was no necessity to sell the lands and that there was no pressure by any of the creditors. He found, also, that the plaintiff was in debt himself and is not a person likely to be in possession of funds for the purchase of lands. It was also found by the District Judge that the plaintiff was not placed in possession of the lands, but that the defendants' co-parcener who was in possession of these lands delivered them to the plaintiff's relative, plaintiff's 1st witness, who is now in possession. He was apparently of opinion that the real beneficiary under the agreement was not the plaintiff himself, but Ramachandra Reddy. Whether Rs. 8,429 was a fair value for the land agreed to be sold he does not find. On these findings the suit was dismissed.

On appeal it is contended that the Judge is wrong in all his findings. It is argued that he does not find that there was coercion and the evidence does not support that plea. It is pointed out by the appellant's Pleader that when Exhibit I was executed, the plaint-

(3) 5 Ind. Cas. 79; 33 M. 359; 7 M. L. T. 137 20 M. L. J. 328;

(4) 13 Ind. Cas. 471; 11 M. L. T. 87; (1912) M. W. N. 87; 22 M. L. J. 257; 37 M. 403.

(5) 15 Ind. Cas. 623; 37 M. 387; 14 M. L. T. 199.

iff was not the son-in-law of Ramachandra Reddi and when Exhibit II was executed Ramachandra Reddi had already given his evidence. It is quite possible that the desire to secure the assistance of Ramachandra Reddy may have materially influenced the defendants in entering into this agreement. But if the consideration is not inadequate, it is difficult to say that this fact will vitiate the transaction. The evidence as to the value of the lands is very meagre. The defendants' 1st witness, who is the 1st defendant's own son-in-law, states that the wet land is worth about Rs. 500 an acre and that the dry land is worth Rs. 450 an acre. According to this evidence the value of the lands will be about Rs. 20,000. On the other hand his own 2nd witness, who appears to be a comparatively wealthy man, admits that the lands in 1911 sold at Rs. 250 an arcre and at the time of Exhibit I only at Rs. 150 an acre, and the plaintiff's 1st witness states that the price for which the plaint lands were to be sold is reasonable. Exhibit VIII shows that the other lands in the vicinity sold at about Rs. 100 an acre. In these circumstances I am not prepared to say that the consideration has been proved to be inadequate. I must accordingly hold that so far as the 1st defendant is concerned, there is no evidence of undue influence and that he has not proved that it was a hard bargain. But it is also quite clear that there was no necessity to sell the lands. The fact that for more than three years after the date of Exhibit I no creditor sued to enforce his claim, is itself strong evidence, and the defence evidence is that the 1st defendant has succeeded in paying off the other debts by selling other lands. The plaintiff's 1st witness admits that the defendants' family had about 200 or 240 acres of land, dry and wet put together. There is no evidence that any creditors were demanding payment of their debts. There is no evidence given by the plaintiff to show why it was necessary to enter into this agreement to sell the property at a future uncertain date while the lands were rising in value. There is absolutely no evidence, therefore, that it was necessary to enter into this agreement to sell. I must, therefore, hold that it is not binding on the 2nd defendant.

It is argued before us on behalf of the appellant that he is entitled to obtain a decree for specific performance against the 1st defendant. A contract can be enforced against any person who was a party to it. The plaintiff was, therefore, right in bringing the suit only against the 1st defendant and if he alone had been a party to the suit, he might have been entitled to get a decree against him without the question whether it was binding on the family of the 1st defendant being gone into. This was pointed in *Kosuri Ramaraja* v. *Ivaluri Ramalingam* (1) and in *Srinivasa Reddi* v. *Sivarama Reddi* (2). In *Kosuri Ramaraju* v. *Ivalury Ramalingam* (1) the suit was dismissed against persons other than the 1st defendant therein, who alone was a party to the contract. In *Srinivasa Reddi* v. *Sivarama Reddi* (2) the son was not a party to the second appeal. In neither case, therefore, was the question, whether the agreement was binding on the family or not, considered. Nor was the question decided whether if the agreement was not binding on the family, the plaintiff was not entitled to get a decree for the managing member's share of the property on payment of the entire purchase-money. That he was so entitled was conceded on behalf of the managing member in *Ponaka Subba Rani Reddi* v. *Vadamadi Seshachellam Chetti* (3). In fact there the argument was that he was entitled only to that relief. But in the case before us, the son has been made a party to the suit and I am not prepared to hold that after the trial of the case, we shall be justified in dismissing him from the suit, without a consideration of the pleas advanced by him. Moreover, the fact that the agreement is not binding on the family has been proved by the evidence let in to prove undue influence and the unconscionable nature of the bargain. On the finding, therefore, that the agreement is not binding on the family, the suit for a decree directing the 1st defendant to sell these lands must be dismissed.

The plaintiff offers to pay the full amount for a conveyance to him of the lands which are the separate property of the 1st defendant and of the 1st defendant's interest in the family lands. This requires a determination of the question whether any of these lands form the separate property of the 1st defendant; and such a decree will only

lead to litigation between the same parties to determine their rights. We think we should not be justified in passing such a decree in this suit. He is, therefore, not entitled to a decree for part performance.

In this view it is unnecessary to consider certain dicta in *Juturi Nagiah* v. *Ariparala Venkatarama Sastrulu* (5). But as the question has been argued before us I shall briefly refer to them.

A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share of the family property. But there is no question of part performance in that case. If the learned Judges intended to go further and lay down that if a junior member of a Hindu family agrees to sell any specific property belonging to his family, a decree may be passed against him to sell his share of that specific property, I am unable to agree with that view. Because the junior member is unable to perform the whole of his part of the contract by conveying the entire property agreed to be sold and for the same reason that he is not entitled to claim any specific property till partition, conveyance of a portion is not such a part of the contract "as he can perform," in the terms of section 15 of the Specific Relief Act.

On the view that a co-parcener cannot alienate any specific property, no specific performance can be decreed. The opposite view rests on the principle laid down in some of the cases that a co-parcener is entitled to alienate any particular property. Bakewell, J., and myself have dissented from those cases in *Nanjaya Mudali* v. *Shanmuga Mudali* (6) and our judgment has been followed by the Officiating Chief Justice and Kumaraswami Sastri, J., in *Maharaja of Bobbli* v. *W. S. Venkataramanjulu Naidu* (7). This question, however, does not arise in the appeal. I would dismiss the appeal with costs.

SPENCER, J.—I concur.

Appeal dismissed.

(6) 22 Ind. Cas. 555; 15 M. L. T. 186, (1914) M. W. N. 356; 26 M. L. J. 576.

(7) 25 Ind. Cas. 585; 27 M. L. J. 409; 16 M. L. T. 181.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 191 OF 1913.

September 1, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Sri Rajah INUGUNTI VENKATA RAJAGOPALA SURYA ROW BAHADUR—DEFENDANT No. 1—RESPONDENT—APPELLANT

versus

K. BASAVI REDDY—PLAINTIFF—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Mortgage-decree—Personal decree, absence of—Receiver, appointment of—Mortgagee, right of.

Per *Oldfield, J.*—The holder of a decree for the sale of mortgaged property, who is prevented from executing his decree, is entitled to have a Receiver appointed in respect thereof, if the security is insufficient to discharge the decree debt and the interest due on the mortgage-bond has not been paid.

In re Pope, 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 369; 34 W. R. 693, *Bodger* v. *Bodger*, 11 W. R. 160, *Hopkins* v. *Worcestor and Birmingham Canal Navigation Co.*, 6 Eq. 437; 37 L. J. Ch. 729, *Davis* v. *Duke of Marlborough*, 2 Swans. 108; 36 Eng. Rep. 555 at 569; 2 Wils. Ch. 130; 53 R. R. 29, *Jaikissondas Gangadas* v. *Zenabai and Kazi Mahomed Miya Dada Miya*, 14 B. 431, *Latafut Hossein* v *Anunt Chowdhry*, 23 C. 517, *Ghanashyam Misser* v. *Gobinda Moni Dasi*, 7 C. W. N., 452, *Aruachellam Chettiar* v. *Manicka Varaher Desikar*, 3 Ind. Cas. 437; 6 M. L. T. 238, *Weatherall* v. *Easthern Mortgage and Agency Co. Ltd.* 9 Ind. Cas. 985; 13 C. L. J. 495, *Eastern Mortgage and Agency Co., Ltd.* v. *Rakea Khatun*, 17 Ind. Cas. 202; 16 C. W. N. 997 and *Khubsarat Koer* v. *Sarada Charan Guha*, 12 Ind. Cas. 165; 14 C. L. J. 526; 16 C. W. N. 126, referred to.

Per *Sadasiva Aiyar, J.*—The holder of a mortgage-decree who has not shown a right to a personal decree against the mortgagor, cannot have a Receiver appointed of the mortgaged properties, even though the mortgagee is obstructed by the mortgagor himself from executing his decree.

Appeal against the order of the Court of the Subordinate Judge of Cocanada, dated the 30th June 1913, in Execution Appeal No. 1370 of 1912 (Original Suit No. 60 of 1906).

FACTS.—The appeal arose out of a petition for the appointment of a Receiver. The petitioner held a compromise decree against the respondent based on two mortgage-bonds executed by the latter's father. The decree was obtained in suits brought by him against the respondent, represented by his mother, during his minority. On attaining age, the respondent instituted a suit

for a declaration that the compromise decree obtained by the petitioner was fraudulent and not binding on him, as his mother had colluded with the petitioner in consenting to such a decree and as his father had no authority to execute the mortgage-deeds on which the compromise decree had been obtained, since the properties in question belonged to him and not to his father. Pending the disposal of his suit, the respondent obtained an injunction restraining the petitioner from executing his decree and bringing the suit properties to sale in execution thereof. Thereupon the petitioner applied for the appointment of a Receiver of the mortgaged properties, on the ground that he would not otherwise be able to realise the amount due to him under his decree, the respondent not having any other property and being likely to spend away the income of the said properties. The respondent opposed the application, on the ground that in the circumstances of the case no Receiver could be appointed as the petitioner had no *prima facie* right to the properties themselves or their rents and profits. The Court below overruled these objections and appointed a Receiver. The respondent thereupon appealed to the High Court.

Mr. *B. Somayya* for the Appellant :—A Receiver can be appointed only if the applicant has a present right to the whole or portion of the rents. The petitioner in this case is only a simple mortgagee and has no such right. The decisions cited by the Court below, *Jaikissondas Gangadas* v. *Zenabai and Kazi Mahomed Miya Dada Miya* (1); *Khubsarat Koer* v. *Sarada Charan Guha* (2) and *Eastern Mortgage and Agency Co., Ld.* v. *Rakea Khatun* (3), are all distinguishable, because in every one of them the mortgagee was entitled to say that the rents should be applied towards his debt. The English cases do not afford any help, because in England the mortgagee is entitled to possession of the property from the date of the mortgage. See Ashburner on Mortgages, page 297. In England, even subsequent mortgagees and equitable mortgagees have a right over the rents and profits —Ashburner, pages 297-8. In India a simple mortgagee is only entitled to bring the property to a judicial sale. *Papamma Rao* v. *Vira Pratapa H. V. Ramachandra Razu* (4). The principle is well explained by Lord Eldon in *Jones* v. *Pugh* (5); also in *Davis* v. *Duke of Marlborough* (6). See also *Khubsarat Koer* v. *Saroda Charan Guha* (2) per Mookerjee, J. The proposition laid down at page 529 and in the other cases is too broad and is based on English cases.

In some States in America the position of a mortgagee is the same as in India. In those States it has been held that even if the mortgagor is insolvent and the security insufficient, a Receiver cannot be appointed. High on Receivers, pages 826-8. In the present case we have only a compromise decree providing for one remedy. Even f the mortgaged property is insufficient there cannot be a personal decree. Hence the mortgagee has no right to ask for a Receiver.

Mr. *P. Somasundaram*, for the Respondent:—In the case reported in *Arunachellam Chettiar* v. *Manicka Varaher Desikar*(7), a Receiver was appointed when there was a decree for sale and the security was insufficient. In that case also the mortgagee was prevented by the mortgagor by injunction. See also *Khubsarat Koer* v. *Sarada Charan Guha* (2); *Eastern Mortgage and Agency Co., Ltd.*, v. *Rakea Khatun* (3); *Beni Madho Singh* v. *Pran Singh* (8); *Weatherall* v. *Eastern Mortgage and Agency Co. Ltd.* (9). The English cases support the position. See *Hopkins* v. *Worcestor* and *Birmingham Canal Navigation Co.* (10), In England a mortgagee who is entitled to possession cannot get a Receiver. Hence the argument of the other side is fallacious. The respondent is entitled to a personal decree.

Mr. *B. Somayya* in reply:—The case in *Arunachellam Chettiar* v. *Manicka Varaher Desikar* (7) is distinguishable, because there the mortgagee was ent tled to the rents and

(1) 14 B. 431.
(2) 12 Ind. Cas. 165; 14 C. L. J. 526; 16 C. W. N. 126.
(3) 17 Ind. Cas. 202; 16 C. W. N. 997.
(4) 19 M. 249; 33 I. A. 32; 6 M. L. J. 53; 7 Sar. P. C. J. 10.
(5) 32 Eng. Rep. 278; 8 Ves. (Jun.) 71.
(6) 36 Eng. Rep. 555 at p. 569; 2 Swans. 108; 2 Wils. Ch. 130; 35 R. R. 29.
(7) 3 Ind. Cas. 437; 6 M. L. T. 238.
(8) 14 Ind. Cas. 456; 15 C. L. J. 187.
(9) 9 Ind. Cas. 985; 13 C. L. J. 495.
(10) 6 Eq. 437; 37 L. J. Ch. 729.

the personal remedy was alive. Otherwise the decision is incorrect. *Hopkins* v. *Worcester and Birmingham Canal Navigation Co.* (10) is inapplicable, as there was a special agreement that rents and current income should be applied towards the debt. The principle that a legal mortgagee who can take possession at Common Law cannot ask for a Receiver is based on the special rule of Equity Courts, which prevailed before the Judicature Act, that a person who has a remedy at Common Law cannot have a remedy in Equity Courts. This rule is no longer applicable even in England after the Judicature Act. Now a Receiver is appointed at the instance of a legal mortgagee, so that he may not be in the difficult position of a mortgagee in possession. Again, a person applying for the appointment of a Receiver for certa n property must show *prima facie* title to it. Kerr on Receivers, pages 45, 607.

JUDGMENT.

OLDFIELD, J.—The order appealed against is one appointing a Receiver. The lower Court's statement of the facts has not been disputed, and I adopt it. Shortly, the respondent holds a compromise decree against the appellant for recovery by sale of mortgage property. That property is heavily encumbered, and, if a sale were held at once, the respondent would not be likely to realise even a tenth part of his debt. He cannot bring the property to sale, because the appellant has sued for a declaration that the compromise decree was obtained through the fraud of his guardian during his minority and has got execution stayed. Meantime interest is running. It is clear that this delay is subjecting the respondent to the risk of irreparable loss and that on general considerations his claim to provisional relief is strong. It is not denied that, when the order staying execution was made, he suggested that it should be conditional on the appointment of a Receiver, but was told to apply separately; and it is possible that the lower Court in making its order had the prospect of such an application in mind. But it is not contended that the former was conditional on the grant of the latter, and it, therefore, cannot be treated as having been so.

The appellant's argument here is as it was in the lower Court, that as the respondent's decree for sale on a simple mortgage would not entitle him to possession of the property or its profits, the Court cannot by means of a receivership give him what it could not give by way of substantive relief, and that this is not affected by the fact that he is unable to execute in accordance with the decree.

This argument is, no doubt, *prima facie* sustainable and the first attempt to reconcible the appointment of a Receiver with the character of the decree must be dismissed shortly. It is that, when the sale has been held and its proceeds have been found insufficient to satisfy the respondent's debt, as they are practically certain to be, he will be entitled to ask for a personal decree and a receivership of the appellant's resources in anticipation of it. There is at least one fatal objection to this, that the respondent has not shown that the personal remedy is still available to him. For it is clearly too late for him to ask for that remedy in respect of the earlier of the two mortgages he sued on, that of 1894; and it has not been shown that suing in 1900, he can claim it in respect of the later, dated 20th June 1900. The lower Court's order must then be supported, if at all, on some wider ground than the appellant's personal liability; and it may be said at once that none of the decisions, to which I shall refer, contains any reference to personal liability as its basis. Such wider ground has, in my opinion, been shown to be available in the practice, on whatever considerations it be founded, of English and Indian Courts to grant the mortgagee equitable relief by way of a receivership in cases such as the present. Thus in *In re Pope* (11) it was said that "the Court of Equity always acted on the principle that it would never grant a Receiver where the party applying for the Receiver had a legal right to possession. An equitable mortgagee could get a Receiver, but a legal mortgagee could not until the passing of the Judicature Act." *Vide* also *Bodger* v. *Bodger* (12); *Hopkins* v. *Worcester and Birmingham Canal Navigation Co.*, (10) and *Davis* v. *Duke of Marlborough* (6). It is

(11) 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 369; 34 W. R. 693.

(12) 11 W. R. 160.

objected against the application of these English authorities that in England the mortgagee's right is either to sell or obtain possession by foreclosure and that the appointment of a Receiver in them may be understood as the anticipatory of the latter. But the appointment is not supported in any of them on that restricted ground; nor is the restriction recognised in any of the Indian cases, in which they are relied on.

In India the current of decisions has been clear in respondent's favour, for appellant has not shown that any of them were based on the decree-holder's right to possession, immediate or future, and has cited no case, similar to the present, in which a Receiver has been refused. *Jaikissondas Gangadas* v. *Zenabai and Kazi Mohamed Miya Dada Miya* (1) was referred to by the lower Court. But it is of assistance, only because *In re Pope* (11) is referred to in it with approval, the suit having been brought on the original side for sale or foreclosure in the alternative. *Latafut Hossein* v. *Anunt Chowdhry* (13) was, like *Jai Kisoondas Gangadas* v. *Zenabai and Kasi Muhomed Miya Dada Miya* (1), decided under the Code of 1882, though it has not been shown that any subsequent change in the law affects the argument. In the former the appointment of a Receiver was refused; but it had been applied for by the mortgagor in circumstances not resembling those before us. The facts in *Ghanashyam Misser* v. *Gobinda Moni Dasi* (14) are not given fully in the report. But it is plain that sale, not possession, was the mortgagee's remedy. It was held that there would be no obstacle to the appointment of a Receiver, if one were justified by the circumstances of the case. This authority was followed by this Court in *Arunachellam Chettiar* v. *Manicka Varaher Desikar* (7); and reference to the record in the case shows that the facts resembled those before us closely, because the decree was on a simple mortgage and its execution had been stayed. The three remaining decisions to be considered are also clearly in respondent's favour and were reached after consideration of the English practice. In two of them, though the report contains no explicit statement, it is clear that the mortgage did not transfer to the mortgagee any title to the property or present or future right to possession; and it is, therefore, to be inferred that the mortgage was (as here) simple and the remedy by sale. For apart from the facts that the transactions in question took place in the *mofussil* and that there is no reference to any special rights in connection with them, in *Weatherall* v. *Eastern Mortgage and Agency Co. Ltd.*(9) there was in connection with the mortgage a trust deed, to which the mortgagee Company consented but in which it did not join, by which the mortgagor vested the property and its possession in trustees to discharge the debt and interest on it from the profits. And in *Eastern Mortgage and Agency Co. Ltd.* v. *Rakea Khatun* (3) the mortgage sued on included provision for the appointment of two managers statedly on behalf of the mortgagors, who must, therefore, have retained their rights. In these cases the Court held that default in payment of interest justified the appointment of a Receiver pending trial. Lastly in *Khubsarat Koer* v. *Sarada Charan Guha* (2) appointment of a Receiver was refused, because the decree was for foreclosure. But the Court said "that if it had been for sale and it had been established that the security was not sufficient to satisfy the judgment-debt, a Receiver would have been appointed almost as a matter of course, especially if there had been default in payment of interest."

Authority being in accordance with the decision of this Court in *Arunachallem Chettiar* v. *Manicka Varaher Desikar* (7) and negativing the appellant's objection, the conclusion must be that the appointment of a Receiver was within the lower Court's powers. It was certainly justified by the circumstances. The appeal must, therefore, in my opinion, be dismissed with costs.

SADASIVA AIYAR, J.—The judgment-debtor is the appellant. A compromise decree for sale of the mortgaged property on failure to pay the amount agreed upon between the parties was passed in July 1907. The judgment-debtor has brought a Regular Suit No. 4 of 1912 to have that compromise decree set aside and has obtained an injunction against the decree-holder's bringing the mortgaged property to sale in execution of that compromise decree. Thereupon the decree-holder applied for the appointing of a Receiver to take charge of the properties and to receive

(13) 23 C. 517.
(14) 7 C. W. N. 452.

the rents and profits and his application has been granted by the executing Court. The present appeal is against that order appointing a Receiver.

Mr. B. Somayya, who argued the case before us for the judgment-debtor with remarkable ability, relied upon several English, Irish, American and Indian authorities in support of his contention that unless the mortgagee was entitled to immediate possession of the corpus of the mortgaged property or at least to the immediate receipt of the rents and profits, the Court has no power to appoint a Receiver at the instance of a mortgagee. I do not intend to deal with these cases in detail. Most of the English cases relate to English mortgages and it is well known that the mortgagees under the English form of mortgage are in the eye of the Common Law the legal owners of the mortgaged property and are entitled, whenever they wished, to obtain actual possession of the corpus and of the rents and profits. They were at first not given the right to have a Receiver appointed through Court as they had the higher, though very inconvenient right as owners of taking possession, the inconvenience arising out of their obligation to keep correct accounts of the profits and to take due care of the mortgaged property. By legislation, the right to have a Receiver appointed through Court has been granted to them. As regards equitable mortgagees by deposit of title-deeds (I do not mean equitable mortgagees in the other sense, that is mortgagees of the equity of redemption), Courts of Equity looked upon them in all respects as if they were legal mortgagees and though Courts of Equity could not themselves award actual possession of the corpus, they appointed Receivers at the instance of the mortgagees to receive rents and profits for the benefit of the equitable mortgagees. After the Judicature Acts (see Ashburner on Mortgages, pages 297 and 298) possession can be given to equitable mortgagees provided there is no legal mortgage outstanding. Similarly in the case of 2nd and 3rd mortgagees, Receivers were appointed subject to the rights of the first legal mortgagee, as the documents obtained by the 2nd and 3rd mortgagees were also in the English form which contain a clause conveying the mortgagor's rights of ownership.

Then there are some cases where Receivers were appointed at the instance of debenture share-holders who have usually the right to be paid the interest on their debenture shares out of the annual profits of the Company.

Mr. B. Somayya argued on these authorities that it was the fact that mortgagees and debenture share-holders had an interest in, or charge on, the rents and profits that gave the power and jurisdiction to the Court to appoint a Receiver for their benefit. I think, however, that he put the matter too high in so stating the proposition. The circumstance to which he referred had undoubtedly the effect of making the Courts readier to grant the application for receivership, as "justice and convenience" could readily be shown to be promoted by the appointment of a Receiver in such cases: but I do not think that that circumstance, namely, the existence in the plaintiff of a right to receive rents and profits or of a charge in his favour on the rents and profits is the indispensable pre-requisite for the exercise of the Court's power to appoint a Receiver. The new Civil Procedure Code, Order XL rule (1), [following the Judicature Act of 1873, section 25 (8)] gives the widest power to a Court to appoint a Receiver of "any property" whenever it appears to the Court to be "just and convenient," whereas the old section 503 gave power to the Court to appoint a Receiver only when it was "*necessary for the realization, etc.*," of a property, "the subject of a suit or attachment." The learned commentators, no doubt, throw out a suggestion in Woodroffe and Ameer Ali's Civil Procedure Code, page 1196, that though the words "any property" are used in Order XL, rule (1), it must be the subject of a suit or attachment. But I do not see why such a restriction should be placed.

In *Arunachellam Chettiar* v. *Manicka Varaher Desikar* (7) it was held that (as I understand the judgment) (1) where the mortgagee decree-holder was prevented by an injunction (as in this case) from bringing the property to sale, (2) where the security was insufficient for the realization of the decree amount by its sale alone (again as in this case) and (3) where added to the above two facts for the balance of the decree after the sale of the mortgaged property, a supplement decree against the

defendant for the balance of the decree amount to be realised by the attachment and sale of his other properties could be passed, the Court had the power to appoint a Receiver for the rents and profits of the mortgaged property in order that the accumulated rents and profits might be available to the decree-holder for the attachment if and when he obtains his supplemental decree. I am, therefore, clear that Mr. Somayya's first contention is stated too widely and cannot be accepted.

His next contention was that under the terms of the decree in the present case the decree-holder is not entitled, after the sale of the corpus of the mortgaged property, to get a supplemental deree for recovery of the balance of the decree amount by proceeding in execution against other properties of the judgment-debtor and that, therefore, the appointment of a Receiver for the purpose of preserving the rents and profits in order that they may be available to the decree-holder for attachment in execution of a further supplemental decree, is futile in this case and ought not to have been granted.

Having considered the terms of the compromise decree carefully and having regard to the fact that the remedy against the other properties appears, *prima facie*, barred on the date of the suit so far as the amount due on one of the two mortgage-deeds on which the suit was brought is concerned and that it is not clear that such a remedy is not barred even as regards the sum due on the second document and that it is also an arguable point whether a compromise decree for sale of the mortgage properties can be followed by a supplemental personal decree for the balance of the decree amount, I have come to the conclusion that this was not a fit case for the appointment of a Receiver of the rents and profits. This aspect of the case seems not to have been brought to the notice of the lower Court. The learned Sub-Judge assumes that the respondent is entitled to "proceed" against other properties of the judgment-debtor for "realising the entire balance that may be due to him (the decree-holder) after the sale of the above mortgaged villages" and that hence, "it is but just to take steps to preserve the rents of the villages for the benefit of the petitioner from loss." But, as I said above, the assumption is, *prima facie*, a mistaken one. Of course, if the corpus itself is likely to deteriorate by acts of waste threatened by the judgment-debtor, a Receiver could be appointed; but there is no such allegation in this case.

As to the hardship on the decree-holder, who is prevented by an injunction from bringing the mortgaged properties to sale while further being unable to get a Receiver appointed through its being doubtful whether he is entitled to a supplemental decree after the sale of the mortgaged property, I have little doubt that when this hardship is pointed out, any application he might make in the new suit for the dissolution of the injunction granted at the instance of the plaintiff in that suit (the judgment-debtor herein) will be favourably considered by the Court which granted the injunction.

In the result, I would set aside the lower Court's order. Under these circumstances I would direct the parties to bear their respective costs in both Courts.

BY THE COURT.—In the result the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 348, 406 TO 408 OF 1913

November 17, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

IN NO. 348 OF 1913

KOLAKUDI VEERAMA REDDI—PLAINTIFF—APPELLANT

IN NO. 406 OF 1913

KOLAKUDI VEERAMA REDDI AND ANOTHER—APPELLANTS

IN NO. 407 OF 1913

SELLAPPA REDDI—PLAINTIFF—APPELLANT

IN NO. 408 OF 1913

ARUNCHALLA REDDI—PLAINTIFF—APPELLANT

versus

VASUDEVA REDDI *alias* RAMASWAMY REDDI, MINOR, BY HIS GUARDIAN, PRASANNA VENKATARAMA REDDIAR—DEFENDANT—RESPONDENT IN ALL.

Madras Estates Land Act (I of 1908), s. 78—Affixing of pattas *to land necessary.*

DIGAMBAR DAS *v.* HARENDRA NARAYAN PANDEY.

In order that a distraint under section 78 of the Madras Estates Land Act should be valid, it is not enough to show that the *pattah* was either tendered to the tenant or affixed to his house. It must also be shown that it was affixed to a conspicuous part of the land.

Zemindar of Sivagiri v. *Micheal* alias *Sankaralingam*, 21 Ind. 587; 14 M. L. T. 423; (1913) M. W. N. 965; 25 M. L. J. 608, followed.

Second appeals against the decrees of the District Court of Trichinopoly, in Appeal Suits Nos. 413, 414, 416 and 415 of 1911 respectively, preferred against those of the Deputy Collector of Namakkal, in Original Suits Nos. 114, 115, 117 and 116 of 1910, respectively.

Messrs. *C. V. Ananthakrishna Aiyar* and *K. S. Ganesa Aiyar*, for the Appellants.

Mr. *V. Purushothama Aiyar*, for Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—Following the decision in *Zamindary of Sivagiri* v. *Micheal* alias *Sankaralingam* (1), we must hold that mere offer of the *patta* to a tenant who refuses to accept it is insufficient, unless followed by affixment to a conspicuous part of the land. The *pattas* in the present cases were admittedly affixed, not to a conspicuous part of the lands, but to the tenants' houses. The provisions of section 78 of the Madras Estates Land Act have not been complied with, and the plaintiffs must be given decrees for setting aside the attachments. Each side will, however, bear their own costs throughout.

Petition allowed.

(1) 21 Ind. Cas. 587; 14 M. L. T. 423; (1913) M. W. N. 965; 25 M. L. J. 608.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 322 OF 1911.

March 13, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

DIGAMBAR DAS—PLAINTIFF—APPELLANT

versus

HARENDRA NARAYAN PANDEY AND OTHERS—RESPONDENTS.

Sonthal Parganas Settlement Regulation (III of 1872), ss. 25, 25A—Putnidar *not a proprietor.*

A suit by a *putnidar* who is not a *zemindar*, for a declaration that the defendant *putnidars* had fraudulently caused certain land to be recorded as their *lakheraj* in the Record of Rights, is barred by sections 25 and 25 *A* of the Sonthal Parganas Settlement Regulation, 1872.

A *putnidar* is not a proprietor within the meaning of section 25*A*.

Appeal against the decree of the District Judge of Dumka, dated the 12th November 1910, affirming that of the Subordinate Judge of Pakur, dated the 15th August 1910.

Babu *Tarak Chandra Chakrabarty*, for the Appellant.

Babu *Nares Chandra Sinha*, for the Respondents.

JUDGMENT.—The plaintiff in this case claims that he is a *putnidar* to the extent of one-third and that the defendants are *putnidar* to the extent of the remaining two-thirds of a property. He complains that the defendants have fraudulently had certain land recorded as their *lakheraj* in the Record of Rights. The Courts have held that the suit is barred by sections 25 and 25A of the Sonthal Parganas Settlement Regulation, 1872. The plaintiff appeals. It appears to me that the decision of the Court below is correct. Section 25 of the Regulation provides: "The Record of Rights shall be conclusive proof of the rights and customs therein recorded other than the rights mentioned in section 25A." Section 25A provides: "Where only the rights of *zemindars* and other proprietors as between themselves are concerned a suit may be brought in a Civil Court." It is admitted that the plaintiff is not a *zemindar*. The only question is whether he and the defendants are proprietors. The word "proprietor" is not defined in the Act; but having regard to the Bengal Tenancy Act, which deals more or less with similar matters, it would seem that a *putnidar* is not a proprietor. Reference may also be made to the Bengal Land Registration Act, 1876. The learned Pleader for the appellant has not shown us any authority for holding that a *putnidar* is a proprietor within the meaning of section 25A of the Regulation and, in our opinion, he is not a proprietor.

That being so, the decision of the Court below is right and the appeal must be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FULL BENCH.

CRIMINAL REVISION PETITION No. 189 OF 1914.

July 2, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, Mr. Justice Johnstone and Mr. Justice Rattigan.

HASTA AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 254, 255, 345—Offence compoundable without sanction of Court—Presentation of petition of compromise—Power of Court to alter charge—Acquittal—Trial—Inquiry.

Where a Court has drawn up a charge of an offence compoundable without sanction of Court and this charge, having been read and explained to the accused, has been pleaded to, that Court should, upon the presentation to it of a petition of composition by the person mentioned in the last column in the table in section 345, Criminal Procedure Code, at once accept the petition and acquit the accused and has no power to alter the charge already drawn up.

Obiter:—When the charge has been drawn up and read and explained to the accused and he has pleaded, the "inquiry" becomes a "trial".

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Additional Sessions Judge of the Shahpur Division, at Lyallpur, dated the 12th of January 1914, affirming that of the Magistrate, First Class, Jhang, dated the 22nd of December 1913, convicting the petitioners.

Mr. *Badr-ud-Din Kureshi*, for the Petitioners.

Mr. *Herbert*, for the Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This case has been referred to a Full Bench as it appeared to require careful treatment and an authoritative decision. The facts are simple in so far as they affect the question referred, and they may be stated thus. On 20th November 1913, seven accused persons being before the Magistrate, he heard evidence and drew up against them charges under section 447 and section 342, Indian Penal Code, the offences punishable under these sections being compoundable. Accused were called upon to plead and pleaded, not guilty. The case was adjourned for further cross-examination of the prosecution witnesses and was still pending, when on 3rd December 1913 complainant put in a *razinama*. The case was adjourned to 4th December on which day complainant was examined, and the 16th December was fixed "for argument." On that day the Court recorded an order that the charges should have been under section 147, Indian Penal Code. They were, therefore, altered accordingly; and the offence of rioting not being compoundable, sanction to the *razinama* was refused, and in the end the Magistrate convicted all the accused persons and sentenced each to nine months' rigorous imprisonment.

In appeal to the Sessions Court the point was taken, *inter alia*, that the complainant having filed a *razinama*, the accused should have been acquitted, the proceedings following the presentation of that document being null and void. This plea the learned Additional Sessions Judge rejected on the strength of a case in which similar procedure had been followed by a Magistrate and approved by the Sessions Judge, the conviction being finally upheld by the Chief Court. In connection with this we would remark that that case came up here on revision, and that the Judge who dealt with it expressed no definite opinion on the correctness of the procedure, but declined to interfere, apparently because he thought substantial justice had been done. In the present instance it does not appear that there are any special reasons for declining to interfere, and the point is one of importance.

We have heard Mr. Herbert in support of the lower Court's view and Mr. Kureshi against it. The way we look at the matter is this. Under section 345 (1), Criminal Procedure Code, offences punishable under section 447 and section 342, Indian Penal Code, may be compounded by the person in possession of the property trespassed upon and the person confined respectively, under both of which descriptions it is not denied that the present complainant comes. Then sub-section (6) says that "the composition of an offence under this section shall have the effect of an acquittal of the accused."

Further, sub-sections (1) and (2) show that while the sanction of the Court is required to composition of offences falling under certain sections and while sanction is required in the peculiar circumstances mentioned in sub-section (5), no such sanction is required when the offence comes under section 447 or section 342 and the case is still under trial in the Court of first instance. Then, see sections 254 and 255, Criminal Procedure Code

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When the charge has been drawn up and read and explained to the accused and he has pleaded, the "inquiry" becomes a "trial." But the law says, as we have seen, that a composition under section 345, Criminal Procedure Code, shall have the effect of an acquittal; and we are of opinion that the composition is complete immediately complainant puts it forward in Court: *cf.* *Kasum Bewa* v. *Bechu Bewa* (1), in which it was held that a petition of composition once put in cannot be withdrawn. In short, when the petition of composition is put in, the case is at an end, and the Court's sole remaining duty and sole remaining function is to record a formal order of acquittal and to set the accused person at liberty. It should at once proceed to do so, it being obligatory on it to accept the compromise and to give effect to it—see *dictum* to this effect in *Kusum Bewa* v. *Bechu Bewa* (1), already quoted, and in *Mahomed Ismail* v. *Faizuddi* (2). We do not think at such a stage it can sit down and consider whether the charge it itself has drawn was appropriate or not, much less proceed to alter that charge and go on with a case which has wholly passed out of its hands.

Mr. Herbert, adverting to section 227, Criminal Procedure Code, suggests that the Court could under that section alter the charge "at any time before judgment is pronounced," and, therefore, still had power to do so in the present case notwithstanding the petition of composition. For two reasons we are inclined to withhold our assent to this suggestion. In the first place, apart from the technical meaning of the word "judgment," it is hardly correct to allow a Court, by a too liberal interpretation of section 227 aforesaid, to go behind what the law has pronounced *equivalent to an acquittal* and to re-try a case already ended. Section 403 (1) of the Code, in our opinion, prevents a re-trial, even on a different charge, of the same persons on the same facts after an acquittal still in force. *Secondly*, it is more than doubtful whether the final order of acquittal on a petition of composition is a "judgment:" *cf.* provisions in section 367 (1) as to "contents of judgment," and *Mir Ahwad Hossein* v. *Mahomed Askari* (3), where it was laid down that an order of discharge by a Magistrate under section 253, Criminal Procedure Code, upon a withdrawal of the complaint by the complainant was not a "judgment" within the meaning of that section. The "discharge" in that case, if the offence was compoundable, would have had the effect of an acquittal as here; and either way the applicability of that ruling to the present case is clear enough.

Cases like *Emperor* v. *Asmal Hasan* (4) and *Emperor* v. *Hira Singh* (5), quoted by Mr. Herbert, have little or no relevancy here. In the former the Police sent up, under sections 325/511, Indian Penal Code (compoundable with sanction of Court), a batch of persons exceeding five, whose offence, if any, certainly came under section 148, Indian Penal Code (non-compoundable). A petition of composition was put in by the complainant and was allowed; but the High Court properly pointed out that the discretion allowed in connection with section 325 had in the circumstances of the case been wrongly exercised, and, further, that the real offence committed was a non-compoundable one. The difference between that case and the present one lies in this, that here charges covering compoundable offences had been actually drawn up and read and explained to the accused persons and had been pleaded to, while there no charge had yet been drawn up and the Magistrate was not tied down to the sections quoted in the *chalan*, but had yet to consider what, on the record, was the substantive offence disclosed by the evidence. In the Punjab case of 1907 (5), on the other hand, certain persons having been *chalaned* under section 147, Indian Penal Code, the Magistrate, having taken no evidence as yet and thus having no material for deciding on the facts, accepted a petition of composition on the ground that probably the case would turn out to come under section 323, section 324 or section 325, Indian Penal Code. Naturally the Chief Court refused to allow such an order to stand; but the case is clearly no guide for us here.

It is unnecessary to labour the point further. We think the answer to the refer-

(1) 3 C. W. N. 322.
(2) 3 C. W. N. 548.
(3) 29 C. 726 (F. B.); 6 C. W. N. 633.
(4) 4 Bom. L. R. 718.
(5) 11 P. R. 1907 Cr.; 34 P. W. R. 1907 Cr.; 6 Cr. L. J. 336; 47 P. L. R. 1908.

ence should be that where a Court has drawn up a charge of an offence compoundable without sanction of Court, and this charge, having been read and explained to the accused, has been pleaded to, that Court should, upon the presentation to it of a petition of composition by the person mentioned in the last column in the table in section 345, Criminal Procedure Code, at once accept the petition and acquit the accused and has no power to alter the charge already drawn up.

Petition accepted.

BOMBAY HIGH COURT.
CRIMINAL APPEAL No. 354 OF 1914.
September 14, 1914.
Present:—Mr. Justice Heaton and Mr. Justice Shah.
ISMAIL ALIBHAI—ACCUSED
versus
EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), *s.* 75—*Previous conviction, proof of, when admissible—Relevancy of previous conviction—Evidence Act (I of* 1872), *ss.* 54, 165.

The proof of a previous conviction, not contemplated by section 75 of the Indian Penal Code, may be adduced, provided the previous conviction is relevant under the Indian Evidence Act.

Where the previous conviction of an accused is relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to his case and where it is also relevant on the question of punishment, a Court is justified in taking it into consideration in deciding the question of punishment after the accused is found guilty.

Criminal appeal from conviction and sentence recorded by the Chief Presidency Magistrate, Bombay.

Mr. *Velinkar* (with him Mr. *B. T. Desai*), for the Accused.

Mr. *S. S. Patkar*, Government Pleader, (with him Mr. *E. F. Nicholson*, Public Prosecutor), for the Crown.

JUDGMENT.

HEATON, J.—This is an appeal against a conviction for using criminal force to deter a public servant from the discharge of his duties. The offence consists in this, that the two accused succeeded in preventing the arrest of a person who was believed to be taking part in traffic in cocaine. The two accused were sentenced and we are dealing with the appeal of one of them.

On the evidence, I think, the Magistrate was right in holding that the offence was committed. The chief question argued is this: Is a previous conviction one of the matters which a Court is permitted to consider in imposing sentence? The imposing of sentence is, within the wide limits allowed by the law, a matter of discretion; it is not a matter of proof. That is, it is a matter within the sphere, not of evidence, but of penology. Section 54 of the Indian Evidence Act is a part of the law of evidence, not a part of the penal law. It regulates what is relevant for the purpose of proof at the inquiry or trial, not what is relevant for the purpose of deciding whether a long or a short sentence should be imposed. Its purpose is quite plain; ordinarily evidence of bad character, including a previous conviction, is irrelevant to help to establish an accused person's guilt. But the law of evidence does not define or profess to define those matters which a Court should consider in using its discretion in passing sentence. What these matters are to be is largely left to practice and to the common sense and knowledge of the world of the Court. Where they are definitely indicated, this is done in the Indian Penal Code and the law of Criminal Procedure, the Whipping Act and so forth; most emphatically not in the Law of Evidence. One might as reasonably, I think, look to the Law of Evidence for information as to the maximum sentence to be imposed. In my judgment, therefore, to apply section 54 of the Indian Evidence Act to the matter now before us is as much out of place as to apply, say, the Hindu Law to an European's Will. Of course, the previous conviction, if it is to be taken into account, must be proved to the satisfaction of the Court, and in the matter of proving it, it may be that the provisions of the Indian Evidence Act apply. I do not wish to express any opinion on that point.

Having regard to the previous conviction, I think that the sentence imposed in this case is appropriate to the offence and I would dismiss the appeal and confirm the conviction and sentence.

SHAH, J.—I agree that the conviction and sentence must be confirmed in this case. The

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conviction is undoubtedly right. We took time to consider the question of sentence. It is argued by Mr. Velinkar that the sentence must be based upon materials which are relevant under the Indian Evidence Act, and that the previous conviction which is taken into consideration by the lower Court is irrelevant under section 54 of that Act.

The previous conviction is used in this case, not for the purpose of affecting the punishment to which the accused is legally liable, but merely to influence the Court in determining the amount of punishment which it should award. The conviction in this case is under section 353 of the Indian Penal Code, and the previous conviction in question was for assaulting an *Abkari sepoy* on the 5th August 1905,—apparently under section 353 of the Indian Penal Code. I think that under section 165 of the Indian Evidence Act the judgment must be based upon facts declared by the Act to be relevant and duly proved. Under the Criminal Procedure Code the judgment or the particulars to be recorded by a Presidency Magistrate would include the punishment to which the accused is sentenced. It is clear that the sentence must be based upon facts which are relevant under the Indian Evidence Act. I am, however, unable to accept Mr. Velinkar's argument that under section 54 a previous conviction is irrelevant, just as the fact that the accused person has a bad character is irrelevant. His contention in effect is that the expressions "bad character" and "previous conviction" are mutually convertible terms within the meaning of section 54. If the section, as it is now and as it was before the Amending Act III of 1891, be carefully read, it seems to me clear that these expressions cannot be treated as having exactly the same meaning and scope. Though the fact of bad character is irrelevant except as provided in the section itself, it does not follow that a previous conviction is similarly irrelevant.

The case of *Emperor* v. *Duming* (1), which is relied upon by Mr. Velinkar in support of his contention, is really not in point. There the evidence of a previous conviction was admitted before the conviction of the accused of the offence charged; and the observations in the judgment have relation to that fact. The question raised in this appeal, *viz.*, whether after conviction the proof of a previous conviction not covered by section 75 of the Indian Penal Code can be given, did not arise and could not have been considered in that case.

I have also considered the provisions of section 348 of the Code of Criminal Procedure in connection with this point. In my opinion the section does not touch the point, that has been argued in this appeal.

It follows that the proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced provided the previous conviction is relevant under the Indian Evidence Act. The whole question, therefore, is whether the previous conviction in question is relevant under the Act. It is certainly relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to this case, and it seems to me to be otherwise relevant on the question of punishment. The lower Court was justified in taking it into consideration in deciding the question of punishment after the accused was found guilty. I do not say that any previous conviction not covered by section 75, Indian Penal Code, is relevant to the question of sentence. But the question of relevancy of a previous conviction not falling under section 75, Indian Penal Code, must be considered and decided in each case as it arises with reference to the circumstances of that case.

Appeal dismissed.

(1) 5 Bom. L. R. 1034.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 574 OF 1914.

September 22, 1914.

Present:—Sir George Shaw, KT., J. C.

NGA TUN E—PETITIONER

versus

MI CHON—RESPONDENT.

Evidence Act (I of 1872), s. 112—Legitimacy—Presumption—Non-access—Impotence—Question of paternity one of evidence only.

The presumption created by section 112 of the Evidence Act can only be rebutted by proof of non-access, and to prove non-access, the evidence must be such as to exclude all doubt. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy.

Proof of impotence would be equivalent to proof of non-access.

Where the point for decision is one of evidence (*e.g.*, paternity) only, the case would be governed by section 112 and not by the personal law of the parties.

The question of a child's paternity is not one of succession, inheritance, marriage, or caste, or any religious institution or usage, within the meaning of section 13 of the Burma Laws Act, 1898.

Mr. *S. Mukerjee*, for the Petitioner.

Mr. *Vasudevan*, for the Respondent.

JUDGMENT.—Respondent applied for maintenance for a child of which she alleged the applicant to be the father. She was a married woman living with her husband, Nga Pauk Kyaing, to whom she had been 20 years married without getting a child. Then, as she says, she fell in love with the applicant in 1270 B. E., and two months afterwards became pregnant by him of the child in question. She continued to live with her husband until two months after the birth of the child, when the husband divorced her. She stated in evidence that from the time when she began to have intercourse with the applicant, she did not allow her husband to approach her.

He, Nga Pauk Kyaing, examined as a witness on respondent's behalf, said that he did not approach his wife from the time she became pregnant though she continued to live in his house, and again that from the time respondent and applicant were accused of having intercourse with each other, respondent would not allow him to approach her, and that this was before respondent was pregnant. He also stated that respondent continually told him that the child with which she was pregnant was not his, and that (after the birth of the child) he tried to catch the applicant and watched and caught him sleeping with the respondent in his house when applicant said, "This is my wife and son, what has it got to do with you," that the headman told him not to take the matter further, and that he accepted Rs. 25 from the applicant as damages.

The midwife stated that the applicant promised to pay for her services when the child was born, and told her not to ask for money from the husband as the child was his, applicant's. This witness is a cousin of respondent's.

Applicant admitted that he had intercourse with the respondent when the child was one year old but not before that, and he denied that he was the father of the child, but admitted that he had to pay, as he said, Rs. 100 to the respondent's husband, Pauk Kyaing. This was all the evidence in the case which it is necessary to mention.

The Magistrate found that applicant was the father of the child. He was assisted to this conclusion by the remarkable similarity of feature which he observed between the child and the applicant. He did not refer to section 112 of the Evidence Act.

It is now contended on behalf of the applicant that the provisions of section 112 of the Evidence Act were opposed to the Magistrate's finding, and also that there was no clear and conclusive evidence as to the applicant having been the father of the child.

It is unnecessary to discuss the evidence as to applicant being the father. Section 112 of the Evidence Act, in my opinion, must be held to decide the case. It reproduces a rule of the English Law, and the principle on which it is based has been stated to be that it is undesirable to inquire into the paternity of a child when the mother is a married woman and her husband has had access to her. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy. The presumption created by the section can only be rebutted by proof of non-access, and to prove non-access, the evidence must be such as to exclude all doubt. Unless it is proved that there has been no opportunity of sexual intercourse between the husband and wife at any time when the child could have been begotten, the presumption is not rebutted. The authorities for these statements are given in Messrs. Ameer Ali and Woodroffe's notes to section 112 and need not be cited here.

It has been contended on behalf of the respondent that the husband was impotent. On the other hand, Field's Commentary on section 112 has been referred to on behalf of the applicant, where it is suggested that section 112 does not permit, as the English

Law does, proof of impotence. But on this point, Messrs. Ameer Ali and Woodroffe in their commentary say: "There can be as little access when the husband is impotent though present, as when he is capable though absent. It is clear that there was no intention to depart from the English rule on the point." This is a reasonable interpretation, and I am of opinion that proof of impotence would be equivalent to proof of non-access. But there is no proof of impotence here. It cannot be inferred from the fact that respondent and Pauk Kyaing had been married 20 years without children that Pauk Kyaing was impotent. Phenomena of this kind are met with every day where there is no impotence.

The point for determination then is simply whether it was proved that the respondent's husband had no opportunity of sexual intercourse with her at any time when the child might have been begotten. The only evidence on the point is that of respondent herself and her husband which I have summarised above. According to English Law this evidence would not have been admissible, but the Evidedce Act does not exclude it. It is, however, in my opinion insufficient. Assuming it to be true, it is to be inferred from what both the witnesses say that sexual intercourse between respondent and her husband continued until the time when respondent began to allow intercourse to the applicant, and the pregnancy was recognized within two months of that time. It is obvious from this fact that the husband might perfectly well have been the father. But I find it difficult to credit the statements made by the witnesses as to Pauk Kyaing not having approached the respondent during the many months—some 10 or 11 months it must have been—they professed to have lived together without such intercourse. The opportunity was manifestly there, and the presumption is that there was intercourse. In short, non-access was not satisfactorily proved. This settles the point.

On behalf of the respondent, it has been further contended that according to the *Manugye*, section 80 (Richardson's Edition, page 319), the child in question, being a child begotten secretly in adultery, the wife remaining with her husband, is not entitled to inherit and, therfore, must be held not to be the child of the husband. The contention is that the Buddhist Law being applicable to questions of marriage and inheritance, section 112 of the Evidence Act must be held to have no application. On this point, Messrs. Ameer Ali and Woodroffe in their commentary on section 112 have some remarks (*see* 5th Edition, page 703 and note). Apparently when the point for decision is one of evidence only, the case would be governed by section 112 and not by the personal law of the parties. But here, in my opinion, there is no doubt; the question is not only one of evidence as to paternity, it is not one of succession, inheritance, marriage or caste or any religious institution or usage, the only cases in which the Buddhist Law is applicable (*see* Burma Laws Act, 1898, section 13). The marriage between respondent and Pauk Kyaing being still subsisting at the time when the child was born and it not being shown that the husband had no access to his wife at the time when it might have been begotten, the law does not allow inquiry to be made as to the child's paternity, and the finding of the Magistrate that the applicant was the father cannot be sustained.

The Magistrate's order is set aside and the respondent's application is dismissed.

Application dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION CASE NO. 1005 OF 1914.

July 10, 1914.

Present:—Mr. Justice Shadi Lal.

PHULA KHAN—ACCUSED—PETITIONER

versus

EMPEROR THROUGH *Musammat* SHAHZADA BEGAM—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance—"Neglects or refuses to maintain his wife," applicability of.

The expression "neglects or refuses to maintain his wife" in section 488, Criminal Procedure Code, does not apply where the husband states that he is willing to maintain his wife and the wife deposes that she is willing to live with her husband but he refuses to maintain her.

Case reported by the Sessions Judge of the Attock Division, with his No. 305J., dated the 12th of May 1914 under

section 438 of the Criminal Procedure Code, 1898.

FACTS.—*Musammat* Shahzada Begam, wife of Phula Khan, petitioner, applied for a maintenance order against her husband alleging that he had refused to maintain her.

The petitioner by W. W. Powell, Esquire, exercising the powers of a Magistrate of the first Class in the Attock District, was ordered, by order dated 17th March 1914, under section 488 of the Criminal Procedure Code, to pay Rs. 5 per mensem as maintenance to his wife, *Musammat* Shahzada Begam, which was to be payable from the date of the application.

GROUNDS.—One *Musammat* Shahzada Begam, the wife of Phula Khan, applied for a maintenance order under section 488, Criminal Procedure Code, against her husband, who appeared in obedience to the summons issued on her application and stated that he was willing that she should live with him. The Sub-Divisional Officer, Pindigheb, in whose Court the proceedings were, gave Phula Khan time in which to arrive at a compromise with his wife. The parties subsequently appeared and asked for further time to compromise, but Phula Khan also applied for an inquiry by the Magistrate. The Magistrate referred the matter to Pir Ghulam Abbas for inquiry under section 202, Criminal Procedure Code. A report was submitted, but the Magistrate then proceeded to inquire into the matter himself.

He had, however, no authority to refer the matter for inquiry as the application, not being a complaint of offence within the meaning of section 4 (*b*), Criminal Procedure Code, the provisions of section 202, Criminal Procedure Code, were inapplicable. During the inquiry Phula Khan, who admitted *Musammat* Shahzada Begam was his wife, stated that he was willing to maintain her. She also stated that she was willing to live with her husband, but contended that he refused to maintain her.

The Magistrate was of opinion that Phula Khan's offer to maintain his wife was not made in good faith, and held that notwithstanding this offer, there were just grounds for making a maintenance order and fixed Rs. 5 per mensem as an equitable allowance. Phula Khan has applied for revision of this order granting maintenance.

Before a maintenance order could have been made, it should have been made to appear that Phula Khan refused or neglected to maintain *Musammat* Shahzada Begam whom he admitted to be his wife, whereas he offered to maintain her and she consented to live with him. In these circumstances, her application should have been dismissed or permission should have been given her to withdraw it. The Magistrate's order, therefore, appears to be wrong and I forward the case to the Chief Court with the recommendation that it be set aside.

Mr. *Nand Lal*, for the Petitioner.

Mr. *Fazal Ilahi*, for *Musammat* Shahzada Begum, complainant.

ORDER.—The sole question in this case is whether the husband "neglects or refuses to maintain his wife" within the meaning of section 488, Criminal Procedure Code. It appears from the record that the husband stated that he was willing to maintain his wife. The wife stated that she was willing to live with her husband but contended that he refused to maintain her. Even the Magistrate who made full inquiry into the matter expressed his opinion that it was "really a difficult matter to decide whether it is the accused who refuses to maintain complainant or whether it is the latter who refuses to be maintained." In view of the above opinion and the statements of the parties, I agree with the Sessions Judge in holding that it is not proved that the husband neglected or refused to maintain his wife.

I accordingly accept the revision and set aside the order of the Magistrate directing the husband to make a monthly allowance of Rs. 5 for the maintenance of the wife.

Revision accepted.

EMPEROR *v.* GANA KRISHNA WALUNJ.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No 58 OF 1914.
October 2, 1914.
Present:—Mr. Justice Heaton and Mr. Justice Shah.
EMPEROR—PROSECUTOR
versus
GANA KRISHNA WALUNJ—ACCUSED.

Criminal Procedure Code (Act V of 1898), *s.* 345—*Compounding a case—Written compromise signed byboth parties put in—Magistrate, whether entitled to call for further evidence.*

Where the parties are entitled of themselves to compound a case and put in a written paper signed by themselves stating that the offence is compounded, they have proved that the offence is compounded and a Magistrate is not entitled to call for further evidence to prove it.

Criminal reference made by the Additional Sessions Judge of Poona.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—In this case as disposed of by the Magistrate, three persons were convicted of the offence of hurt under section 323 of the Indian Penal Code. One was sentenced to a fine of Rs. 100, the other two to a fine of Rs. 50 each. The one on whom the appealable sentence was imposed appealed, and the conviction was reversed on the ground that the offence had been compounded. We hold that the Sessions Judge very properly sent the case to us, submitting that the convictions of the accused of the two non-appealable sentences may also be set aside.

We have not—of course it is not usual to have—the explanation of the Magistrate for his proceedings, and in the absence of any explanation I confess I do not understand them and find some difficulty in dealing with them. There is no doubt whatever that the complainant and the accused put in before the Magistrate a writing signed by them, in which the complainant states that she does not wish to proceed and that the case has been compounded. There is no doubt seeing that this was a case of hurt, that the complainant could compound the case without the permission of the Court. But the Court, as I understand it, came to the conclusion that its own permission was needed, that is, unless I have misunderstood, the purport of the Magistrate's judgment. He seems to have come to this conclusion on the strength of a passage in paragraph 6 of the Resolution of Government in the Judicial Department, No. 7969 of the 4th of November 1912. It is there stated that "Magistrates would also do well to scrutinize requests made to compound offences. Permission to do so should only be accorded when a composition is actually offered by the accused and accepted by the complainant." That advice on the part of Government can only apply to cases where the permission of the Court is needed in order that the case may be compounded. It cannot apply to cases where the person injured is entitled of himself to compound the case. The law on the point is clearly enough laid down in section 345 of the Code of Criminal Procedure. But the Magistrate, thinking that he must take some action of his own, called on the parties to prove that the case was compounded, and he says that the parties have not even attempted to prove it. This is a part of the Magistrate's judgment in particular which I do not understand. When the parties had of themselves put in a written paper signed by themselves—there is no doubt whatever on these points—and when that paper states that the offence is compounded, then it seems to me that the parties have not only attempted to prove, but have in fact proved that the offence is compounded. That this was so is further demonstrated by what followed when the Magistrate refused to treat the case as compounded and went on to take evidence. The complainant said that she had compounded the case and stated later that the facts alleged in the complaint were not true. That seems to me to be further evidence, if further evidence were needed, that she was determined for her part not to go on with the case against the persons whom she had originally accused. That again is entirely consistent with the view that she had compounded the case. Indeed, how the idea ever entered the Magistrate's mind that the case had not in fact been compounded is another matter which I am unable to understand. It seems to me to be clear beyond any possibility of doubt that the case was

compounded in fact. And seeing that it was a case which the complainant could compound without the permission of the Magistrate, it was also compounded in law.

Therefore, the convictions of accused Nos. 2 and 3 in this case must be set aside and the fines, if paid, ordered to be refunded.

The order as to payment of Court-fees made by the trying Magistrate is also set aside.

SHAH, J.—I agree. It is clear in this case that the offences with which the accused were charged by the complainant were compoundable and that they were in fact compounded by the person concerned. There being no doubt whatever about the fact of the offences having been compounded, it is clear that under clause 6 of section 345 of the Code of Criminal Procedure the accused ought to have been acquitted.

Order accordingly.

PUNJAB CHIEF COURT.

FIRST CRIMINAL APPEAL No. 612 OF 1914.

September 8, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

CHUHAR SINGH—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (XLV of 1860), s. 300—Murder—Circumstantial evidence · Unsatisfactory evidence of identification of body—Conviction, whether sustainable.

A conviction of murder cannot be sustained where the only circumstantial evidence against the accused is that the deceased was seized by the accused and the husband of the deceased in the road, placed on a camel and carried towards a canal in which her body was afterwards found completely dismembered, specially when the evidence of identification of the body is unsatisfactory and there is no direct evidence connecting the accused with the commission of the crime.

Appeal from the order of the Sessions Judge, Ferozepur Division, at Ferozepur, dated the 11th July 1914, convicting the appellant.

Messrs. *Vaughan* and *Nand Lal*, for the Appellant.

The *Assistant Legal Remembrancer*, for the Respondent.

JUDGMENT.—Chuhar Singh, appellant, has been convicted of murder and has been sentenced to death. He has appealed and we have also to consider his case under section 374, Criminal Procedure Code, if we support the conviction. However after going very carefully through the evidence and giving due weight to the arguments laid before us on both sides, we have arrived at the conclusion that there is not sufficient legal proof of the guilt of the appellant, who is, therefore, entitled to an acquittal.

The learned Sessions Judge and the assessors alike took a different view and the former has written a painstaking and lucid judgment—so lucid and full that we need not discuss the case at great length. According to the theory of the prosecution *Musammat* Rupan, wife by Karewa of Khem Singh, was seized by him and the appellant in the road, placed on a camel, which Chuhar Singh had borrowed that day from one Indar Singh, carried towards the canal, murdered and dismembered and thrown into the water. This is said to have happened on 14th January last, the capture taking place some little time before sunset. But then, according to the prosecution evidence (see P. W. No. 18 and P. W. No. 28), Chuhar Singh, appellant, was at Raoke Kalan, his own village, and returned the camel to its owner, at lamp-lighting time, which at that time of the year would certainly be less than an hour after sunset; and here we have the first obstacle in the way of finding that appellant was one of the actual murderers, for judging by the map and the evidence of the trackers, who profess to have detected the route and journeying and halts made, the party must have travelled at least five miles, and to the time necessarily occupied in travelling we must add the time spent in more than one halt and in the actual murder, the complete dismemberment of an adult human body and the carrying of it some distance to the water. It is suggested that P. W. No. 23, who is Indar Singh's servant, may, like his master, have had some motive for representing the early return of the camel and so helping to save appellant, but this argument does not touch the

eivdence of Hazara Singh, P. W. No. 18, who seems a respectable *lambardar*. No doubt we have the direct evidence of Chandu Singh and Mit Singh—P. W. No. 9 and P. W. No. 10—to the abduction, indirectly corroborated by Bhola Singh, P. W. No. 8, but even if that evidence be true, it may only prove appellant's taking part in the carrying off of the woman and is quite compatible with his leaving her with Khem Singh, who it should be noted has not been found, and returning home without joining in the murder, if any. Further, P. W. No. 9 and P. W. No. 10 are not above suspicion, for the latter brings into his statement to the Committing Magistrate Indar Singh as being present and abetting the abduction and then drops this before the Sessions Court. The learned Sessions Judge tries to get over this difficulty by suggesting at the end of his judgment that appellant, knowing questions would be asked if he was late with the camel, hurried back with it immediately after the murder; but considering the distances traversed and all the circumstances, we do not think this really removes the difficulty in the way of the prosecution.

Again, the body supposed to be *Musammat* Rupan's was found on 22nd January, eight days after the alleged murder, in the water 56 miles down stream from the spot where it is supposed to have been thrown in, and the question arises whether it was Rupan's body at all. The head, arms and legs were not found, but only the trunk, which was entirely naked. The only identificatory mark pointed to by the prosecution is a boil mark on the back of one thigh. A mark was mentioned in the *Naksha Surat-i-hal* as like mole, the size of an 8-annas piece. The doctor who made the *post mortem* never noticed this, but later Narain Singh, P. W. No. 5, a former paramour of *Musammat* Rupan, when asked about this, said he remembered that she had a boil mark. The body was then exhumed and the mark found. This seems to us a somewhat slender foundation for a finding that this was *Mussammat* Rupan's body; and against the theory of the prosecution is the very important fact that the doctor who did the *post mortem* expressly says that the skin was fresh-looking. He was, unfortunately, not expressly asked whether the decomposition had set in or whether the body was like that of one killed eight or nine days previously; but when we add that in the *Naksha Surat-i-hal* in the column, "is it stout, thin or decomposed?", the entry is "stout," with not a word about decomposition, it is fairly clear that it is somewhat improbable that the body found met with its death so early as 14th January.

There is nowhere in the case for the Crown any attempt to connect appellant with a crime committed later than 14th January, and we thus have, *first*, the doubt as to the identity of the corpse, and, *secondly*, the probability that it was murdered some days after 14th January, each of which circumstances seem to us, even taken separately, to justify appellant's prayer for absolution. Mr. Herbert strives to meet all this by pointing out that appellant and Khem Singh had a strong motive for getting rid of *Musammat* Rupan, and referring us to page 42 of the paper-book, where in his judgment the Sessions Judge has summarised the quarrels between the woman and them, and to page 38, and to the deposition of P. W. No. 21. We may say at once that we agree with him here. Then he insists that, in connection with the identity of the body, the finding of the ear-ring by Bhagu and Gajjan near the canal track towards the canal, and the proof that this was one of the ear-rings worn by *Musammat* Rupan, are the important things. As to this we can go so far as to concede that the woman was probably taken to the spot where the ear-ring was found; but this is all. Next, Mr. Herbert adverts to the evidence that *Musammat* Rupan was a woman with undeveloped breasts, a peculiarity found in the corpse, that she had a peacock tattooed on one arm, which arm on this very account probably was cut off and disposed of elsewhere, and, lastly, that she was known to have unusual defects in her genital organs which in the corpse were found mutilated and to a great extent removed. We are far from refusing to recognize the force of these arguments and from brushing them aside. They seem to us very much to deepen the suspicion that *Musammat* Rupan has been done to death; but they in no way remove the difficulties in the way of holding the

present appellant guilty of her murder.

Finding ourselves, therefore, unable to hold with any confidence that appellant joined in the alleged murder of *Musammat* Rupan, we must accept his appeal and acquit him. We order accordingly.

Appeal accepted.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 154 OF 1914.

September 20, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BHAU SAVALARAM KOTASTHANE—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 898), s. 110—Inquiry in progress—Detaining accused in jail—Illegality—General repute, evidence of.

To send a person to jail while an inquiry under security proceedings is in progress, is an illegality which prejudices his interests in the inquiry.

Therefore, such an inquiry can be said neither to be fair nor conducted with that regard for the rights and privileges of the person against whom the proceedings are taken, which the law requires.

Where the Chairman of the Managing Committee of a Municipality was proceeded against under section 110 of the Criminal Procedure Code, the proceedings being based on evidence of general repute, and he was detained in jail pending the inquiry:

Held (1) that the fact of detaining him in jail while the inquiry was in progress prejudiced his interests in the trial and rendered the inquiry unfair;

(2) that the evidence of general repute must in this case be evidence of a reputation which the accused had acquired since his appointment to the chairmanship.

Revision application against an order passed by the Sub-Divisional Magistrate, Ahmednagar, and confirmed in appeal by the District Magistrate of Ahmednagar.

Mr. *G. S. Rao*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—In this case we set aside the order requiring security from the applicant.

We do this in revision. It is said, and no doubt correctly said, that we seldom

interfere in these matters in revision. But the circumstances here are very exceptional. The applicant was sent to jail whilst the inquiry was in progress, an illegal thing and one which, on the face of it, prejudices his interest in the inquiry. Therefore, we cannot but say in this case that the inquiry has not been a fair one. It has not been conducted with that regard for the rights and privileges of the person against whom the proceedings were taken, which our law requires.

On the merits of the case I only want to say one thing. There is evidence of general reputation. It appears, however, that the applicant was Chairman of the Managing Committee of the Municipality of Vambori. Now when he came to be last appointed to that office, it ought to be evident that at that time his general reputation hardly could be that of a receiver of stolen property. And if evidence of general reputation is put forward in a case of this kind it must, so far as general reputation goes, almost inevitably be evidence of a reputation which has been acquired since the last appointment to an office of this kind, and, as such, it can be tested perhaps more easily than is usually the case with the evidence of that type.

For these reasons, I think the order requiring security must be set aside.

SHAH, J.—I agree.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 91 OF 1914.

July 17, 1914.

Present:—Mr. Kendall, A. J. C.

SHAHAMAT KHAN—APPLICANT

versus

GULAB KHAN—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Execution of decree, proceedings in—Judicial proceedings—Jurisdiction of Court.

Proceedings in execution of a decree are 'judicial proceedings' and, therefore, a Court has jurisdiction to pass an order under section 476, Criminal Procedure Code, with reference to matters which have come to its knowledge in execution proceedings.

Shaikh Bahadur v. *Shaikh Eradatulla Mallick*, 6 Ind. Cas. 801; 11 Cr. L. J. 407; 14 C. W. N. 799; 12 C. L. J. 45; 37 C. 642, referred to.

Application against the order of the Munsif, Kunda, dated 1st June 1914.

Mr. *I. Masaldan*, for the Applicant.

Mr. *Ali Muhammad* and the Government Pleader, for the Opposite Party.

JUDGMENT.—Shahamat Khan, applicant, held a decree, dated 20th January 1914, against Gulab Khan, opposite party, for Rs. 177-14. On the 16th of May 1914, Shahamat Khan applied for execution of the decree, and the property of the judgment-debtor was ordered to be attached. Meanwhile on the 9th of May Gulab Khan had applied filing a receipt, dated 28th February 1914, and asking that the decree-holder might be called for to certify its correctness. Notice was issued and on the 30th of May the Munsif went into the question and decided that the receipt was genuine, that the money had been paid and the decree discharged, that the statement of Shahamat Khan in that connection, that he had not received any money nor had signed the receipt, was false, and that his application for execution of decree made on the 16th May, after having received the decretal amount, was deserving of punishment. He committed him for trial under sections 193 and 210 and sent the case under section 476 of the Criminal Procedure Code to the District Magistrate, Partabgarh.

Application in revision has been made to this Court on the ground that the learned Munsif had no jurisdiction to pass any such order after the termination of the judicial proceedings. The learned Counsel who argued this application explains that his objection means that, as section 476 of the Code of Criminal Procedure only has reference to matters which have come to the knowledge of the Court in the course of judicial proceedings, therefore, the Munsif had no jurisdiction to pass an order under that section in this case, proceedings in execution of a decree not being judicial proceedings; and he relied upon a ruling in *Kanto Ram Das* v. *Gobardhan Das* (1). Having regard to the definition of 'judicial proceedings' in the Code of Criminal Procedure, there can be no doubt whatever that proceedings in execution of decree are judicial proceedings: and that has recently been held in *Shaikh Bahadur* v. *Shaikh Eradatulla Mallick* (2).

The application is rejected.

Application rejected.

(1) 35 C. 133; 7 Cr. L. J. 159.

(2) 6 Ind. Cas. 801; 11 Cr. L. J. 407; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 566 OF 1914.

September 15, 1914.

Present:—Sir George Shaw, KT., J. C.

NGA MYO—PETITIONER

versus

NGA KYAN AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 250—Charge of bribery—False charge—Compensation—Frivolous or vexatious.

As long as a case is frivolous or vexatious, the fact that it is also false is no bar to the application of section 250, Criminal Procedure Code.

A charge of bribery may not be frivolous, but, if false, is undoubtedly vexatious.

Mr. *J. N. Basu*, for the Applicant.

Mr. *L K. Mitter*, for the Respondents.

ORDER.—The applicant presented a complaint charging respondent, Nga Kyan, a Revenue Surveyor, with having taken a bribe of Rs. 100, and respondents, Aung Tha and Thet Le, with having given this bribe to him.

The District Magistrate framed charges against respondent, Nga Kyan, under section 161 and the other two respondents under sections 161 and 114 of the Indian Penal Code, but in the end acquitted all three and directed the applicant to pay Rs. 50 to each of them as compensation under section 250 of the Code of Criminal Procedure.

I am asked to interfere in revision, on the ground that the order was illegal because the Magistrate found the applicant's charges to be false and because Rs. 50 is the maximum prescribed by the section. A further objection is also taken on the ground that the Magistrate at the same time made an order to the effect that in default of payment, applicant should undergo simple imprisonment for one month.

The last-mentioned order was, of course, wrong as a perusal of clause (2) of section 250 is sufficient to show, but as the money has been paid, the mistake is immaterial.

As regards the maximum, the learned

Advocate must have misconstrued clause (1) of the section, the language of which is quite plain and free from ambiguity. It authorises a Magistrate to order compensation not exceeding Rs. 50 to be paid to each of the accused where there are more than one.

As regards the first point, the subject was fully considered by a Full Bench of the Calcutta High Court in *Beni Madhub Kurmi* v. *Kumud Kumar Biswas* (1). Four of the five Judges composing the Bench held that as long as a case is frivolous or vexatious, the fact that it is also false is no bar to the application of section 250. On consideration, I am of opinion that this ruling deserves to be followed. In the present case the charges being of giving and receiving a bribe were not frivolous, but if false, as the Magistrate found, they were undoubtedly vexatious. It is to be noted that section 250 of the present Code speaks of "frivolous or vexatious" accusations and not, as one of the previous Codes had it "frivolous *and* vexatious."

No objection has been taken in the application to the order of acquittal, and after referring to the proceedings, I am of opinion that no ground has been made out for the interference of this Court in revision with that order.

The application is dismissed.

Application dismissed.

(1) 30 C. 123; 9 C. W. N. 799.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 903 OF 1913.

March 4, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

GUL SHAH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Murder—Four accused joined in beating of which two only gave fatal blows—Responsibility of other two—Hurt—Penal Code (Act XLV of 1860), *ss.* 300, 323.

Where four persons joined in beating another, out of them two gave him fatal blows on the head which resulted in his death, while the remaining two struck him on the body with no exceptional violence, and were not shown to have realized that they were taking part in a murder or how grave the injuries inflicted by their comrades were:

Held, that the latter were guilty only of causing simple hurt under section 323, Indian Penal Code.

Appeal from an order of the Sessions Judge, Attock Division, at Campbellpur, dated the 26th October 1913, convicting the appellants.

Mr. *Nand Lal*, for Mr. *Bhagat Ram Puri*, for the Appellants.

Mr. *Saunders*, for the Respondent.

JUDGMENT.—On the evening of 21st August 1913 at *Mauza* Mirza, one Gauhar Din was killed and Abdullah, Ali Akbar and *Musammat* Mirzan were hurt, it is said, by the four accused, namely, Nizam Shah, aged 70; Gul Shah, his brother, 50; Akbar Shah, son of Gul Shah, 20; and Hussain Shah, 18, son of Nizam Shah. They have been convicted of the murder of Gauhar Din, and all four have been sentenced to transportation for life, and have put in a joint appeal, which has been argued at some length by Mr. Nand Lal. The conclusion we have arrived at is that all four of them joined in beating Gauhar Din, that Nizam Shah and Gul Shah in doing so committed murder, but that the two younger men merely intended to cause, and did cause, simple hurt. We will now proceed to explain how we have arrived at this conclusion.

In our opinion the following facts are fully proved. In the courtyard of the house of Abdullah aforesaid there was a dog-fight. This led to abuse between him and Nizam Shah. Gul Shah was there with Nizam Shah, and presently Akbar Shah came in. He first struck Abdullah, and then Nizam Shah and Gul Shah struck him (we do not believe that Gul Shah had an axe, as some of the witnesses pretend). The accused were then induced to leave the yard, but outside they first came upon Ali Bahadur, and then upon Gauhar Din, and beat them both separately, disposing of Ali Bahadur first. Nizam Shah and Gul Shah both struck Gauhar Din *on the head*, and after he fell, Akbar Shah and Hussain Shah joined them in striking him with sticks on the shoulders and back. The injuries to the head were terrible and necessarily fatal causing at least six serious fractures of the skull; but the body injuries were, comparatively speaking, ordinary, not amounting in themselves to grievous hurt. After that some or all of the accused attacked *Musammat* Mirzan.

Two reports were made at the *thana*,

the first by the accused's party at 9-45 P.M. and the second by complainant's party at 10-15 P. M., each accusing the other of aggression and asserting for themselves the position of victims. *This* case was tried first, and when conviction was had, the Public Prosecutor withdrew from the other case. The accused here insist that their version of the affair is the real one ; but examination of the evidence shows that the story of the prosecution is substantially true. No doubt some of the accused suffered injuries, that is, Nizam Shah and Gul Shah did, but this, no doubt, occurred in the course of their encounter with Abdullah and Ali Bahadur. As to Gauhar Din, who is an old man of 60 and whom we believe to have been unarmed, there is every reason to suppose that there was no fight in the proper sense of the word: in short, we think, the accused fell upon him and knocked him about simply because he was who he was and because he remonstrated with Nizam Shah.

Mr. Nand Lal complains that the witnesses for the Crown are not disinterested, and it is true that most of them are either persons injured by the accused or interested in the prosecution party ; but at least Nawab and Mustakim, P. W. No. 11 and P. W. No. 12, are independent witnesses, and others would naturally be on the spot. In such quarrels it is extremely difficult to get persons unconnected with either party to come forward, and the Courts must come to conclusions on such evidence as may be available. If that evidence accords well with the general circumstances and with the medical evidence, it cannot be rejected merely because it is to some extent merely the testimony of partisans. We have carefully perused the depositions of Abdullah, P. W. No. 3, who was himself beaten and who saw the latter part of the beating of Gauhar Din; of Kiman, his son, P. W. No. 4, who saw the occurrences in the yard; of Rahman-ud-Din, P. W. No. 5, who saw all the assaults; of Wazir, P. W. No. 6, who saw the attacks on Ali Bahadur and Gauhar Din; of *Musammat* Mirzan of Kala; P. W. No. 7, who saw much the same of Ali Bahadur, P. W. No. 8, who testifies to his own beating but saw no more as he became senseless; of Hussain (a boy of 12), P. W. No. 9, who saw Ali Bahadur and Gauhar Din knocked down; of *Musammat* Mirzan, P. W. No. 10, who saw the whole affair; of Nawab and Mustakim (P. W. Nos. 11 and 12), who only saw Gauhar Din beaten. Though Kariman is son of Abdullah; though Rahman-ud-Din is related to Wazir, who is son-in-law of the murdered man; though Kala is occupancy-tenant under Abdullah; though Ali Bahadur is own brother of Abdullah and of the deceased; though the boy Hussain is Abdulla's son; though *Musammat* Mirzan is wife of Ali Bahadur—we are convinced that the tales they tell, which agree with the general circumstances and with the medical evidence, are substantially true; and we think that the defence theory of a violent attack by a large number of persons of the opposite party on Nizam Shah and Gul Shah, the younger men Akbar Shah and Hussain Shah not being present at all, is discredited, both because it is highly improbable, as it does not account for injuries to Abdulla, Ali Bahadur and *Musammat* Mirzan, not to speak of Gauhar Din, and because it is wholly unsupported by evidence. We wish especially to note the valuable evidence of Rahman-ud-Din, P. W. No. 5, who is a *Havildar* in a regiment, and whose evidence, by its ring of truth and its avoidance of exaggeration in details, deserves every credit.

It remains only to explain that we distinguished the guilt of Nizam Shah and Gul Shah on the one hand from that of Akbar Shah and Hussain Shah in this way. The matter in hand is the attack on Gauhar Din. All the witnesses are agreed that only the two older accused struck him on the head and those blows caused his death. The two younger men struck him on the body, not with exceptional violence. There was no *original* design to kill Gauhar Din, and we think very likely the younger accused, who did not themselves strike fatal blows, did not realize that they were joining in a murder or how grave the injuries inflicted by their older comrades were. The latter must certainly be taken to have intended to cause such bodily injury as was to their knowledge likely to cause death, and no "exception" to section 300 applies.

We, therefore, reject the appeal of Nizam Shah and Gul Shah, but accept that of Akbar Shah and Hussain Shah, altering their conviction to section 323, Indian Penal Code, and their sentences to one year's rigorous imprisonment in each case.

Appeal partly accepted.

NGA KAN HLA *v.* EMPEROR.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 162 OF 1914.

September 29, 1914.

Present:—Sir George Shaw, KT., J. C.

NGA KAN HLA—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 84—Unsoundness of mind—Mental derangement falling short of unsoundness—Murder—Lesser penalty—Youth ordinarily extenuating circumstance.

The law requires that a man shall be held responsible for his acts although he may be suffering from mental derangement in cases where that mental derangement falls short of the unsoundness of mind described in section 84 of the Penal Code.

On proof of such mental derangement in a murderer, the lesser sentence may be passed.

Ordinarily youth is itself an extenuating circumstance, but it does not mean that in every case of murder, where the accused is under a certain age, the lesser penalty must be awarded.

Mr. *J. N. Basu*, for the Appellant.

Mr. *H. M. Lutter*, Government Prosecutor, for the Crown.

ORDER.—Appellant, Kan Hla, 17, has been convicted under section 302 of the Indian Penal Code, and sentenced by the Sessions Court of Sagaing to death for the murder of Mi Kan Shi, a girl of 15, his betrothed, on the 23rd June last at Myintagyi.

The facts really admit of no doubt. There was an eye witness, Mi Tha Mi, a woman of 36, who was on a *tama* tree plucking leaves between 300 and 400 yards from the spot, and saw appellant striking the deceased two or three times with some weapon and saw the deceased fall. She swears that she was under no sort of doubt as to the identity of the appellant, and she immediately went to the village and gave information as well as telling people she met on the way.

Appellant was at once searched for, and found at the house of his natural father at Tetkaung. (He lived ordinarily with his adoptive father at Myintagyi). On being arrested by the headman, he confessed to him that he had killed the deceased. On the next day, the 24th June, at Yeu, appellant made a full confession to the Sub-Divisional Magistrate which was recorded after the prescribed preliminary inquiry. This preliminary inquiry was not as full or intelligent as it might and ought to have been, but it was sufficient to make the confession admissible.

In the Sessions Court, appellant alleged that he confessed because he was threatened by the Sub-Inspector of Police, Po Hla, and Constable Tha Kun. The Sessions Judge inquired into this allegation and came to the conclusion that it was unfounded and that the confession was voluntary. In this finding I concur.

The appellant in his confession said that he quarrelled with the deceased because she would not go with him to open some water channels and wished that a viper might bite him; that this enraged him so much that he went to the village (1,100 odd yards distant) and got a *dama* with which he proceeded to kill the deceased, and that he "did not know what happened to his mind." He delivered several cuts on deceased, one of which severed the head from the body all but a bit of skin, and another penetrated the abdomen and pierced the liver. There can be no doubt that the offence falls within section 300, and unless any exception general or special applies, amounts to murder punishable under section 302, Indian Penal Code.

The Sessions Judge referred to *Nga Tha Kin* v. *Emperor* (1) and, as I understand his remarks, came to the conclusion that in spite of appellant's age the circumstances of the case were such that he ought to be hanged. He was of opinion that there was no indication whatever of mental unsoundness, that appellant was well developed and normal physically and mentally, and should be held fully responsible.

It is argued on his behalf before me that appellant's story of going to the village for the *dama* is extremely improbable, on the supposition that appellant was in a normal condition of mind, and was probably untrue, and that if it was true, it argues a serious derangement of mind, the motive for appellant's anger being so trivial and inadequate that if he was a person of really sound mind, he could not have gone all the way to the village and back without cooling down. It is suggested, therefore, that either appellant made use of a weapon which was ready to his hand on the spot and acted without premeditation and on the spur of the moment in the heat of passion, or else, if he went to the village for the *dama*, he was the victim of homicidal

(1) 11 Ind. Cas. 792; U. B. R. (1911), I, 87; 12 Cr. L. J. 448.

NGA KAN HLA *v.* EMPEROR.

mania. Reference is made to Lyon's Medical Jurisprudence, 3rd Edition, page 350 *seqq.*, where symptoms of homicidal mania are enumerated, absence of motive, absence of any attempt at concealment, absence of accomplices, absence of elaborate preparation, etc., etc., and where cases are given of homicidal mania in which there had been no previous manifestation of mental derangement.

In brief, it is not contended that any of the special exceptions applied, and the only general exception touched upon is that contained in section 84, Indian Penal Code.

With regard to appellant's age, the effect of the decision in *Tha Kin's* case (1) above cited was to explain that ordinarily youth is itself an extenuating circumstance. I do not think that there is any room for misapprehension on this point. At the same time the ruling was not intended to lay down, and it did not lay down, that in every case of murder where the accused is under a certain age, the lesser penalty must be awarded. I am not, therefore, disposed to hold that the learned Sessions Judge was wrong in the view which he took that the appellant's age was not a sufficient ground for exempting him from the death penalty.

But the question of mental unsoundness remains. Here I think that the contentions of the learned Advocate are not without support. There seems to be no reason to doubt the correctness of appellant's statement that he went to the village for the *dama*. But the case is somewhat similar to the English cases mentioned by Taylor in his Medical Jurisprudence (6th Edition, Volume I, page 878,) and referred to in *Queen-Empress* v. *Lakshman Dagdu* (2), where there was practically nothing to show that the accused was insane except the nature of the crime and the manner in which it was committed. But as pointed out in *Lakshman Dagdu's* case (2), the question of appellant's responsibility must be decided according to the test prescribed in section 84 of the Indian Penal Code. As I understand it, the law requires that a man shall be held responsible for his acts, although he may be suffering from mental derangement, in cases where that mental derangement falls short of the unsoundness of mind described in the section. As far as one can judge, the appellant was not incapable of knowing the nature of his act or that it was wrong or contrary to law. He made himself scarce and he did not tell any one what he had done until he was arrested. He then related what he had done and gave explanations. There have been one or two cases in this Court in which the same question arose. The last one which I have traced was in many respects a close counterpart of the present. This was *Nga Tin* v. *Empreor*, unreported Criminal Application No. 170 of 1909, decided on November 16th, 1909. There the accused, one Nga Tin, aged 17, was convicted and sentenced to death for the murder of his wife, Mi Mi. The facts admitted of no doubt. The accused without any apparent reason whatever suddenly picked up a *dama* and cut his wife with it several times. One cut falling on the throat severed the carotid artery and so caused instant death. The next day the accused made a full confession to the Sub-Divisional Magistrate in which he said that he "did not know what became of his mind" and that he cut his wife "because his mind had gone astray." According to the evidence, the accused had never exhibited any signs of insanity at any time. I held that there was no ground for ordering further inquiry into the accused's mental condition, and that he was not entitled to be acquitted, but that the case was one where the lesser sentence was sufficient to meet the ends of justice, following in this respect the view taken in *Queen-Empress* v. *Lakshman Dagdu*(2) already cited and also the later Madras case of *Queen-Empress* v. *Venkatasami* (3). It appears to me that the present case calls for a similar finding.

The appellant's conduct suggests that there was present a certain degree of mental unsoundness, although it was not sufficient to bring him within section 84 of the Indian Penal Code, and on this ground I am of opinion that the lesser sentence should be passed, apart from the question of his age.

The conviction is maintained and the sentence is reduced to transportation for life.

Conviction altered.

(2) 10 B. 512.

(3) 12 M. 459; 1 Weir 42.

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